Neutral Citation Number: [2023] EWCA Civ 305

Case Nos: CA-2022-001419, CA-2022-001428

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)
MRS JUSTICE COCKERILL DBE
[2022] EWHC 690 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/03/2023

Before:
LORD JUSTICE POPPLEWELL
LORD JUSTICE PHILLIPS
and
LADY JUSTICE FALK

- -

Between:

(1) RECOVERY PARTNERS GP LIMITED	**Claimants/**
(2) REVOKER LLP	**Respondents**
- and -	
(1) MR IRAKLI RUKHADZE	
(2) MR IGOR ALEXEEV	
(3) MR BENJAMIN MARSON	
(4) HUNNEWELL PARTNERS (UK) LLP	
(5) HUNNEWELL PARTNERS (BVI) LIMITED	
(6) PARK STREET (GP) LIMITED	
(7) PARK STREET (BR) LIMITED	
(8) PARK STREET (GS) LIMITED	**Defendants/**
(9) PARK STREET (L) LIMITED	**Appellants**

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Tom Weisselberg KC, Tom Cleaver, Will Bordell and **Marlena Valles**
(instructed by **Brown Rudnick LLP**) for the **Claimants/Respondents**

Lord Wolfson KC, Simon Birt KC and **Watson Pringle**
(instructed by **Signature Litigation LLP**) for the **Defendants/Appellants**

Hearing dates: 29, 30 November and 1 December 2022

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Approved Judgment

This judgment was handed down remotely at 10.30am on 21 March 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Introduction

1. This is the judgment of the court to which all members have contributed.

2. These appeals raise issues as to the proper fashioning by the court of an account of profits. The account in question was of the profits the defendants had made in breach of fiduciary duties they owed to Salford Capital Partners Inc ("SCPI") and/or the claimants[1].

3. On 1 November 2018, following a "Phase 1" liability trial, Cockerill J ("the Judge") determined that in 2011 the defendants had wrongfully appropriated a maturing business opportunity from SCPI (which it was intending to exploit through the claimants). The first to third defendants ("the Individual Defendants") had resigned in bad faith as directors or employees of SCPI and/or the claimants with an intent to compete with SCPI for the opportunity, for which purpose the remaining defendants were subsequently incorporated. The opportunity was to provide "recovery" services to the family members ("the Family") of the deceased Georgian billionaire Arkadi "Badri" Patarkatsishvili, who had died in February 2008. Those services ("the Recovery Services") were needed to identify, protect and recover the estate's assets held in various jurisdictions by various structures and individuals.

4. After the conclusion of the Phase 1 liability trial, the claimants elected to pursue an account by way of remedy, maintaining that the defendants should pay over all proceeds which had come to them via the business opportunity from 2011. The account was taken during a lengthy "Phase 2" trial, following which (and a further ruling by the Judge as to the value of one asset), on 25 July 2022, the Judge ordered each of the defendants to make a specified payment to the claimants (plus interest), provided that the total recoverable from them all was not to exceed US$129,576,750 plus interest.

5. In her reserved Judgment dated 25 March 2022 the Judge determined numerous issues as to how the account of profits should be fashioned. Those in respect of which permission to appeal was granted (by the Judge or subsequently by Males LJ) were that:

    i) contrary to the defendants' contentions, there was no pre-existing profit-sharing agreement (50/50 or otherwise) between the Individual Defendants and SCPI and/or the claimants, but that even if there had been such an agreement (a) it would not have limited the amount for which the defendants were liable to account because any such agreement would not have limited SCPI's interest in the profits, but only determined the payment which the defendants would have been entitled to be paid by SCPI had they not breached their fiduciary duties and (b) it would automatically have been revoked on the individuals' breach of their fiduciary duties;

    ii) it was not open to the defendants to limit the temporal scope of the account on the grounds of unconscionable delay on the part of the claimants as the question of delay goes to whether an account should be ordered at all, not the fashioning of the account once it has been ordered; but in any event, even if the delay principle was at large, the claimants were not in a financial position to

[1] SCPI assigned its claim to the claimants on 1 June 2016.

commence this type of proceedings earlier than they did and it was in any event reasonable for them to have delayed as they did;

iii) the defendants were, however, entitled to an equitable allowance of 25% of the profits they made from the business opportunity to reflect the value of the work they did to generate those profits.

6. The defendants appeal against the Judge's decision on two grounds. By ground 1 the defendants challenge each aspect of the Judge's decision in relation to the alleged pre-existing profit-share agreement, and argue in the alternative that, even if not binding and legally relevant to the fashioning of the account, there was an understanding as to a 50/50 split which should have dictated the percentage of the equitable allowance made. Ground 2 challenges the Judge's conclusions as to unconscionable delay, contending that it is a freestanding discretionary defence which can (and in this case should) result in the account being temporally limited.

7. The claimants cross-appeal against the award of the equitable allowance, submitting that the defendants did not argue for the market value of their services and that there had been no disclosure or evidence as to such value. They further contend that the Judge had erred in basing her conclusion (that 25% was the appropriate allowance) on the expectations of various of the defendants and other persons, none of which was relevant.

The background facts

8. The background facts were set out, considered and determined in considerable detail in the Judge's reserved judgments. For present purposes the following very brief summary will suffice, drawn from those judgments and from the chronology agreed by the parties for this appeal.

9. SCPI was incorporated in 2001 for the purpose of providing investment management services to Badri and Boris Berezovsky. It was wholly owned by Eugene Jaffe ("Mr Jaffe"). In July 2004 the first defendant ("Mr Rukhadze") was appointed a director. The claimants were incorporated in the autumn of 2008, following Badri's death, with a view to undertaking the Recovery Services for SCPI. The second defendant ("Mr Alexeev") was recruited to work on the Recovery Services in December 2008. Both Mr Rukhadze and Mr Alexeev became members of the second claimant ("Revoker") in 2009, following which Mr Rukhadze ceased to be a director of SCPI.

10. The Recovery Services were conducted out of two London based offices: the Pall Mall office, run by Mr Jaffe, and the Park Street office, led by Mr Rukhadze and Mr Alexeev. The third defendant ("Mr Marson") was employed by the second claimant from 5 October 2009 to be its chief legal counsel with specific responsibility for providing legal services to the Family, with an annual salary of £150,000 plus a bonus of £35,000.

11. Between 2008 and 2011, the Recovery Services were increasingly provided out of the Park Street office, with Mr Rukhadze leading on an ad hoc basis in return for management fees. The claimants accept that during this period Mr Jaffe said that he would allocate 40% of the profits from the Recovery Services to the Park Street team, later increased to 46%, and that Mr Jaffe had said that he was willing to increase it to

50% "should we agree on everything else". The defendants contend that there was a binding oral agreement for a 50% split.

12. During 2010 to 2011 Mr Jaffe and Mr Rukhadze fell out. Negotiations began between them and the Family for the Individual Defendants to take on the Recovery Services and for Mr Jaffe/SCPI to receive a lump sum pay-off. No agreement was reached and, on 25 May 2011, Mr Jaffe was informed by the Family that he, SCPI and the claimants would no longer be involved in providing them with Recovery Services. On the same date Mr Marson emailed Mr Jaffe alleging that his employment contract with Revoker had been frustrated (which was taken by Revoker as a repudiatory breach, which it accepted). The following day Mr Rukhadze and Mr Alexeev resigned as members of Revoker.

13. Thereafter the Individual Defendants, at the request of the Family, continued providing the Recovery Services on an ad hoc basis and created a new corporate structure (named "Hunnewell") for that purpose: the sixth to ninth defendants were incorporated on 19 July 2012 and the fourth and fifth defendants on 26 and 27 September 2012 respectively. In October 2012 an Investment Recovery Services Agreement ("the IRSA") was signed between the defendants and the Family. The defendants agreed to provide the Recovery Services in exchange for a carried interest, to which they would only be entitled if they met a threshold of recovering US$500m in proceeds for the Family. The defendants did a huge amount of detailed work on the Recovery Services and the threshold was in due course reached. Following a dispute, a Deed of Termination was signed in 2018 resulting in full and final settlement between the defendants and the Family pursuant to which the defendants received cash and certain assets.

14. From as early as 27 May 2011 the claimants had reserved their rights against the Individual Defendants, including the right to seek an account of profits, but by the end of the summer 2011 Mr Jaffe had decided against suing them for the time being. It was not until 12 September 2016 that the claimants commenced these proceedings.

15. Following the Phase 1 liability trial, the Judge:

    i) found that the business opportunity of providing the Recovery Services to the Family had belonged entirely to SCPI;

    ii) did not find that the Individual Defendants had diverted the opportunity away from SCPI, but found that they had nonetheless breached their fiduciary duties by disloyally carrying out preparatory steps while working for SCPI and the claimants, and then resigning with the intention of undertaking the Recovery Services themselves.

The alleged antecedent agreement

16. The defendants' primary argument is that, as at the date the Individual Defendants resigned in bad faith, there was a binding agreement in place (even though the identity of the contracting parties, the structure of the deal and the precise percentage were at large) that they were entitled to be paid in the region of 50% of the profits made by SCPI/the claimants from carrying out the Recovery Services and that, therefore, as a matter of law, the defendants should have been required to account for only 50% of

profits they subsequently received. The defendants contend that the Judge erred in holding (i) that there was no binding agreement; (ii) that any such agreement as alleged would have been automatically revoked; and (iii) that any such agreement would, in any event, have been irrelevant to the scope of the account.

17. It is important to emphasise that the defendants do not allege that SCPI had divested itself (or was going to divest itself) of any part of the business of providing the Recovery Services, such that the Individual Defendants owned or would own 50% of that business or the profits generated by it. Even on the defendants' own case, the Individual Defendants were only entitled to be paid (in some form) 50% of profits made and owned by SCPI/the claimants in exchange for the Individual Defendants' loyal service to SCPI/the claimants in assisting them to make the profits.

18. In the alternative, the defendants argue that even if the agreement for which they contend was not binding, or was binding but not strictly relevant to the fashioning of the account, the broad understanding that the Individual Defendants should receive in the region of 50% of the profits was a factor which should have dictated the amount awarded by the Judge in exercising the broad equitable jurisdiction to require a fiduciary to account for profits. We will consider this alternative case in the context of an equitable allowance below.

19. We now turn to consider the three aspects of the challenge to the Judge's rejection of the case that there was a persisting binding agreement that should limit the scope of the account.

Was there a binding agreement?

20. Lord Wolfson KC, for the defendants, accepted all of the Judge's primary findings of fact, challenging only her conclusions, including as to what was "obvious". He disavowed reliance on any material not referred to in the Judge's Phase 2 Judgment. It is therefore appropriate to set out in full the section of the Judgment in which the Judge considered whether there was a binding agreement:

> "424. The starting point is the 40% deal. The Claimants accept that: "*it was 'agreed' prior to the split that Mr Rukhadze would receive 40% of the profits from the Recovery Services, in the sense that Mr Jaffe agreed to allocate that share.*"
>
> 425. The Defendants' case was that there was then in existence a binding agreement for 50% not conditional upon any global deal, relying in particular upon the Kira Gabbert spreadsheets (referred to at [122] of the Phase 1 judgment). These were, as Mr Jaffe agreed, "*where entitlements were recorded*". Reliance was also placed on Mr Jaffe's evidence in relation to them, as well as his evidence in these proceedings, in particular the following passage:
>
> > "I do accept that I promised to [Mr Rukhadze] initially 40% for him and his team, then it was increased to 46% and then I was willing to increase it to 50% should we agree on everything else."

426. Reliance was also placed on a number of references in passing in the correspondence to 50/50. In addition, the Defendants relied on the fact that in the Reply in the Revoker proceedings (i.e. the proceedings which Mr Jaffe brought against a number of the former Revoker executives) Mr Jaffe refuted a case advanced by Mr Nagle that the profit shares recorded in the Kira Gabbert spreadsheets were interim arrangements – he said specifically that they were "binding".

427. On this point my conclusion is that the Defendants' position is not entirely correct; it pays too little regard both to the overall complexity of the relationships and to the lack of focus by these parties on formal contracts or the English Law requirements for a contract. The reality is that the situation as between SCPI and the Family and Mr Jaffe and Mr Rukhadze was in a state of flux. And just as SCPI did not quite achieve an agreement with the Family, despite coming close at times, so too did the position as regards entitlements of the Park Street Team remain some way short of a contract.

428. This was reflected by the Defendants' own case in Phase 1; that directly contradicted the profit-sharing case now advanced. At that time the Defendants said that "*the Salford Principals attempted to negotiate […] an agreement between themselves as to how the proceeds of the Recovery Services would be divided between them*" and that "*the commercial terms of [that negotiation] were never concluded*". That case is inconsistent with the assertion of a concluded agreement and also reflects the reality of the developing situation.

429. This is reflected also in the evidence. The Kira Gabbert spreadsheets show in essence what Mr Jaffe was prepared to pay at any given point in relation to the business then due to result in any payments into SCPI. There seems to have been no process of formal agreement. The SCPI executives spoke of the shares as "entitlements". But the shares were moved without any formal process. The spreadsheet reflected the realities of who was contributing to the current paying projects and the likely division of the spoils. Mr Jaffe thought of them as in some sense binding, as he said in the Revoker litigation. But nothing was fixed.

430. The problem for the Defendants is that the Recovery Services had not been formalised with the Family. The shape of what was to be done and how things would move forward was not in place; without that, an agreement as to entitlements in respect of that work could not be in place. It would be a case of putting the cart before the horse.

431. However, the set up as regards current projects, and the negotiations as to how matters would be formalised if and when an agreement was achieved set up a background against which the likely agreement can easily be discerned. The reality of the situation is that, while no formal agreement was in place, there was a common understanding in the run-up to the breaches that Mr Rukhadze would receive or have a right to dictate the allocation of somewhere in the

> region of 50% to the Park Street Team in relation to the outcome of the Recovery Services.
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> 432. This was reflected in Mr Jaffe's email to Mrs. Gudavadze on 28 January 2011 that:
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> > "had this issue not being dragged on by Irakli, and you not been drawn into this by him and the final agreement with Revoker had been executed this issue would be far behind us now – [Mr Rukhadze] and his team would have perfected their interest in 50% of the recovery proceeds…"
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> 433. This reflects the reality on the ground. Mr Jaffe was not embedded in Park Street. Mr Rukhadze and his team worked better with the Family than Mr Jaffe did. Mr Jaffe would not put in the bulk of the detailed work; Mr Rukhadze and his team would.
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> 434. If all had gone forward absent a breach (and there were no other changes in the interim), that is what would most likely have happened. But there was no agreement. There was no substance to which an agreement as to future revenues arising from the Recovery Services could attach. And matters did not go forward on that basis – because the Defendants breached their fiduciary duties."

21. It is apparent from the above that an experienced Commercial Court judge, after hearing weeks of evidence and argument, including oral evidence from Mr Jaffe and Mr Rukhadze, reached the firm conclusion (repeated several times) that no binding agreement had been reached between the parties to the negotiations, a conclusion which coincided with the case the defendants themselves had advanced at the Phase 1 trial.

22. Lord Wolfson argued, nevertheless, that that conclusion could not stand in the light of the Judge's own findings of fact, relying on her statement in [431] that "*there was a common understanding in the run-up to the breaches that Mr Rukhadze would receive….somewhere in the region of 50%....*" and her recognition in [432] that this was reflected in Mr Jaffe's comment that *"[Mr Rukhadze] and his team would have perfected their interest in 50% of the recovery proceeds…*". Lord Wolfson contended that, where parties were effectively engaged in an ongoing joint venture, such a common understanding could and should be viewed as a binding agreement as to the split of profits arising from that venture. He made specific criticism of two of the reasons given by the Judge for rejecting the existence of a binding contract:

    i) first, that there was no reason why the split of profits could not have been agreed between Mr Jaffe and Mr Rukhadze before an agreement with the Family had been finalised: the Judge was wrong at [430] to view this as "putting the cart before the horse"; the converse might well be thought to be the case;

    ii) second, a binding agreement does not require the parties to have focused on formal contracts or the English law requirements for a contract [427], nor does it require any "formal agreement" [429].

23. However, whilst the Judge found there to have been a common understanding between Mr Jaffe on the one hand and Mr Rukhadze and his team on the other as to the approximate percentage of the profits to which the latter would be entitled, there was no indication, let alone certainty, as to:

    i) who would be the parties to any agreement: the common understanding was formed between Mr Jaffe and Mr Rukhadze, but the opportunity was that of SCPI, and was being exploited through the claimants, and the profits would somehow be distributed between Mr Rukhadze and the other Individual Defendants directly or indirectly;

    ii) what would be the terms of any contract, including as to the nature and structure of any entitlement to profits: payments might be by way of employee remuneration, equity shares (and therefore dividends), simple contractual agreement or some other structure;

    iii) what sums would be treated as profit subject to the sharing arrangement; and

    iv) what the precise percentage would be.

24. Lord Wolfson objected that the above matters were not identified by the Judge as reasons why the common understanding she identified was not a binding agreement. We do not agree. The Judge expressly regarded as factors in her decision "*the overall complexity of the relationships*" and that "*the situation as between…Mr Jaffe and Mr Rukhadze was in a state of flux*" [427]. By that, the Judge clearly meant that the structure and terms of any agreement were far from agreed and were constantly changing; her reference to the lack of focus on formal contracts was, in our judgement, a recognition that the parties had not given any real consideration to the manner in which their broad discussions would be implemented through a legal structure which would have sufficient certainty to be binding on them.

25. We also consider that the Judge made it plain that, whilst there was a common understanding as to the rough percentages of any future split, there was no intention on the part of Mr Jaffe and Mr Rukhadze to create legal relations in that regard. This is apparent from her references to the position being "*some way short of a contract"* in [427], that "*nothing was fixed*" in [429] and that the common understanding was that Mr Rukhadze would receive "*somewhere in the region of 50%*" in [431]. The Judge was entitled to note, in this regard, that as late as the Phase 1 trial, the Individual Defendants did not consider that they had made a binding agreement as to their profit share prior to their resignations [428].

26. Further, whilst we accept that it would not generally be necessary for parties to have concluded a contract for services with a customer before agreeing how they would share any profits from providing services to that customer, the Judge was not addressing the general position. On the contrary, she was considering the complex and evolving relationship between the Family, Mr Jaffe and Mr Rukhadze, and in that context took the view that finalising an agreement with the Family was necessary before Mr Jaffe and Mr Rukhadze could formalise a division of profits between their respective teams. There is no basis for criticising the Judge's view in that regard, let alone overturning it.

27. For the above reasons, we consider that the Judge's finding that there was no binding pre-existing agreement was fully open to her on the facts she found and is unimpeachable.

Would the alleged agreement have been automatically revoked?

28. As we agree with the Judge that there was no finalised agreement, not least because the structure and terms of any such agreement had not been addressed by the parties, let alone agreed, no question arises as to whether the agreement alleged by the defendants was revocable.

29. The Judge reached the conclusion at [624] that, "*if there had been an agreement, it would have been one that provided for revocation in the event of breach*". We have considerable sympathy with that view, but in our judgement it is not relevant or otherwise helpful to speculate as to what would have been agreed as part of a hypothetical profit-sharing structure. As the Judge stated in that same paragraph, "*the reality is that there was no agreement*". There was therefore nothing to revoke.

Would the alleged agreement have required the scope of the account to be limited?

The issue

30. If, contrary to the above, there was a persisting binding agreement that the Individual Defendants would be paid 50% of the profits made by SCPI/the claimants, the further issue arises as to whether such an agreement would have been relevant to the scope of the account. The defendants argue that they should not have to account for what was in any event agreed to have been "their share" of the profits.

31. The Judge, after considering certain of the authorities, expressed the following view:

> "363. I consider that the authorities go this far: where there is an antecedent agreement which limits the principal's interest – for example in the case of a joint venture - the fiduciary need only account for profits in respect of the principal's interest. They do not however purport to lay down any principle as regards cases where there is an agreement which does not limit the principal's interest."

32. The Judge returned to the issue when considering the facts of the present case, rejecting the defendants' argument in the following terms:

> "422.There is then a threshold point, which is this: the principle as to antecedent agreements which I have outlined above relates effectively to agreements which define the extent of the principal's interest. This is not such a case because whatever the state of play as regards agreements to remuneration/division of the spoils, they were or would have been agreements under the umbrella of SCPI (or its successor). So SCPI had the business opportunity and was to contract with the Family; 100% of the interest in the MBO was that of SCPI. The principle as to antecedent agreements therefore is not engaged."

33. The defendants challenge that finding, contending that the Judge's approach is not justified by the authorities (of which none is directly in point), gives rise to arbitrary

distinctions depending on how joint ventures are structured and does not reflect the broad equitable considerations that govern the fashioning of an account.

The relevant principles and their application

34. The starting point is the "stringent" rule, recently reiterated in *Gray v Global Energy Horizons Corporation* [2020] EWCA Civ 1668; [2021] 1 WLR 2264 at [126] by David Richards, Henderson and Rose LJJ, that a fiduciary must not make an unauthorised profit from his fiduciary position, requiring an errant fiduciary to account to his principal for all unauthorised profits falling within the scope of his fiduciary duty. The court emphasised that the rule is intended to have a deterrent effect, and to ensure that no defaulting fiduciary can make a profit from his breach of duty, echoing the opinion of Lord Hodson in *Boardman v Phipps* [1967] 2 AC 46 at p.105D that "[*i]t is obviously of importance to maintain the proposition in all cases and to do nothing to whittle away its scope or the absolute responsibility which it imposes*". In *Murad v Al-Saraj* [2005] EWCA Civ 959 Jonathan Parker LJ referred to it on several occasions as "*an inflexible rule*" and (at [101]), citing *Parker v McKenna* (1874) LR 10 Ch App 96) a rule that must be "*must be applied inexorably by this court*".

35. In *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134 at pp.144G-145A Lord Russell explained the all-embracing nature of a fiduciary's liability to account for profits as follows:

> "The rule of equity which insists on those, who by the use of a fiduciary position make a profit, being liable to account for that profit, in no way depends on fraud, or absence of bona fides; or upon such questions or considerations as whether the profit would or should otherwise have gone to the plaintiff, or whether the profiteer was under a duty to obtain the source of the profit for the plaintiff, or whether he took a risk or acted as he did for the benefit of the plaintiff, of whether the plaintiff has in fact been damaged or benefited from his action. The liability arises from the mere fact of a profit having, in the stated circumstances, been made. The profiteer, however honest and well intentioned cannot escape the risk of being called upon to account."

36. Specifically, it is no defence to a fiduciary's liability to account (i) that the result is to confer a benefit on the principal which the principal would not otherwise have been able to reap (*Gray* [126]); (ii) that the fiduciary would have made the profit even if there had been no breach of fiduciary duty (*Murad* [67]); or (iii) that the fiduciary would have been able to secure the principal's agreement to the fiduciary keeping some of the profits (*Murad* [71]).

37. The strict enforcement of an errant fiduciary's liability to account for all profits is mitigated only by the separate power of the court to make an allowance for the fiduciary's work and skill in generating those profits, as in *Boardman v Phipps*.

38. Applying those principles, it would seem clear that the fact that an errant fiduciary would have received remuneration (whether in the form of salary, fees, bonuses, a percentage of profits or otherwise) from the principal had he not left to compete with the principal in breach of his fiduciary duty would in no way limit his liability to account for the profits he makes. To permit the fiduciary to retain profits in the amount of sums

he would have received from the principal had he not breached his duty would remove the deterrent effect of the stringent rule and "whittle away" at its scope. The fiduciary would have nothing to lose by breaching his duty, whilst hoping to make a greater profit at the expense of his principal. The strict rule requires that the fiduciary account for all profits and be limited to such allowance as the court considers is just, taking into account the work done and skill deployed, but also the policy underlying the rule.

39. The defendants seek to escape the stringent rule by reference to a passage in the judgment of Arden LJ in *Murad*. After setting out and explaining that equity imposes stringent liability of this nature as a deterrent at [74], Arden LJ stated at [85] as follows:

> "The kind of account ordered in this case is an account of profits, that is a procedure to ensure the restitution of profits which ought to have been made for the beneficiary and not a procedure for the forfeiture of profits to which the defaulting trustee was always entitled for his own account…Even when the fiduciary is not fraudulent, the profit obtained from the breach of trust has to be defined…"

40. The defendants' argument is that an antecedent agreement for the fiduciary to receive a share of the principal's profits entails that the fiduciary was always "entitled" to that share "for his own account".[2] They point out that there is no authority which confronts directly the issue of what effect, if any, an antecedent profit-sharing agreement has on the scope of an account of profits, and argue that there is no real distinction (or at least none which should be determinative in fashioning an account according to equitable principles) between a joint venture where the partners each have a 50% stake and one where the venture is wholly owned by one party, with an agreement to pay the other party 50% of the profits made by the owner.

41. In our judgement it is plain that Arden's LJ's reference to "the profits to which the defaulting trustee was always entitled for his own account" is to situations in which the fiduciary had a pre-existing proprietary interest in the relevant asset, correspondingly limiting the principal's interest; the profits (or part of them) made by the fiduciary always belonged to the fiduciary and were not obtained by reason of the breach of duty. This is consistent with the fact Arden LJ considered at [87] that the defaulting fiduciary in *Murad* could not benefit from this defence because he had not in fact invested in purchasing the relevant asset (an hotel): she did not suggest that a profit-sharing agreement between the fiduciary and the principals was relevant.

42. It is in any event inconceivable that Arden LJ intended to suggest that fiduciaries who have a contractual right to payments from their principals for their loyal service would be entitled to keep profits equivalent to such contractual entitlements when they disloyally ceased to provide such services. Such an outcome would be directly contrary to the stringent rule set out above and would undermine its deterrent effect for the reasons set out in [38] above.

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[2] The defendants formally advanced an argument that a common understanding as to profit shares would meet this test even if it was not legally binding, but it is difficult to see how, on any basis, this would give rise to an "entitlement". The defendants rightly did not press the argument. The existence of a non-binding common understanding might be a factor in relation to the quantum of an equitable allowance, but not the scope of an account.

43. There is, in our judgement, nothing arbitrary or inequitable about the distinction between situations where the fiduciary has his own proprietary interest and where he does not. The different outcome is due to the extent of the interests in respect of which the fiduciary owes duties to the principal and those in respect of which he does not.

44. We are therefore in full agreement with the Judge's conclusions as set out in [31] and [32] above.

Conclusion on Ground 1 (pre-existing agreement)

45. For the above reasons, ground 1 of the appeal must fail, subject to the arguments on its relevance to the amount of a discretionary award of an equitable allowance, which we will address below.

Unconscionable Delay

46. The defendants' second ground of appeal is that the Judge erred in holding that the claimants' delay in taking action following the breach was available only as a defence of laches or acquiescence going to the question of whether an account should be ordered, but was irrelevant at the later stage of taking the account. Rather, the correct approach was for the Judge to treat the claimants' delay as a fact that was capable of justifying a limit on the account. The Judge should have treated the delay as unconscionable, given the material risks taken by the defendants and Mr Jaffe's misconduct. Instead of accepting that writing letters reserving their rights was sufficient, the Judge ought to have held that the claimants should have commenced proceedings. The defendants also maintain that the Judge wrongly held that the claimants lacked sufficient funds to bring proceedings, and was wrong to place the burden of proof on that issue on the defendants.

The Judgment

47. The Judge's findings of fact included that Mr Jaffe had been enraged at the defendants' (and Family's) actions, considered what he could do to cause trouble, but decided by the end of summer 2011 against suing the defendants for the present with commercial considerations in mind – albeit that his pleaded reason was impecuniosity – his interests being aligned with those of the Family at that stage. The Judge concluded that a failure to launch proceedings at that point could not fairly be categorised as delay for the purposes of an unconscionable delay argument. (See [59]-[66] of the Judgment.)

48. In her consideration of the legal issues, the Judge held at [292]-[294] that the concepts of laches and acquiescence are relevant only as equitable defences to a claim. It had not been suggested at Phase 1 that an account of profits was not available. At [300] the Judge also rejected, as having no legal basis, the submission that the defendants could rely on a separate general principle of unconscionable delay. At [303]-[308] she observed that the concepts of laches and acquiescence required not only delay but facts rendering it inequitable to order relief, referring to various cases including *Clegg v Edmondson* (1857) 8 De G M & G 787; 44 ER 593.

49. The Judge then went on (at [309]-[321]) to consider cases relied on by the defendants to justify a temporal limitation on the account, in particular *Clegg*, *Warman International v Dwyer* (1995) 182 CLR 544, *Grundt v Great Boulder Pty Gold Mines*

Ltd [1937] 59 CLR 641 and *Ford v Foster* (1872) LR 7 Ch 611. She found that none of those cases, nor the decision in *Murdoch v Mudgee* [2022] NSWCA 12; 398 ALR 658 which was provided to her following the hearing, provided any real support for the defendants' argument. She also considered *Fisher v Brooker* [2009] 1 WLR 1764, a decision of the House of Lords that considered the defences of laches and acquiescence in the context of proprietary estoppel, concluding at [330] that it reinforced the claimants' case that mere delay was insufficient.

50. The Judge returned to the topic of delay in considering and dismissing the defendants' argument that conduct should be considered alongside delay, and that Mr Jaffe's conduct should bar or restrict relief (in particular at [337] and [354]-[356]). There is no challenge on this appeal to the conclusions reached about the impact of Mr Jaffe's conduct, apart from the decision not to commence proceedings at an earlier stage.

51. At [451]-[455] the Judge considered the question of risk, noting its relevance to the issue of delay, and in section 5 of the Judgment, at [630]-[638], made factual findings specifically in respect of delay. Both of these sections of the Judgment are considered in more detail below, but in summary the Judge did not accept that there was significant material risk.

The parties' submissions

52. The defendants submit that the account should be limited to the period from the date of the breach up to the point when some form of legal process should have been commenced. They say the Judge was wrong to hold that there was no unconscionable delay. The authorities demonstrate that unconscionable delay is a freestanding factor that can justify a temporal limitation on the account. The defendants had taken massive risks and Mr Jaffe had elected to wait and see whether their work would prove profitable, thereby avoiding taking risk himself, while at the same time engaged in clandestine conduct to disrupt the Recovery Services and damage the Family.

53. Various dates are suggested as points by which the Judge should have determined that the claimants should have acted, such that there should be no disgorgement of profits thereafter. These range from June 2011, very shortly after the breach, to October 2012 when the IRSA was signed, with two suggested intermediate dates of September 2011, when Mr Jaffe decided against suing for the present, and June 2012, when a related entity received an injection of funds.

54. The claimants submit that the Judge made no relevant error of law, but in any event her unchallenged factual findings were fatal to any attempt to rely on unconscionable delay. These included that the delay was reasonable and that it was not the case that significant material risk had been taken.

Discussion: the applicable principles

55. The defendants no longer rely on laches or acquiescence, but do maintain that there is a separate principle that unconscionable delay can justify a temporal limitation of relief by way of an account, and that relief should have been so limited in this case.

56. The short answer to this is that, irrespective of whether any such principle exists, no limitation would have been justified on the facts found by the Judge. However, the legal question was fully argued, and we will address it first.

57. The earliest, and principal English, authority relied on was *Clegg*. In that case, which was heard on an appeal in the Court of Chancery, the managing partners of a mining partnership gave notice of dissolution of the partnership to the plaintiff partners with effect from the expiry of an existing lease under which the mines were worked, and also informed them that they would be taking a fresh lease for their own benefit and would bid at a public auction for part of the partnership's stock in trade and effects. Partnership accounts were prepared and made available, but the plaintiffs took no action. The new lease was granted and the mines were worked profitably, and without interruption, until the claim was made nine years later, in 1855. In the interim, another matter was settled between the plaintiffs and certain defendants and claims in respect of certain other collieries were pursued. The plaintiffs continued to insist on their interest in the renewed lease, so the defendants were at no stage led to believe that the claim had been abandoned. Relief was nevertheless refused on the grounds of "delay and acquiescence".

58. The first point to make is that this was not a case of temporal limitation on a claim for an account of profits related to a breach of duty. Although the court was prepared to permit an account of the proceeds of the auction and the profits of the mines since the date of the last settlement in the plaintiffs' favour, that was by reference to profits prior to the expiration of the previous lease, in other words the profits of the dissolved partnership (see in particular at pp.814-815, per Knight-Bruce LJ). It was not an account in respect of the renewed lease in which the plaintiffs claimed an interest.

59. In reaching the conclusion that there should be no account of profits in respect of the renewed lease, Turner LJ referred at pp.808-810 to the "extraordinary contingencies" arising in respect of mining property, which could be rendered productive "only by a large and uncertain outlay". The feature of that case that the defendants' expenditure may have been more than met by the profits did not affect this. The fact that the plaintiffs had taken no steps to prevent the lease being granted, or any step in the prosecution of the claim, shifted the onus onto them to provide justification, the mere assertion of a claim "unaccompanied by any act to give effect to it" being insufficient. Knight-Bruce LJ's reasons were similar. He said at p.814:

> "A mine which a man works is in the nature of the trade carried on by him. It requires his time, care, attention and skill to be bestowed on it, besides the possible expenditure and risk of capital, nor can any degree of science, foresight and examination afford a sure guarantee against sudden losses, disappointments and reverses. In such a case a man having an adverse claim in equity on the ground of constructive trust should pursue it promptly, and not by empty words merely. He should shew himself in good time willing to participate in possible loss as well as profit, not play a game in which he alone risks nothing."

60. It is clear that the underlying principle that the court was applying was one of justice. Turner LJ expressly posed the issue in that way at p.808 when he asked whether the plaintiffs were "in justice entitled to reap the benefit when they could not be made subject to the loss". It is also clear that a distinction was being drawn between different

types of assets, and in particular trading assets carrying a risk of material loss and other assets not carrying that sort of risk. So mere delay was insufficient. The plaintiffs failed because there was not only a significant, and unreasonable, delay but it was unjust to grant the relief sought. On the facts of that case it amounted to the defence of laches, as Cockerill J found.

61. *Warman* was a decision of the High Court of Australia, which concerned a claim by Warman against a senior employee, Mr Dwyer, who had left to participate in a joint venture with an Italian gearbox manufacturer, Bonfiglioli, for which Warman had acted as the Australian distributor. The court held that Mr Dwyer had breached his fiduciary duties but limited the account to a period of two years. At first sight, therefore, this appears to be an example of a temporal limitation.

62. The court emphasised at p.559 that, although an account of profits is discretionary, it is granted according to settled principles. However, there is also a "cardinal principle of equity" that the remedy must be fashioned to fit the nature of the case and the particular facts. The court went on to say at p.561:

> "In the case of a business it may well be inappropriate and inequitable to compel the errant fiduciary to account for the whole of the profit of his conduct of the business or his exploitation of the principal's goodwill over an indefinite period of time. In such a case, it may be appropriate to allow the fiduciary a proportion of the profits, depending upon the particular circumstances. That may well be the case when it appears that a significant proportion of an increase in profits has been generated by the skill, efforts, property and resources of the fiduciary, the capital which he has introduced and the risks he has taken, so long as they are not risks to which the principal's property has been exposed. Then it may be said that the relevant proportion of the increased profits is not the product or consequence of the plaintiff's property but the product of the fiduciary's skill, efforts, property and resources. This is not to say that the liability of the fiduciary to account should be governed by the doctrine of unjust enrichment, though that doctrine may well have a useful part to play; it is simply to say that the stringent rule requiring a fiduciary to account for profits can be carried to extremes and that in cases outside the realm of specific assets, the liability of the fiduciary should not be transformed into a vehicle for the unjust enrichment of the plaintiff."

63. Applying these principles to the facts at pp.565-566, the court concluded, based on the trial judge's findings, that the Warman distributorship would probably have survived only for one further year. Further, while account had to be taken of the fact that Mr Dwyer's breaches extended to persuading employees to leave Warman and join the joint venture, the fact that the joint venture was half owned by Bonfiglioli, and Bonfiglioli had retained the local goodwill, precluded the conclusion that the whole of the business was built on the breach of duty. The court concluded at pp.567-8 that the appropriate order was an account for a limited period. The period of two years was fixed by reference to the likely remaining life of the distributorship and the additional advantages obtained from persuading other employees to join. A two year period would "clearly cover the whole of the benefits acquired by [the joint venture] through Dwyer's

breach of fiduciary duty". The order made required an account of the net profits less an allowance to reflect the defendants' contribution.

64. *Warman* was, of course, not a case about delay. Rather, what the court was concerned with was the determination of the scope of the profits in respect of which it was appropriate to order an account, the relevant limiting factors in that case being the role of Bonfiglioli as a joint venturer contributing its own goodwill, and the conclusion that the distributorship would have expired relatively shortly in any event. The court emphasised that, while it set aside the order at first instance to award four years' profits as being "beyond what is fair and equitable in the circumstances", the order it made covered the "whole of the benefits acquired through the breach" (pp.567-568).

65. It is worth noting that *Warman* was considered by both Arden and Jonathan Parker LJJ in *Murad*. We agree with Jonathan Parker LJ's observations at [115]-[116] that the judgment does not involve any departure from well-established principles.

66. *Grundt* was another decision of the High Court of Australia, related to a claim by a mine owning company against miners who had mined outside agreed contractual boundaries. It was held that the mine owner's ability to recover did not extend to amounts relating to the period after it had discovered that mining was occurring outside the boundaries, when it had continued to pay over amounts in respect of the ore that was being mined. Latham CJ decided the relevant issue on the basis of estoppel or waiver. Dixon J disagreed that there was an estoppel but reached the same conclusion as Latham CJ. Dixon J's decision appears to have been based on a form of laches, on the basis of a failure to insist upon a known right in circumstances where it would be inconsistent with fair dealing to seek a remedy thereafter. He emphasised that the mine owner not only failed to take action after its discovery but made voluntary payments. He also relied on the "hazardous or speculative" nature of the venture as "most important circumstances", and the fact that while the miners knew that the owner did not intend to waive its rights it was "plainly unwilling" to act on the claim and chose to make payments. He concluded that the mine owner was entitled to an account for the period up to the point that it became aware that work was occurring outside the boundaries. In reaching that conclusion Dixon J clearly took into account both the risks taken by the miners and that the company had not simply sat on its hands but had actively chosen to make payments.

67. The Australian decision on which the defendants relied most heavily was *Murdoch v Mudgee*, a recent decision of the Supreme Court of New South Wales. The Judge did not hear oral submissions on this case, which was only made available to her following the Phase 2 trial. The case related to a derivative claim for breach of duty brought by one brother, Brian, against another brother and his son. An account of profits was ordered but it was restricted on appeal to profits for the period to October 2011, rather than for subsequent periods prior to the date of the claim. At [204] Leeming JA, who gave the leading judgment, framed the enquiry as being about when Brian had sufficient information for it to become inequitable thereafter to obtain an account of profits while he stood by permitting profits to be made, bearing in mind the history and the relationship between the parties. He concluded at [216] that it was inequitable for Brian to stand by after November 2011 and then seek to recover profits made thereafter. This conclusion was reached on the basis of the information available to Brian by that time, and the fact that an issue had also been raised about funds being extracted, but Brian had failed to confront his brother: see [207]-[216].

68. The legal principles on which this decision was reached were addressed by Leeming JA at [195]-[197]. At [195] he referred to the equitable remedy of an account of profits being discretionary, and observed that one aspect of the discretion is that the remedy may be withheld entirely where an equitable defence such as laches, delay or acquiescence is made out. He cited no authority for the proposition that there is an equitable defence of delay alone, separate from laches or acquiescence.

69. At [196]-[197], in the passage most heavily relied on by the defendants, he articulated the principle upon which the decision was apparently founded:

> "196. … [The] court has ample power to fashion the account so as to achieve its purpose of taking from the fiduciary the profit or benefit derived by reason of the breach of duty, but avoiding punishing the fiduciary. This was at the forefront of the reasoning in *Warman International Ltd v Dwyer* itself, where the account of profits was limited to the first two years of operation of the businesses conducted by the errant fiduciary. The High Court set aside the orders made at first instance, where four years' profits had been ordered, on the basis that they "went beyond what is fair and equitable in the circumstances". Instead, "[a]n account of profits in respect of that period would, in our view, clearly cover the whole of the benefits acquired by [the corporate vehicle] through [the fiduciary's] breach of fiduciary duty" (at 567-568).
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> 197. The High Court also identified three other bases upon which the account could be fashioned. One was to make just allowances, reflective of the contribution to the profits by the fiduciary's skill, expertise and related expenses. Another, which the High Court said was not generally available unless there had been an antecedent arrangement for profit-sharing (as in *O'Sullivan v Management Agency and Music Ltd* [1985] QB 428), was to allow to the fiduciary a proportion of the profits earned. A third was that relied on by the appellants in the present case, namely at 559:
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> > 'The conduct of the plaintiff may be such as to make it inequitable to order an account. Thus a plaintiff may not stand by and permit the defendant to make profits and then claim entitlement to those profits.'"

70. Leeming JA appears to treat *Warman* as the primary authority for the existence of a discretionary defence of "standing by", including as one that could operate to limit rather than prevent an account. If this was a suggestion that the decision in *Warman* was an example of a separate principle that the fashioning of the account could impose a temporal limit as a matter of general equitable discretion, it was a mistaken reading of *Warman*. As Jonathan Parker LJ emphasised in *Murad*, *Warman* was decided on the basis that after 2 years there was no longer any relevant connection between the breach of duty and the profits being earned. He said at [115]:

> "I do not, for my part, read that passage in the judgment of the High Court of Australia as sanctioning any departure from, or as recognising any qualification to, the 'no conflict' rule. Rather, as I read its judgment,

> the court is regarding the defendants as trustees who have made a profit from trust property in breach of what I may call the 'no profit' rule, and recognising that given that the property in question is the goodwill of the claimant company's business, there will in all probability come a time when it can safely be said that any future profits of the new business will be attributable not to the goodwill misappropriated from the claimant company when the new business was set up but rather to the defendants' own efforts in carrying on that business."

71. Leeming JA also appears to have thought support for his approach could be found in *Re Jarvis* [1958] 1 WLR 815 and *Edmonds v Donovan* [2005] VSCA 27, a decision of the Supreme Court of Victoria. *Re Jarvis* was a decision of Upjohn J in which a claim to an account of profits by one sister against another in respect of a business was barred by laches, while a claim to an interest in a lease was not. In the course of his judgment Upjohn J referred at p.820 to the plaintiff having "stood by" and observed her sister running the business and incurring debts and liabilities. However, this appears to us to have been a comment on the facts of the case rather than any formulation of a legal test.

72. *Edmonds v Donovan* was a case where the award was one of equitable compensation rather than an account of profits. One of the reasons for refusing an account was delay, and what was held to be acquiescence justified an award of compensation that took account of the profit shares to which the fiduciaries would have been entitled under the original arrangements: see in particular at [76]-[78] and [82].

73. Despite these criticisms of the judicial support invoked for the principle applied in *Murdoch v Mudgee*, the case is one in which the jurisdiction for which Lord Wolfson contends was recognised and applied.

74. Returning to cases in this jurisdiction, the defendants relied on the fact that accounts had been temporally restricted in intellectual property cases by reference to delay. *Ford v Foster* was a trademark infringement action relating to the mark "Ford's Eureka Shirt", the complaint being that the defendants had also applied a "Eureka" mark to their shirts. An injunction was granted but, in determining what account to order, the court took account of elements of the plaintiff's behaviour, being misrepresentations made that his product was protected by a patent and his lack of vigilance, such that the account should not extend to the period prior to filing the bill (pp.627, 633). Similarly in *Lever Brothers, Port Sunlight v Sunniwite Products Ltd* (1949) 66 R.P.C. 84, p.102, an account was restricted (without challenge) to the period following the complaint being made, due to delay, and in *Edward Young & Co v Stanley Silverwood Holt* (1948) 65 RPC 25, pp.31-32 the court also considered whether to limit the period of account but determined not to on the basis that there was no unjustifiable delay. Like *Ford v Foster* these cases both concerned trademark infringements.

75. The defendants also relied on a comment made by Birss LJ in another trademark infringement case, *Lifestyle Equities C.V. v Ahmed* [2021] Bus LR 1020. After explaining that a successful claimant in an infringement action was entitled to damages, but could in the alternative seek the discretionary equitable remedy of an account of profits which would deprive the infringer of the profits made from the infringement, Birss LJ said at [7]:

> "As a species of equitable relief, accounts of profits are also available in other circumstances such as cases of breach of fiduciary duty and dishonest assistance. Some of the cases addressed below are from that sphere. One of Lifestyle's submissions before us was that the principles applied to accounts of profits in fiduciary or dishonest assistance cases did not necessarily apply to accounts of profits in intellectual property cases. I disagree. The circumstances will differ, but I can see no reason why the principles applicable to this remedy should differ in that way."

76. An obvious response to the defendants' reliance on this passage is that Birss LJ was considering the application of principles in fiduciary cases to intellectual property cases, rather than the other way round. But a further note of caution is appropriate by reference to the different considerations that apply, including the fact that the aim of the relief in intellectual property cases is to deprive the infringer of enrichment caused by the infringement. In fiduciary cases the test is not one of causation or the prevention of unjust enrichment as such. Rather, the guiding principle is to determine the profits made from conduct falling within the scope and ambit of the duty, which has been expressed as requiring a "reasonable relationship" between the breach of duty and profits in question: see for example *Keystone Healthcare Ltd v Parr* [2019] 4 WLR 99 at [18], per Lewison LJ. This reflects the strict nature of the rule and its intended deterrent effect. It is also notable that in the *Edward Young* case Wynn Parry J referred at p.26 to the potential for an innocent infringer not being required to account for profits in respect of periods for which he was unaware of the breach. In principle, the innocence of the infringer is not a relevant criterion in determining the scope of the account in fiduciary cases.

77. Drawing these threads together, we agree with the court in *Warman* that, while relief by way of an account of profits is discretionary, the court must act in accordance with settled principles. Unconscionability is a core principle. We do not see a good reason why unreasonable delay, or indeed other unreasonable behaviour on the part of a claimant, should not be capable in an appropriate case of limiting rather than barring relief if justice so requires, whether temporally or otherwise. As Arden LJ commented in *Murad* at [81], the rule in *Regal (Hastings)* is an inflexible one but "historically equity has been able skilfully to adapt remedies against defaulting trustees or fiduciaries so as to meet the justice of the case". However, as with the defence of laches, any restriction on relief by reference to delay would need to involve not only delay that was unreasonable in the circumstances, but factors that render it unjust to grant the relief – or in this case the full extent of the relief – sought. Those factors would typically relate to the position of the defendant, the most obvious being a material element of detriment: see by way of analogy *Spry, Principles of Equitable Remedies*, 9th ed. at p.450, which refers (in the context of laches as a defence to the grant of an injunction) to a "substantial detriment" rather than mere inconvenience.

78. Whether it is necessary to limit relief to avoid an inequitable result would depend on the individual facts and circumstances. Mere delay, even if lengthy, would certainly be insufficient. In *Clegg* the plaintiffs not only failed to take legal action for a very lengthy period but allowed the fiduciaries to take significant risks without, it seems, taking material steps to seek to participate in the opportunity themselves by putting in an alternative bid for the lease or challenging its grant to the managing partners. Further,

although the plaintiffs in *Clegg* maintained their legal rights in respect of the dispute in question, other matters were pursued and settled in the meantime.

79. In *Clegg* the plaintiffs were aware from the outset that the defendants were planning to exploit the opportunity but failed to take action to participate or to seek to prevent the defendants from pursuing it. The result may well not have been the same in an otherwise similar factual scenario if the plaintiffs had not been so aware but there had nonetheless been a delay once they finally found out what was going on. It might be that in such a case relief should neither be denied nor restricted, but that would depend on the circumstances of the case. As in *Grundt* and *Murdoch v Mudgee*, it ought in principle to be possible to limit the scope of relief on a temporal basis if justice so requires.

80. However, the law does not, and should not, require a claimant to take action as soon as they become aware of a breach of fiduciary duty, or else risk losing their ability to obtain an account of profits. That would be inconsistent with the long-established strictness of the rule that unauthorised profits made by persons subject to fiduciary obligations must be accounted for. As with the position on the grant of an allowance, any restriction of relief could only be justified if it would not have the effect of encouraging such persons to put themselves in positions of conflict (see below).

81. It may be reasonable for a claimant to "wait and see" for a number of reasons. Those might well include whether the venture proves profitable – so that there is something to have a realistic dispute about – as well as other considerations, such as in this case the position with the Family. A lack of funds might also be relevant. To the extent that *Murdoch v Mudgee* might be read as suggesting that action must be taken as soon as a breach is identified, or within a short period thereafter, we would respectfully disagree. "Standing by" is not, as such, a defence or partial defence to a claim for an account. Relief could be only denied or restricted on account of delay when the circumstances are such that, taking full account of the strictness of the rule, it would nonetheless be inequitable to grant the full relief sought.

Application to the facts found

82. In our view the Judge's findings of fact are fatal to this ground of the defendants' appeal.

83. In short, the Judge's findings are inconsistent with the defendants' assertion that they took "massive risks". She also concluded that the delay was reasonable.

Risk

84. At [630]-[638] of the Judgment the Judge made factual findings specifically in respect of delay, against the backdrop of her conclusion that the authorities where laches or acquiescence had barred relief had been cases where the generation of the profits in question had involved material risk and there had been clear knowledge of the conduct of the business on the part of the claimant. Her findings included (at [632]) that the Recovery Services were not inherently risky in the sense seen in the authorities. There was no risk of no outturn. The Family were billionaires on any basis and, realistically, "there would be some (very significant) recovery". Further (at [633]):

> "The element of real serious commercial risk shouldered by the Defendants and deliberately dodged by Mr Jaffe was lacking."

85. This point is important and, as the Judge recognised, a distinguishing feature from *Clegg*. Mr Jaffe was not avoiding participation. He wanted to participate but, at least in part due to the defendants' actions, he was unable to do so: see in particular [393]. Further, as the Judge pointed out at [635], this was not a case where Mr Jaffe was avoiding significant work that he would otherwise have done himself. He was seeking what he (or more strictly SCPI or its nominee) would otherwise have been entitled to.

86. The Judge made more detailed findings about risk earlier in the Judgment, at [451]-[455]. She found the evidence of personal risk taken by the defendants not to be persuasive, bearing in mind that the risk was one that they had agreed to in becoming involved in the Recovery Services initially. Although there was a degree of personal risk, it appeared to have been "avoidable and manageable". As to financial and commercial risk, the Judge said this:

> "454. As for financial and commercial risk again I accept a degree of risk, but that degree has to be assessed. And when assessed I conclude that the risk taken was not really akin to the authorities, in particular the mining cases. In those cases a very significant outlay was required to get the businesses started. The investors might have been ruined if things had not gone well. Here there was commitment to the project. There was a degree of commercial risk in that the Defendants for some time did not know how well remunerated they would be. They did loan the Family money at certain points. But that does not mean that there was a real risk - they were effectively betting on a certainty. As Mr Shvidler made clear the Family:
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> > "were and they are, by the way, billionaires, billionaires, billionaires, they just didn't have control of those billions, and the whole point was they wanted to get this control and for that they needed cash and they needed to somehow settle with Berezovsky, with Anisimov, with [etc.]"
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> 455. So while Mr Rukhadze lent the Family over £1 million, and the Family did not finally repay all of this until 2016 there was no real risk; it was not (as pleaded) a risk that "*the entire estate might end up insolvent and his money would not be repaid*." Similarly while the Defendants were often and over a considerable period confronted with significant shortfalls in funds which created real issues for them in pursuing the Recovery Services and which necessitated the Individual Defendants using their contacts to assist the Family, these were effectively simply cash flow problems – and the way in which they were capable of being dealt with demonstrated the confidence of all concerned that there would be a positive outcome in the end."

87. We disagree with Lord Wolfson's submission that the comments about limited risk in this section of the Judgment were directed only at the risk of loans made by the defendants not being recovered. Most of the comments are more general, in particular the Judge's distinction between the facts of this case and the mining cases, the comment

about there being a degree of commercial risk as to how well remunerated the defendants would be (as opposed to whether they would be remunerated), and the fact that all concerned were confident that there would be a positive outcome in the end.

88. In summary, she accepted that the defendants had assumed a degree of commercial and financial risk, but that it was not akin to that in the mining cases, in which significant outlay was required to get the business started. They had lent the Family money but repayment was a certainty at some point. The degree of commercial risk was that "for some time the defendants did not know how well remunerated they would be".

89. This section of the Judgment must be read in the light of [117] to [118], in which the Judge had described the terms of the IRSA which governed the extent to which the defendants would share in recoveries, including its US$500 million threshold. There she had said that it was "no mean feat" to achieve the threshold (which did not occur until October 2016, according to the defendants, many years after the resignations); and that the risk of the defendants not being able to do so was "extreme and indeterminate". However, the evidence showed that in addition to the profit share, which the defendants described as the main incentive, they were paid consultancy fees, salaries and members drawings. These were measured in tens of millions of dollars over the whole period, but were receipts before taking account of expenses or overheads.

90. As we read the Judgment as a whole, the Judge was accepting that the time and effort put in by the defendants in effecting the recoveries involved some degree of financial and commercial risk, but only the risk that they would not be as well remunerated as they would have been had they devoted their energies elsewhere over the six and a half years in question.

91. The Judge was clearly entitled to reach the conclusions that she did about the overall level of risk.

Delay in commencing litigation

92. As already mentioned, the Judge made some factual findings about delay in the initial stages after the breach, finding that Mr Jaffe's failure to take action at that time could not fairly be categorised as delay for the purposes of an unconscionable delay argument.

93. The Judge also made comments about Mr Jaffe's financial ability to commence litigation at [637]. She tended to the view that he would have been able to commence "some form of litigation" at an earlier stage but the case that he could have commenced "this heavy litigation" was not made out. However, the Judge also found at [638] that even if it had been possible to commence proceedings earlier, she would have concluded that a reasonable decision had been taken to wait.

94. Lord Wolfson criticised these comments. In written submissions it was suggested that an injunction could have been sought at a much earlier stage. This was rightly not pursued in oral submissions. Apart from the need for a cross-undertaking in damages and the requirement that, if injunctive relief was to be obtained, it would generally be on the basis that the underlying claim would be pursued promptly, any claim for an injunction might well have been successfully resisted on the basis that damages were an adequate remedy and because of the potential impact of an injunction on the Family.

95. Instead, Lord Wolfson's oral submissions were made on the basis that litigation commenced at a much earlier stage would have had a very different complexion, in particular not requiring a quantum phase and not involving other complications, such as whether certain investments were within the scope of the account. In short, it would have been much less "heavy".

96. In our view this is both unrealistic and wrong in principle. It is inappropriate for the court to attempt to engage in a speculative exercise to determine how "heavy" litigation would be if it had been commenced at a different point and seek to judge that against the claimant's financial means. Further, the key reason why it was suggested that litigation might be less heavy was that the subject matter of an account of profits had not then materialised. Indeed, on certain of the defendants' earlier dates, the deal with the Family would not even have been achieved. A wronged beneficiary should not be forced into taking action at an unreasonably early stage. Any such principle would risk jeopardising the deterrent effect on fiduciaries that the remedy is intended to have. Any action for an account in those circumstances would be at risk of failure, or at least settlement on what might well prove to be unattractive terms. The result could be to leave the fiduciary at liberty to reap profits from his breach of duty at a later stage.

97. The Judge's finding at [638] was as follows:

> "Further even had the delay principle been more at large and even had it been on the facts possible for me to conclude on the balance of probabilities that it had been possible for him to commence proceedings earlier, I would in any event have concluded that he essentially took a commercial and strategic decision to wait, at least until the outcome of the VDP carried interest litigation, before he did so and that decision was a reasonable one given (i) the ramifications of the litigation within the VDP litigation (ii) the demands of that litigation and other litigation which remained live and (iii) the likely financial demands of this litigation."

98. The reference to the VDP litigation is to litigation brought by the liquidators of VDP, a private equity vehicle previously managed by SCPI, regarding SCPI's claim to a carried interest in VDP. SCPI's appeal to the Privy Council in those proceedings was dismissed in November 2015.

99. Lord Wolfson submitted that the Judge did not apply the correct test. It would always be in a claimant's interests to stand by and allow the defendant to take the risk. But we agree with Mr Weisselberg KC (for the claimants) that, in circumstances where the Judge had found that the decision to wait was reasonable, it is very difficult to see how the delay could be characterised as unreasonable.

100. We have rejected the existence of any general defence of "standing by". The test is whether the circumstances are such that it would be inequitable to grant the relief sought. The Judge's unchallenged factual findings about the reasons for the delay are a relevant consideration, as was her conclusion that there was an absence of significant material risk.

101. More fundamentally, it was never made clear why the claimants' delay in taking action rendered a full account of profits unjust, in circumstances where that would not have

been the case if proceedings had been commenced earlier. It was not suggested that there was evidence from which it could be concluded that the defendants would have acted differently in that scenario, any more than they did in the face of the letters that were in fact sent threatening action against them (see the Judgment at [45] and [55]-[58]). The fact that the defendants continued to pursue the opportunity, and indeed did not take up their own suggestion in that correspondence of seeking declaratory relief, suggests that they would not have been deterred by the commencement of proceedings, and instead would have denied liability, and resisted any account of profits, in the same way as they did in these proceedings.

Equitable Allowance

The issues

102. Both the claimants and the defendants appeal against the Judge's determination that the defendants should be granted an equitable allowance of 25% of the profits falling within the scope of the equitable duty to account, as remuneration for the skill, risk and labour in earning those profits.

103. The claimants contend that no equitable allowance should have been granted on the grounds that:

    i) the Judge granted the allowance on a basis which was not pleaded or argued and in respect of which the defendants had advanced no supporting evidential case; and/or

    ii) the Judge's reliance at [469] of her Judgment on five "indicators" of value was wrong and insufficient in law to support an allowance of 25% or any allowance.

104. The defendants contend that the effect of the "50/50 agreement" is that the equitable allowance should have been 50% because such agreement was the best evidence as to the value of the services provided; or alternatively that the effect of the agreement is that the "gravitational pull" should have been towards a figure of 50%.

The Judgment

105. At [239], the Judge identified a number of points of common ground between the parties as to the law, including the fundamental rule that a fiduciary must not be allowed to make an unauthorised profit out of his fiduciary position, and that the profits for which he is obliged to account should bear a reasonable relationship to the breach of duty proved. At [240] she observed that the court may make an allowance for the fiduciary's skill, labour and assumption of business risk. At [241]-[260] the Judge then referred to what she described as "*the deterrent dimension vis a vis the accounting party*", being that because of the nature of the fiduciary relationship, the courts had historically regarded it as important that the remedy ensures disgorgement effectively, lest a failure to do so should encourage other fiduciaries to breach their duties. In this context she cited *Regal (Hastings)*; *Boardman v Phipps*; *Guinness v Saunders* [1990] 2 AC 663; *Murad*; *Gray*; and a number of academic articles including three written by Professor Conaglen. In this section of her Judgment she concluded at [260]:

> "What this run of authority says clearly, what I therefore hold in my mind as the backdrop to the exercise which is to be performed, is that the court should attempt -if possible- to hold the balance between the disgorgement of profits wrongly earned and not unjustly enriching the claimant. However the very considerable significance attached to the deterrent effect means that if there is a doubt as to which side of the line to stray, that doubt should be resolved in favour of the principal. In essence the need for consistency, principle and deterrence is seen as more important. That may….lead to harsh results,. But those harsh results are the accepted price of the deterrent motivation which underpins the remedy".

106. The Judge returned to the law, specifically in respect of an equitable allowance for skill exercised by the fiduciary, at [366]-[372]. She referred to another article by Professor Conaglen; *O'Sullivan v Management Agency & Music* [1985] 1 QB 428; *Boardman v Phipps*; *Re Macadam* [1946] Ch 73; *Re Berkely Applegate (Investment Consultants) Ltd* [1989] Ch 32; and Meagher, Gummow & Lehane's *Equity* at 5-280. She concluded at [372]:

> "An allowance may be made in equity for the skill and labour put in by the defaulting fiduciary, and that while the court will look carefully at the circumstances before granting any such allowance, cases where (i) the work done by the fiduciary would otherwise have had to be done by another and/or (ii) the work done has benefitted the property which forms the basis of the account are ones where such an allowance may be appropriate."

107. The critical section of the Judgment on this issue is at [436]-[471]. In this section the Judge started by observing that the way the issue was defined in the list of issues, by reference to whether the defendants had brought exceptional or unique skills to bear, was not entirely apt. She foreshadowed her later conclusions by saying "However I shall consider the formulation agreed [in the list of issues] before passing on to the part of it which has real potential to impact in this case." In addressing the formulation in the list of issues she concluded that the defendants had not exercised skill which was unique. She next considered the risk undertaken by the defendants in the passage at [454]-[455] quoted above, which we have summarised above, in the light of the Judgment as a whole, as being that the time and effort put in by the defendants in effecting the recoveries involved some degree of financial and commercial risk that they would not be as well remunerated as they would have been had they devoted their energies elsewhere over the six and a half years in question.

108. The Judgment then has a sub-heading "Necessary skill and effort" which begins at [456] in these terms:

> "However, having said all of this, I am satisfied that there is a relevant, less focussed question (effectively within the ambit of the pleaded issues) to which the answer is yes. The formulation spoke of unique skills. However, as I have indicated above, while an allowance may often reflect something unique or highly skilled, there is also material which justifies a conclusion that an allowance is permissible for doing,

> with requisite (but not necessarily unique) skill, that which needs to be done."

109. In the paragraphs which followed the Judge identified particular examples of skills demonstrated by the defendants and of the resulting favourable outcome in terms of recoveries, including reference to "dogged determination, hard work and a certain amount of strategic thinking [which] ultimately paid off"; and to the exercise of particular skills by each of the Individual Defendants which, whilst not unique, was valuable, and to which many others could not aspire. She had already recorded at [122] that it was common ground that the defendants "did a huge amount of detailed work on the Recovery Services" between October 2012 and December 2017; and that "they worked extremely hard". Details had been set out, by way of summary only of the main events, over the course of the fifty paragraphs which had followed. At [464] the Judge concluded:

> "Having read and listened to the evidence both as to the early stages of the Recovery Services (in Phase 1) and as to the completion of those services (in Phase 2) I am persuaded that the Defendants did make a significant contribution to the Recovery Services and that without their work – including their work after 2011 – the outcome for the family would have been somewhat less favourable. I conclude that it would be unjust to deny them some recompense for that. I also conclude that to do so would err on the side of overcompensating the Claimants."

110. The next paragraphs contain her reasoning leading to the quantification of the allowance at 25%, which merit quotation in full:

> "465. The question then becomes whether it is possible to ascertain what the allowance made should be. The Defendants advocated a 40% allowance, based essentially on the profit-sharing agreement. In my judgment that is the wrong approach. There is no valid (in the sense of legally enforceable) profit-share agreement. The cases caution against analysing by reference to what would have happened had there been no breach (See for example *Murad* at [76], *Regal* at 144G-145A, …154F-G).
>
> 466. Analytically we have moved from a determined figure based on the past and hypothetical future agreement to a realm where something akin to the *Boardman* and *O'Sullivan* approach is to be aimed at.
>
> 467. In relation to this approach the Defendants offered no assistance; doubtless for sound tactical reasons. However this opened the door for the Claimants to argue that the Defendants have failed to quantify the allowance they claim or to advance any case as to the value of their contribution; nor did they put forward any expert evidence of the market rate that would be payable for services of the kind they provided. The Claimants therefore submit that I should refuse any allowance since I have been given no tools with which to calculate what level of allowance would be appropriate. They also point out that in *Gray*, Asplin J refused to make an allowance for the defaulting fiduciary's work over seven years in part because he had put forward

no properly evidenced case as to the value that should be attributed to that work. At [213] she observed: "*in my judgment, there is insufficient evidence before the court upon which to do so [i.e. to make an allowance] with sufficient certainty. Mr Ward's rule of thumb is not an appropriate basis for doing justice*". (Mr Ward was an accountant (not instructed as an expert) who had given evidence on behalf of Mr Gray in that case.)

468. However I am not minded to follow this counsel of despair. Such authority as there is shows that in this context of fashioning an equitable allowance (which can have more than one input factor) courts are prepared to be robust.

469. Here it seems to me that there are a number of indicators which can point me to a sufficiently fair and robust conclusion. They are these:

a. The expectation was always that the Individual Defendants would do the lion's share of the hard work in performing the Recovery Services;

b. Mr Rukhadze had previously been remunerated based on a percentage – and a not insignificant percentage in the region of 40-50% as described above;

c. Mr Alexeev, while originally employed on a salary, expected a percentage participation of some sort – in the range of 10% (Phase 1 judgment [335]);

d. Mr Marson's previous employment had been just that; but he had been anticipating some share in proceeds (running to the low millions) as he gained in status and value within the Recovery Services (Phase 1 judgment [429]);

e. Mr Hauf was looking for a payment in the region of US$15 million gross plus expenses and claimed to have been told "don't do it for much less than £100 million". An early draft of an Engagement letter was structured around a US$700,000 per annum fee, with a US$10 million Success Fee and 0.5% of the value of the recovered assets.

470. I bear in mind that the *O'Sullivan* and *Boardman* approaches indicate that I should be aiming to approximate to the value of the services, but not to take full account of the Defendants' contribution or to award them "*at all as much*" as they might have obtained if they had not breached their fiduciary duties.

471. On this basis I conclude that the value of the Defendants' services must be considered to run into the tens of millions and that on any analysis that is what the Family (or SCPI) would have had to pay to receive equivalent services. That value can be sensibly approximated

> by way of a percentage. I conclude that an appropriate percentage in this context is 25%."

The law

111. We have referred at paragraphs [354]-[36] above to the all-embracing nature of a fiduciary's liability to account for profits. This is a strict and inflexible rule, based in part upon the policy of deterring fiduciaries from placing themselves in positions of conflict or breaching their duties: see the authorities traced by Jonathan Parker LJ at [101]-[109] of *Murad* (although there is surely some hyperbole in the dictum of James LJ in *Parker v McKenna* that the safety of mankind requires it); and *Gray* at [126]. Like many inflexible rules it is capable of having harsh results, depriving a well-intentioned fiduciary of profits earned by his own skill and labour and conferring on the beneficiaries to whom such profits must be disgorged what would generally be regarded as an unjust enrichment. As Arden LJ observed at [82] of *Murad*, it may be that the time has come when the court should revisit the operation of the inflexible rule of equity in harsh circumstances. It is not, however, a departure which it is open to this court to make in the light of binding authority, despite Clarke LJ's views to the contrary in his dissenting judgment in *Murad*.

112. The concept of unjust enrichment has, at best, only a subsidiary and minor role to play in limiting the duty of a fiduciary to account: *Gray* at [124]-[127]. One way, however, in which the harshness of the rule may be mitigated, and any unjust enrichment of the beneficiaries curtailed, is by the jurisdiction to grant a defaulting fiduciary who is liable to account for profits, made from his position as a fiduciary, an allowance in respect of the skill, risk and labour he has undertaken in creating the profit, in addition to the expense he has incurred in doing so. It is well-established that such jurisdiction exists. It is less well established exactly when and in what circumstances the jurisdiction should be exercised.

113. In general terms it can be said, as this court said in *Gray* at [209], that it should be exercised only in exceptional circumstances. The phrase "exceptional circumstances" comes from the speech of Lord Templeman in *Guinness v Saunders* where Lord Templeman used it to describe the award of such remuneration in *Phipps v Boardman* by Wilberforce J ([1964] 1 WLR 993, 1018), an award which was upheld by the House of Lords. However, that provides little assistance as to what circumstances will be regarded as exceptional, and indeed as to what exactly is meant by "exceptional" in this context.

114. Helpful guidance on both aspects is to be found in the speech of Lord Goff in *Guinness v Saunders*. At p.700C-D he refers to the long established principle that directors are not entitled to contract with the company for their services, because of the conflict between duty and interest, just as trustees are not entitled to charge remuneration where it is not authorised by the terms of the trust deed. He then says at p.700D-E:

> "Plainly it would be inconsistent with this long established principle to award remuneration as of right on the basis of a quantum meruit claim. But the principle does not altogether exclude the possibility that an equitable allowance might be made in respect of services rendered."

115. He then cites *Phipps v Boardman* as establishing that an allowance may be made by way of remuneration for services rendered by a trustee in breach of his fiduciary duty, and explains the circumstances of that case, in which a solicitor to a trust and one of the beneficiaries were held accountable to another beneficiary for a proportion of the profits made by them from a sale of shares which they had bought with the assistance of information gained by the solicitor when acting for the trust. Having set out Wilberforce J's reasoning, which included the fact that if the solicitor had not acted as he had, the beneficiaries would have had to employ and remunerate an expert to obtain the profit, Lord Goff observed that the decision to make the allowance was founded upon the simple proposition that (in Wilberforce J's words) "it would be inequitable now for the beneficiaries to step in and take the profit without paying for the skill and labour which has produced it." At p.701D-F he continues:

> "The decision has to be reconciled with the fundamental principle that a trustee is not entitled to remuneration for services rendered by him to the trust except as expressly provided by the trust deed. Strictly speaking it is irreconcilable with the rule as so stated. It seems to me therefore that it can only be reconciled with it to the extent that the exercise of the equitable jurisdiction does not conflict with the policy underlying the rule. And, as I see it, such a conflict will only be avoided if the exercise of the jurisdiction is restricted to those cases where it cannot have the effect of encouraging trustees in any way to put themselves in a position where their interests conflict with their duties as trustees.
>
> Not only was the equity underlying Mr Boardman's claim in *Phipps v Boardman* clear, and indeed, overwhelming; but the exercise of the jurisdiction to award an allowance in the unusual circumstances of that case could not provide any encouragement to trustees to put themselves in a position where their duties as trustees conflicted with their interests."

116. A number of points emerge from this analysis. First, an equitable allowance will not be the usual order or one which the defaulting fiduciary can expect as of right. It is in this sense that the exercise of the jurisdiction is exceptional. Secondly the ultimate test, which was that applied by Wilberforce J in *Phipps v Boardman*, is whether it would be inequitable for the beneficiaries to step in and take the benefit of the profits made by the fiduciary without paying for the skill, labour and risk which has produced it. The taking of an account is an equitable remedy, as is the making of any allowance in favour of the defaulting fiduciary in the fashioning of the account. The assessment will be fact specific. As the High Court of Australia said in *Warman* at p.559, "It is necessary to keep steadily in mind the cardinal principle of equity that the remedy must be fashioned to fit the nature of the case and the particular facts." Thirdly, it will not be inequitable for beneficiaries to take the profits without making an allowance for remuneration if and to the extent that such an allowance would be seen as encouraging fiduciaries to breach their fiduciary duties.

117. One consequence of the second and third points is that it will be relevant to consider the degree of culpability which is to be ascribed to the breach of fiduciary duty. It will be more inequitable to deprive a defaulting fiduciary of the profit resulting from his own skill and labour, without making an allowance, where his breach is honest and well

intentioned than when it is dishonest or otherwise highly culpable; and the deterrent imperative is all the stronger in the case of dishonest breaches than it is for honest and well-intentioned ones. As Lord Denning MR observed in the Court of Appeal in *Boardman v Phipps* [1965] Ch 992, p.1020:

> "If the defendant has done valuable work in making the profit, then the court in its discretion may allow him a recompense. It depends on the circumstances. If the agent has been guilty of any dishonesty or bad faith, or surreptitious dealing, he might not be allowed any remuneration or reward."

118. But that is not to say that the jurisdiction to grant an allowance can only be exercised in cases where the personal conduct of the fiduciary cannot be criticised. An allowance of some, but part only, of the remuneration which a defaulting fiduciary would have earned in generating the profit if not acting in breach of fiduciary duty may satisfy the rationale that it would act sufficiently as a deterrent, whereas a full allowance would not. Elias J made this point and applied it in *Nottingham University v Fishel* [2000] ICR 1462. Having identified the *Guinness v Saunders* deterrent principle, he said at pp.1499H-1500A:

> "However, in an appropriate case I do not consider that the principle would preclude some reward for services rendered, albeit not compensation representing the full value of those services. This would hardly encourage breaches of duty in the normal case."

119. This may justify some allowance even where there is a significant degree of culpability in the behaviour of the defaulting fiduciary. *O'Sullivan* provides an example. It involved a subsequently successful singer songwriter, professionally known as Gilbert O'Sullivan, signing disadvantageous recording, publishing and management agreements in the early stages of his career, as a result of exploitation by an experienced manager and producer, Mills. It was held that the agreements were procured by undue influence and were in restraint of trade. Since they had been fully performed and the parties could not be restored to their previous position, this court upheld an order for an account of the profits made by the companies, but further held that an allowance should be given for the skill and labour in promoting Mr O'Sullivan and contributing to his success. The allowance was ordered, in an amount to be determined by an inquiry, notwithstanding that there was an abuse of personal trust and confidence by a manager exercising undue influence over his recording artiste. Fox LJ said at p. 468A-B:

> "A hard and fast rule that the beneficiary can demand the whole profit without an allowance for the work without which it could not have been created is unduly severe. Nor do I think that the principle is only available in cases where the personal conduct of the fiduciary cannot be criticised. I think that the justice of the individual case must be considered on the facts of that case. Accordingly where there has been dishonesty or surreptitious dealing or other improper conduct then, as indicated by Lord Denning MR [in *Boardman v Phipps*], it might be appropriate to refuse relief; but that will depend upon the circumstances."

120. Fox LJ then considered and rejected an argument that the companies should be remunerated on a profit sharing basis by reference to the terms of the agreements which would have been reached had Mr O'Sullivan had independent advice, but concluded that they should be remunerated in an amount to be determined by an inquiry, in the following terms at pp.468E-469B:

> "Once it is accepted that the court can make an appropriate allowance to a fiduciary for his skill and labour I do not see why, in principle, it should not be able to give him some part of the profit of the venture if it was thought that justice between the parties demanded that. To give the fiduciary any allowance for his skill and labour involves some reduction of the profits otherwise payable to the beneficiary. And the business reality may be that the profits could never have been earned at all, as between fully independent persons, except on a profit sharing basis. But be that as it may, it would be one thing to permit a sharing of profits in a case such as *Phipps v Boardman* [1967] AC 46 where the conduct of the fiduciaries could not be criticised and quite another to permit it in a case such as the present where, although fraud was not alleged, there was an abuse of personal trust and confidence. I am not satisfied that it would be proper to exclude Mr Mills and the M.A.M. companies from all reward for their efforts. I find it impossible to believe that they did not make a significant contribution to Mr O'Sullivan's success. It would be unjust to deny them recompense for that. I would, therefore, be prepared, as was done in *Phipps v Boardman*, to authorise the payment (over and above out of pocket expenses) of an allowance for the skill and labour of the first five defendants in promoting the compositions and performances and managing the business affairs of Mr O'Sullivan, and that an inquiry (the terms of which would need to be considered with counsel) should be ordered for that purpose. Such an allowance could include a profit element in the way solicitors' costs do.
>
> In my view this would achieve substantial justice between the parties because it would take account of the contribution made by the defendants to Mr O'Sullivan's success. It would not take full account of it in that the allowance should not be at all as much as the defendants might have obtained if the contracts had been negotiated between fully advised parties. But the defendants must suffer that because of the circumstances in which the contracts were procured."

121. Dunn LJ agreed with this aspect of Fox LJ's judgment at p.459A. Waller LJ gave a concurring judgment holding that the defendants were entitled to reasonable remuneration involving expenses and a "fair" profit, the amount of which it would be for the official referee to decide.

122. The case therefore stands as authority for the propositions (i) that an allowance may be made by way of an order for profit sharing, especially if the market is one in which remuneration would have been earned by the beneficiary, in the absence of breach of duty, by a profit sharing arrangement; and (ii) that an allowance may be made where there is a degree of culpability in the fiduciary's breach, in a lesser sum than the remuneration a fiduciary would have earned absent breach.

123. We would add two further observations about the grant of an equitable allowance by way of remuneration for generating the profits in question. The first is that, as this court said in *Gray* at [239], a claim for an equitable allowance should in principle be pleaded and supported by evidence in the usual way. The second is that the quantification will often not be a matter of mathematical calculation. The determination of what is equitable involves an evaluative judgement akin to the exercise of a discretion, and this court will only interfere with a first instance decision in the well-known and restricted circumstances which apply to the exercise of such a discretion.

Culpability on the facts of this case

124. It is convenient here to say something about the culpability of the defendants in this case, before turning to the arguments on the appeal. It formed no part of the claimants' submissions to us that the breaches of duty by the defendants were sufficiently egregious to rule out any equitable allowance. The Judge did not address their seriousness in the section of her Judgment explaining her 25% allowance. She had addressed the nature and scope of the breaches of fiduciary duty in her Phase 1 Judgment at some length. In the Phase 2 Judgment, she identified at [390]-[393] the findings on the nature and scope of the breaches which informed her conclusions on the fashioning of the account, when addressing arguments advanced on behalf of the defendants that they were minor and/or had had no causative effect. In particular she held that:

    i) The necessary element of disloyalty which founded liability for breach of fiduciary duty consisted of the preparatory acts by the Individual Defendants, prior to their resignations, in failing to support the entities to whom they owed the duties (SCPI/the claimants) and in actively aligning themselves with the Family. By mid-April 2011 they had actively or passively made clear to the Family that they were prepared to continue providing the Recovery Services if the Family severed ties with SCPI; and were taking actions to make themselves ready to provide the services in a post-SCPI world. They were prepared to "scupper any lingering chance of an SCPI deal by letting the Family know that they would do the business if SCPI were sent packing".

    ii) It was not possible to conclude on the balance of possibilities that the defendants positively caused the Family to terminate the relationship. The deal which SCPI sought may have been over by the time of the resignations and Mr Jaffe "may have been faced with the prospect of monetising the opportunity or settling for a very different deal." Nevertheless "if Mr Jaffe could never, by the time of the resignations have landed a deal for the Recovery Services, that was a state of affairs brought about by the Defendants' previous disloyalty".

125. It is clear that there was no finding of dishonesty on the part of the defendants. Moreover, as Lord Wolfson was keen to emphasise, the defendants would have been free to exploit the business opportunity for their own benefit once they had resigned had they done nothing which constituted a breach of duty whilst still employees/directors/agents.

126. Beyond these findings, it is difficult for this court to judge the nuances of how blameworthy the defendants' conduct was, in the context of the developing difficulties in securing an agreement with the Family and the human relations and interactions

between Mr Jaffe and the defendants. The Judge, on the other hand, was well placed to form such an assessment having heard the evidence in the course of the four week Phase 1 trial, including the oral evidence of the main protagonists as to the course of events, human interactions and motives which led to these "preparatory acts" which constituted the breaches of fiduciary duty. No doubt she had formed such an assessment, and it will inevitably have played a part in her consideration of a fair level of equitable allowance by way of remuneration. This court is not in a position to substitute its own moral judgement.

The defendants' appeal: the relevance of the "50/50 agreement"

127. As part of its first ground of appeal, in addition to the arguments we have addressed above, the defendants relied on the "50/50 agreement" in support of an equitable allowance of more than 25%. The high water mark of the argument was that it justified an equitable allowance of 50%. The alternative argument was that it exerted a gravitational pull towards a figure of 50% such that a 25% allowance was insufficient.

128. As to the primary case, the claimants argued that it is not open to the defendants to argue for a 50% allowance because Mr Cogley KC, counsel for the defendants below, conceded that 50% could not be claimed. Rather, he appeared to accept the Judge's point, put in the course of final speeches, that a 50% allowance would offend the *Guinness* principle by giving the defendants everything they would have received had they not been in breach of duty; and he accordingly argued for a 40% figure.

129. We would not be inclined to hold the defendants to this concession, were there any merit in the argument. There is no prejudice to the claimants in addressing it in this court. However there is no merit in the point for two reasons. First, on the Judge's findings there was no binding agreement that the defendants would be paid 50%, as we have already explained, but merely a common understanding of a profit share somewhere in the region of 50%. Secondly, the Judge was right to point out that an allowance of everything the defendants would have earned absent a breach of duty would run contrary to the *Guinness* deterrent principle.

130. As to the "gravitational pull" argument, we agree that the Judge's findings as to the 50/50 agreement could properly inform her assessment of the amount of the equitable allowance. This is so in two ways. First, it was evidence that remuneration for the services in question would be valued by way of a profit share rather than by way of fixed remuneration. When considering how much remuneration to allow the defendants, it therefore supported the Judge's conclusion that it could properly be expressed as a profit share, just as Fox LJ had considered appropriate in principle in *O'Sullivan*.

131. Secondly it provided some indication of the level of profit share which would have been regarded as reasonable remuneration for the services in question. We return below to its evidential status and weight in the context of the arguments advanced by the claimants. However the defendants' appeal can be disposed of even if it be assumed that proper remuneration for the services absent breach would have been a 50% profit share. On that hypothesis it would still have been necessary to reduce the profit share to take account of the culpability of the defendants and the deterrent principle. We cannot say that a reduction to 25%, even on the stated hypothesis, was outside the range reasonably open to the Judge given the advantage she had in assessing culpability.

The claimants' cross-appeal

The pleading point

132. On behalf of the claimants Mr Weisselberg advanced essentially three points in support of the argument that the Judge's basis for granting an equitable allowance had not been pleaded. The first was that there was no pleaded case based on the market value of the work involved in carrying out the Recovery Services. The second was that the pleading only sought an allowance in reliance on the defendants having deployed exceptional and unique skills; and that once the Judge had rejected the case that there was anything unique about the skills they exercised, there was no pleaded basis for granting an allowance based on some lesser degree of skill and labour. The third was that the plea sought 50% on the basis of the 50/50 agreement and left no room for the award of a lesser sum.

133. We can see no merit in any of these points. The pleadings for Phase 2 took the form of Position Statements. The Defendants' Re-Amended Position Statement set out their case on the 50/50 agreement at paragraph 17. The relevant pleas in respect of the equitable allowance followed at paragraphs 18 and 19 in the following terms:

> "18 Further or alternatively, the Defendants are entitled to an equitable allowance to reflect their exceptional deployment of time, effort and skill, and assumption of personal risk, in performing the Recovery Services, as set out in Section B below. In the context of the private equity business in which the parties were engaged, and in the specific context of this case, that should be calculated as a share of profits (after deduction of reasonable expenses) and/or a sum representing the consultancy fees, salaries and member drawings paid to Individual Defendants (alternatively on such other basis as the Court thinks fit).
>
> 19 Specifically, the Defendants will contend that it should be at least 50% of the otherwise recoverable amount; alternatively such sum, calculated on such basis, as the court thinks fit."

134. Section B set out in considerable detail the Recovery Services provided by the defendants.

135. The prayer at the end of the pleading included at subparagraph (5):

> "The Individual Defendants are also entitled to an equitable allowance in light of the time skill effort and risk which they expended in performing the Recovery Services."

136. The pleading does not assert that the deployment of time, effort and skill, and assumption of personal risk, was "unique", although this concept was addressed in the Judgment because it was used in the list of issues. What was alleged in paragraph 18 was "exceptional" deployment. Contrary to Mr Weisselberg's submission, this is not a term of art reflecting the exceptional nature of an allowance for remuneration. The authorities provide that such an allowance is exceptional in the sense that it is not the usual or routine course; the services do not themselves have to be exceptional to come within the scope of the jurisdiction. It was well within the scope of the pleading to base

an allowance on the very considerable skill, labour and effort which the Judge found was deployed, notwithstanding her rejection of the argument that it was unique. The prayer contains no adjectival description of such time, skill and effort. The Judge's conclusion that an allowance "for doing with requisite (but not necessarily unique) skill that which needed to be done" was "effectively within the ambit of the pleadings" cannot be faulted.

137. Equally a claim for 50% is clearly sufficient to encompass a claim for less than 50%, even without the additional pleaded words used in this case "or such sum on such other basis as the Court thinks fit". It would be absurd to require an express pleading of every lesser amount, such as "alternatively 49%, alternatively 48%...[etc]" before a Court could award a lesser sum.

138. Moreover, we have little doubt that the plea claims an allowance based on the market value of the remuneration for the services: that is clear from the reference to a share of profits being the appropriate measure "in the context of the private equity business in which the parties were engaged, and in the specific context of this case". It was obvious that the 50% figure sought in paragraph 19 relied on the 50/50 agreement which had been pleaded in the preceding paragraph 17. This was reinforced in the defendants' written opening for Phase 2 which alleged that the most accurate measure for the equitable allowance was the 50/50 agreement. That was itself an allegation of a measure of remuneration by reference to the value of the services.

The evidence point

139. Mr Weisselberg's main submission under this head was that there would have had to be expert evidence to support a market rate of remuneration before the Judge could properly grant an equitable allowance to reflect such remuneration. We disagree. The services in question involved recovery of Badri's assets for the Family, which arose in very unusual, perhaps unique, circumstances. We have considerable reservations as to whether any expert would have been able to establish the relevant expertise to be able to comply with the rules of evidence and the Civil Procedure Rules. But however that may be, a level of remuneration may be capable of being assessed in any given case without expert evidence, by reference to the factual evidence in the case. This is especially so if, as in this case, an allowance is to be made for less than the full measure, which does not therefore need to be assessed in more than approximate terms. The decision of Vos J in *Accidia Foundation v Simon C Dickinson Ltd* [2010] EWHC 3058 (Ch) provides an example of the court fixing an allowance by reference to one piece of factual evidence in the case without expert evidence.

140. In this case the 50/50 agreement and the way in which the Individual Defendants had been remunerated within the SCPI structure in relation to other projects provided a proper evidential foundation for findings as to an appropriate rate of remuneration.

141. Mr Weisselberg relied on the Judge's reference at [467] to the defendants having had "sound tactical reasons" for offering no assistance in relation to what she described as the *Boardman* and *O'Sullivan* approach. He submitted that this was a recognition that the defendants had advanced no evidential case for an allowance. This is to mischaracterise her remark. In context, she was referring to the fact that the defendants had provided no assistance as to where to pitch a figure below 50% if a lesser sum was to be awarded, for the sound tactical reasons that they contended that the figure should

be 50%, alternatively 40%. That did not, however, mean that the Judge was bound to award 50% or zero, or that there was no evidential basis for an intermediate amount, as she correctly held.

142. Mr Weisselberg's overarching submission was that it was fundamentally unfair to the claimants for the Judge to have proceeded as she did. We can detect no unfairness. The claim for an equitable allowance based on the valuation of the services rendered, by way of a profit share, was clearly pleaded. The services fell to be valued on the basis of the pleaded case of exceptional deployment of time, effort and skill, and assumption of personal risk; that was a matter which was always in the arena and which the claimants had to address. An allowance on the basis of skill, effort and risk which was less than unique or exceptional was within the pleading. It too was a case which the claimants had to meet. There was a detailed pleading of the work done, supported by extensive evidence at the trial. There was clear reliance on the 50/50 agreement in this context. The claimants could and did challenge the level of skill, time and effort involved, and the degree of financial and commercial risk assumed. Had expert evidence been available on the issue of valuation, it would have been open to the claimants to adduce it; it was their choice not to do so. Ultimately the claimants' submission on this point amounts to no more than that the Judge, faced with rival contentions for 50% or zero, was not entitled to choose a figure in between. That is not a valid criticism. This was not a case like *Al-Medenni v Mars UK Ltd* [2005] EWCA Civ 1041, on which Mr Weisselberg relied, in which the judge decided the case on the basis of a theory as to what had happened which had not been pleaded or clearly relied on at trial, and which the other party had had no opportunity to address. Rather it is an example of what was described by this Court in *Ali v Dinc* [2022] EWCA Civ 34, as a judge's rejection of the full pleaded case of each side but an acceptance of an intermediate combination of matters making up both parties' cases, which is a commonplace in civil litigation, and which involved no unfairness or prejudice.

"The five indicators"

143. The Judge might have taken as her starting point, in identifying what level of remuneration would have been appropriate had there been no breach of fiduciary duty, the "50/50 agreement", in the terms in which she found it existed, namely a preliminary common understanding in the run-up to the breaches that Mr Rukhadze would receive or have a right to dictate the allocation of somewhere in the region of 50% to the Park Street Team in relation to the outcome of the Recovery Services. This is not, however, what she did, despite the efforts of Mr Birt KC to persuade us to the contrary. At [465] she rejected any reliance on the 50/50 agreement on the basis that *Murad* and *Regal (Hastings)* "caution against" such an analysis.

144. In this respect we think that the Judge was mistaken. In the particular circumstances of this case, in which the Judge had had to embark on the evidential inquiry as to whether there was a 50/50 agreement, there is nothing in the passages quoted from *Murad* or *Regal (Hastings)* which precluded her conclusion on that issue from being taken into account as evidence of the value of the services later performed. This was not a hypothetical exercise of trying to decide what would have been negotiated but for the breach. It was evidence of what had in fact been negotiated between these very parties prior to the breach. It was clearly of considerable evidential weight in seeking to value the services in fact provided by the defendants to the Family between 2011 and 2018 that SCPI had agreed in 2008 that the services then contemplated as being provided by

the defendants should be remunerated at about 50% of the profits obtained from the Family. That was a measure of how SCPI then valued the work which was to be done by the defendants on its behalf in performing the Recovery Services. It was also cogent evidence that remuneration for services of this nature would take the form of a profit share.

145. Although the Judge did not take the 50/50 agreement as a starting point for valuing the defendants' services, as she might properly have done, we think it very probable that she had it in mind in reaching her ultimate conclusion at [471] that the appropriate allowance was 25%. We say this for two reasons. First, in [470], immediately before expressing her conclusion on the 25%, she directed herself that it should not be "at all as much" as they might have obtained had they not breached their fiduciary duties. If, as this suggests, she was using the amount they would have earned had they not been in breach of duty as a factor (being a figure which would then have to be reduced in any allowance awarded), she would be bound to have had in mind her findings in respect of the 50/50 agreement. Secondly, the first of her five indicators in [469a] was that the expectation was always that the Individual Defendants would do the lion's share of the work. As Mr Weisselberg correctly submitted, this would not form a freestanding justification for adopting an allowance of 25% or any other figure. But it makes sense if the Judge had in mind the 50/50 agreement as one made at a time when it was contemplated that the defendants would not be performing all the work. The reason, in context, why the Judge noted that it had always been the expectation that the defendants would do the lion's share of the work was to explain why the profit share in the 50/50 agreement was as appropriate a reward for the work done after the resignations as before, notwithstanding that after the resignations the defendants were doing all the work. The point being made is that no upward adjustment from 50% would be justified by that fact. On any view this factor is addressed to what the expectation was prior to the breach of fiduciary duty, and that most obviously involved the expectation reflected in her findings about the 50/50 agreement.

146. The Judge's second factor at [469b] relied on Mr Rukhadze having previously been remunerated for other services for SCPI on the basis of a percentage of profits in the region of 40-50%. This was clearly of evidential value in estimating the method and value of remuneration for the Recovery Services later performed, although not determinative. Mr Weisselberg argued that the past was not a guide to the future because what had been agreed was at a time when Mr Rukhadze had been a loyal lieutenant whom it was intended should take over in due course; and at a time when the services themselves seemed more precarious than they were by the time at which the Recovery Services were being performed. However that is to say no more than that the figures cannot be treated as determinative. The Judge did not treat them as determinative. She identified them as one of a number of indicators pointing to a robust conclusion that a 25% allowance was "not at all as much" as what would have been the remuneration earned had there been no breach of fiduciary duty. They remain relevant to the valuation of the services subsequently provided by Mr Rukhadze, and the Judge properly took them into account for that purpose.

147. The same is true of the Judge's third indicator at [469c] relating to Mr Alexeev. The Judge here referred to his 10% as an expectation, but in the paragraph of her Phase 1 judgment to which she cross refers it is identified as a binding entitlement.

148. Mr Weisselberg's criticism of the Judge's fourth indicator at [469d] in relation to Mr Marson was that he was always on a salary and that he was only offered a profit share (to which the Judge referred as his anticipation) as a result of associating himself with Messrs Rukhadze and Alexeev acting in breach of their fiduciary duties. Nevertheless the salary element was undoubtedly a relevant matter for the Judge to take into account because, as she found, Mr Marson provided valuable Recovery Services, and the Recovery Services as a whole had to be valued by reference to the contribution of the defendants as a whole. The indicators at [469b and c] had considered only Mr Rukhadze and Mr Alexeev, and [469d] properly addressed the additional value contributed by Mr Marson.

149. The fifth indicator, relating to Mr Hauf's position in the early stages after Badri's death, was based on documents which were before the court in the Phase 1 hearing but which were not referred to by the parties in argument. Accordingly Mr Birt sought to attach no very great weight to this indicator. Nevertheless it was one piece of evidence to which the Judge was entitled to have regard in the exercise she was conducting. It was a cross-check in relation to what a person unrelated to the defendants had been seeking to be paid for services to the Family similar to those which fell to be valued.

150. We therefore reject Mr Weisselberg's criticism of the Judge's reliance in [469] on the matters she there set out. Those matters, together with her findings as to the 50/50 agreement which she must also have had in mind, justified an allowance measured as a percentage of profit, and we are quite unable to say that a figure of 25% was wrong in law or outside the ambit of the discretion reasonably available to the Judge.

151. The claimants' cross-appeal must therefore be dismissed.

Conclusion

152. The appeal and cross-appeal will be dismissed.