Neutral Citation Number: [2019] EWCA Civ 817

Case No: A3/2018/0265

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
Mr Justice Morgan
HC-2014-000468

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14 May 2019

Before :

LORD JUSTICE LEWISON
LORD JUSTICE LINDBLOM
and
LADY JUSTICE ROSE

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Between :

(1) RUEDI STAECHELIN **(2) MARTIN DAVID PAISNER** **(3) CARLYN MCCAFFREY**	**Appellants**
- and -	
(1) ACLBDD HOLDINGS LIMITED **(a company incorporated in the Bailiwick of Jersey)** **(2) DE PURY & DE PURY LLP** **(3) SIMON DE PURY** **(4) DR MICHAELA DE PURY**	**Respondents**

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Mr John Wardell QC & Mr James McCreath (instructed by **Lipman Karas LLP**) for the **Appellants**
Mr Jonathan Cohen QC & Mr Ashley Cukier (instructed by **Grosvenor Law**) for the **Respondents**

Hearing dates : 9th and 10th April 2019

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Approved Judgment

Lord Justice Lewison:

Introduction

1. In his reserved judgment delivered after a nine-day trial, Morgan J decided that Mr de Pury (or, more accurately, his LLP) was entitled to commission of $10 million for his part in the sale by the trustees of the Rudolf Staechelin Family Trust of a painting by Paul Gauguin entitled *Nafea faa ipoipo* for $210 million. There were three trustees of the trust: Mr Staechelin, Mr Paisner and Ms McCaffrey. The judge rejected the trustees' case that, in breach of fiduciary duty, Mr de Pury had concealed from them the existence of an earlier offer of $230 million. He also held that although the decision to pay the commission was taken by two only of the three trustees, the trustees were nevertheless bound to pay it.

2. As Henderson LJ observed in granting permission to appeal, the trustees face obvious difficulties in challenging findings of fact made by a very experienced judge. On the facts of this case, in my judgment those difficulties are insuperable.

The judge's findings

3. Mr and Mrs de Pury are art dealers. At the time of the events in question they were long-standing friends of Mr Staechelin and his wife. They also had a long-standing association with a Mr Bennett, who acted on behalf of successive Emirs of Qatar in acquiring works of art. Mr and Mrs de Pury both gave evidence, as did Mr Staechelin. Mr Bennett did not.

4. From the summer of 2012 Mr de Pury had been encouraging Mr Staechelin to sell the painting; but at that stage Mr Staechelin was reluctant to do so. On 26 November 2012, Mr and Mrs de Pury, Mr Staechelin and Mr Bennett met at a restaurant at Zurich airport. Mr Bennett explained to Mr Staechelin that he acted for the Qatari royal family who were interested in the painting and he further explained the intentions of the Qatari royal family if they were to acquire the painting. A couple of months later, the subject was discussed again between Mr and Mrs de Pury and Mr and Mrs Staechelin, at the latter's home in Basel. After an exchange of e-mails, Mr Staechelin said that he would submit Mr de Pury's proposals to the trustees.

5. Over a period of 7 to 10 days up to 20 March 2013, Mr de Pury negotiated with Mr Bennett as to the sale of the painting. The judge found that no later than 19 March 2013 Mr Bennett "said words to the effect "I am going to make an offer" and then said the offer was of $230 million." At [43] the judge found:

> "Following Mr Bennett's offer of $230 million, Mr de Pury telephoned Mr Staechelin (not later than 19 March 2013) and encouraged him to accept the offer. Mr Staechelin told me that he asked Mr de Pury for his confirmation that there would be no commission deducted from the $230 million. Mr de Pury replied that he was expecting to be paid commission by the sellers. Mr Staechelin told me that he was surprised to be told this as he had thought that Mr de Pury was acting for the

> Qataris. The matter was not resolved in that conversation. I accept Mr Staechelin's evidence as to the conversation with Mr de Pury about commission."

6. The judge then recounted a number of discussions, both orally and by e-mail, in which the subject of Mr de Pury's commission was considered. He found that Mr de Pury and Mr Staechelin agreed in their telephone conversation or conversations after the email of 20 March 2013 that Mr de Pury should propose to Mr Bennett a sale at $260 million and in the event of such a sale Mr de Pury would receive $10 million compensation. However, within a few days, the negotiations with Mr Bennett came to an end without agreement. At [52] the judge found:

> "On 23 March 2013, Mr de Pury emailed Mrs Staechelin (but not Mr Staechelin) referring to "the offer of 230"."

7. On 11 April 2013 Mr de Pury sent an email to Mr and Mrs Staechelin stating that he wanted to confirm the current situation in writing. He referred to the last offer made by the Qataris as being $230 million and Mr Staechelin's counter-offer as being $260 million. He added that the counter-offer of $260 million involved the payment of commission of $10 million, or 3.85%, so that the sum received by the seller would be $250 million. Mr de Pury added that the Qataris had said that the matter was now closed; and they would never again attempt to acquire the painting even if became available later at auction.

8. Things went quiet for the remainder of 2013. But in January 2014 Mr Staechelin asked Mr de Pury to contact Mr Bennett again to see whether negotiations could be re-opened. Mr de Pury and Mr Bennett did not meet again until June 2014, when they had lunch together. The judge found that at that meeting Mr Bennett emphasised to Mr de Pury that the purchaser would not offer more than $210 million. Among the reasons were that the market had declined, and that the new Emir was less interested in impressionist works of art.

9. On 16 June 2014 Mr de Pury and Mr Staechelin spoke on the telephone. The judge heard evidence from both of them about that conversation. But he was not persuaded that either of them could remember the details of it. It is worth noting at this point that Mr Staechelin's evidence about this conversation included this:

> "Mr Staechelin gave evidence that Mr de Pury told him over the telephone about the change of Emir and that the purchaser would not offer $230 million again but would only offer $210 million."

10. In substance, the judge accepted this part of Mr Staechelin's evidence. He found that Mr de Pury passed on to Mr Staechelin the essential points which Mr Bennett had made to Mr de Pury at their lunch on 16 June 2014. There was no obvious reason why he would not tell Mr Staechelin what had been discussed. The judge concluded at [62]:

> "What I consider probably happened is that Mr de Pury emphasised to Mr Staechelin that Mr Bennett would offer $210 million but the price was not negotiable and there was no

> prospect of getting back to the previous year's offer of $230 million."

11. Thus Mr Staechelin had been told both of the previous offer; and also of the fact that there was no prospect of its being repeated.

12. A meeting took place on the following day, 17 June 2014. Mr de Pury, Mr Bennett, Mr Staechelin, Mrs Staechelin and Martin Staechelin were present. The judge's findings about this meeting are important. He said at [64]:

> "It was common ground that, at this meeting, Mr Bennett explained why he was offering $210 million. Mr Bennett referred to the new Emir and his attitude to impressionist art. Mr Bennett also said that the market had fallen. At the time of this meeting, Mr de Pury and Mr Staechelin knew that Mr Bennett had made an offer of $230 million the previous year. Mr Bennett's explanations for the figure of $210 million were entirely consistent with that. That comment particularly applies to Mr Bennett's comment about the market having fallen. I find that Mr de Pury and Mr Staechelin understood Mr Bennett to be explaining to them why he was only offering $210 million when he had offered $230 million the previous year."

13. There was some disagreement about whether the figure of $230 million had actually been mentioned. The judge did not find it necessary to resolve that disagreement; because he found at [65] that:

> "Even if that specific figure was not mentioned, Mr Staechelin clearly understood from Mr de Pury's earlier statements that Mr Bennett had offered $230 million the previous year and Mr Staechelin also understood that Mr Bennett was saying to him that he was now only offering $210 million and the higher figure of the previous year was no longer available."

14. By this stage, then, Mr Staechelin had been told about the offer of $230 million at least three times: once by Mr de Pury in March 2013; again by Mr de Pury on 11 April 2013; and a third time on 16 June 2014, at a meeting at which Mr Bennett was present, and explained his position. The result of all that, as the judge found at [64] and [65], was that Mr Staechelin *knew* that Mr Bennett had made an offer of $230 million; or at least that he had made an offer higher than $210 million that was no longer available. Mrs Staechelin had also been independently told.

15. Following that meeting, Mr Staechelin's intention was not to involve Mr de Pury any further in the sale.

16. However, on 26 June 2014 a meeting took place between Mr de Pury, Mr Staechelin and Mr Paisner (who was another of the three trustees). The judge found that there was a consensus that if the sale went through Mr de Pury would receive $10 million. The judge found that it was not explained to Mr de Pury that there was no commitment to pay commission without the approval of the third trustee. He concluded:

> "The words used at the meeting would have simply stated that if the sale went through at $210 million, then Mr de Pury would receive a commission of $10 million."

17. This meeting was the foundation of the judge's conclusion that Mr de Pury was contractually entitled to commission.

18. The critical events all took place within a few days in July 2014. It is during this time that the trustees allege that Mr de Pury concealed from the trustees the previous existence of a higher offer by Mr Bennett's clients.

19. These events begin with Mr Paisner seeking to persuade Mr Bennett to offer $230 million. In the course of their meeting, Mr Paisner recorded:

> "He [i.e. Mr Bennett] wanted me to understand very clearly that he had never made any offer of US $230. Did I appreciate that?"

20. Since the judge's findings about what happened next are the focal points of the appeal, I should set them out in full. (I note, parenthetically, that the reference in Mr Bennett's email to an offer made on 18 June in fact referred to the meeting on 17 June):

> "[91] Mr Paisner immediately telephoned Mr Staechelin and told him what Mr Bennett had said over the telephone. Mr Paisner's note of what Mr Staechelin said stated:
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> "He expressed surprise, since he had understood from Simon de Pury that there was an offer on the table at US $230 and he had this in writing."
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> Mr Staechelin told me that when he said that "he had this in writing", he had in mind Mr De Pury's email of 11 April 2013. Mr Paisner then suggested that he should ask Mr Bennett to contact Mr Staechelin and Mr Staechelin agreed to that course. Mr Paisner telephoned Mr Bennett again and arranged for him to speak to Mr Staechelin.
>
> [92] Mr Staechelin then telephoned Mr Bennett. Mr Staechelin referred to an earlier offer of $230 million. He said that Mr de Pury had told him that Mr Bennett had offered $230 million. Mr Bennett simply said words to the effect "No, that's not true" and that he had never offered $230 million.
>
> [93] Mr Staechelin told me that these statements from Mr Bennett shocked him. His reaction was to conclude that Mr Bennett was telling the truth and that Mr de Pury had lied to him about there having been an offer of $230 million in March 2013. He became very suspicious of Mr de Pury and thought that Mr de Pury had earlier tried to prevent Mr Staechelin having a meeting with Mr Bennett alone.

> [94] Mr Staechelin then spoke to Mr Paisner again. Mr Paisner said that on the basis that the offer of $210 million was the highest offer on the table, he and his family ought to give it very serious consideration. Mr Staechelin agreed with this advice. He told me that an acceptance of the offer of $210 million would give the trustees time to consider and that they could back out later if they discovered anything new to contradict Mr Bennett.
>
> [95] Mr Staechelin spoke to Mr Bennett again on the telephone. Mr Bennett repeated that there had never been any offer of $230 million. Mr Staechelin told him that he would recommend the offer to the trustees subject to Mr Bennett confirming in writing that there had been no previous offer of $230 million.
>
> [96] On 7 July 2014 at 13.13 London time, Mr Bennett sent an email to Mr Staechelin referring to their earlier conversation. The email stated:
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> "As requested, this email is to confirm that I never made a formal offer for the painting by Paul Gauguin for the amount of $230 million.
>
> The only formal offer made was directly to you for $210 million on the 18th June 2014.
>
> I am overwhelmed that you have accepted this offer pending agreement from the other trustees and I very much look forward to concluding the contract."
>
> [97] On 7 July 2014 at 14.47 Swiss time, Mr Staechelin replied to Mr Bennett thanking him for his email and saying "agreed". Mr Staechelin also, at around that time, sent Mr Bennett's email to Mr Paisner."

21. Mr Bennett sent Mr de Pury a copy of that e-mail exchange on the same day. They also spoke on the telephone. The case for the trustees is that, in breach of fiduciary duty, Mr de Pury and Mr Bennett agreed to conceal the truth about the previous offer of $230 million from the trustees. Mr de Pury failed thereafter to tell Mr Staechelin that Mr Bennett's statement that he had "never made a formal offer" of $230 million was untrue. By failing to give that information to Mr Staechelin or the other trustees, Mr de Pury forfeited his right to any commission. It was also part of the trustees' case that Mr de Pury had colluded with Mr Bennett to deceive the trustees, in order to preserve his entitlement to commission.

22. Mr de Pury gave evidence about his communications with Mr Bennett. The judge recorded at [107]:

> "In his evidence, Mr de Pury was quite clear that Mr Bennett had made an offer to buy the painting for $230 million. He was also quite clear that Mr Bennett knew that and also that Mr

> Staechelin knew that because Mr de Pury had told Mr Staechelin so and indeed had discussed it with him a number of times. Mr de Pury told me he was puzzled why Mr Staechelin wanted Mr Bennett to put into writing something that both he and Mr Bennett knew was not true."

23. He found at [110] that there was no evidence that Mr Pury knew that Mr Bennett had told Mr Staechelin and Mr Paisner that he had made no earlier offer of $230 million, whether formal or otherwise; and accepted Mr de Pury's evidence that he was puzzled about what was going on. The judge also accepted Mr de Pury's account of what happened on 7 July. He continued at [111]:

> "The fact that Mr de Pury did not immediately contact Mr Staechelin and tell him that there had indeed been an earlier offer of $230 million can be explained by a number of factors. The first is that Mr de Pury believed that Mr Staechelin knew as well as he did that Mr Bennett had made an earlier offer of $230 million. The second factor is that there was an emphasis in Mr Bennett's statement that there was no "formal offer" and this seemed to be intended by Mr Bennett and by Mr Staechelin to be consistent with what they both knew as to the earlier offer. The third factor is that Mr de Pury was puzzled about what Mr Staechelin's motive was. The fourth factor was that at around this time (if not on 7 July 2014, then on 8 July 2014) Mr Bennett told Mr de Pury that Mr Staechelin did not want Mr de Pury to be involved. That was indeed the case as Mr Staechelin did say to Mr Bennett at around this time that he did not want Mr de Pury to be informed of what was going on."

24. As far as Mr Staechelin's motive was concerned, the judge made findings. Mr Staechelin wanted to keep Mr de Pury out of the sale, because he did not want to pay commission. He did not want Mr de Pury to "to complicate matters by telling him that what Mr Bennett was saying was untrue." What he meant by that was that if the sale to the Qataris did not go through the trustees would not achieve a sale at $230 million to anyone else. Indeed, Mr Staechelin had said in his witness statement that if the sale went off it would positively damage the value of the painting.

25. At [115] the judge said:

> "I also find that one of the reasons why Mr Staechelin wanted Mr Bennett to send an email about there not being an earlier offer of $230 million was to use that email against Mr de Pury in relation to Mr de Pury's claim to commission."

26. At this time, the judge found that it was "clear" that Mr Staechelin did not want to engage with Mr de Pury; did not want to hear from him and did not want to explain his thinking. Nevertheless, in fact, Mr de Pury did attempt to contact Mr Staechelin within a few days. The judge found as follows at [123]:

> "On 11 July 2014, Mr de Pury telephoned Mr Staechelin. Mr de Pury gave evidence about this conversation. Mr Staechelin told

> me that he did not recall what had been discussed. I accept the essentials of Mr de Pury's evidence about this conversation. Mr de Pury was eager to contact Mr Staechelin as he was unclear what was happening and he wished to raise again his own position in relation to the sale. His pretext for contacting Mr Staechelin was that Mr Paisner had asked him on 26 June 2014 whether the commission would include VAT. Mr de Pury therefore told Mr Staechelin on 11 July 2014 that his commission would not bear VAT. Mr de Pury told me that he then referred to Mr Bennett's email of 7 July 2014 but Mr Staechelin tried to close down the conversation and said that he did not want to have a "bilateral" conversation about that matter but that he would later have a discussion with Mr de Pury and Mr Bennett so that he could understand why the final deal would be for $20 million less than the previous offer. Mr de Pury then tried to explain the position and Mr Staechelin said that he did not want to discuss it over the telephone. Mr de Pury said that he would be happy to meet him and Mr Bennett in due course."

27. The judge commented at [124]:

> "Thus, on 11 July 2014, Mr de Pury wished to discuss with Mr Staechelin the question of Mr Bennett's email of 7 July 2014 which referred to there having been no formal offer of $230 million and Mr Staechelin made it clear that he did not want to know what Mr de Pury had to say on that subject. Mr de Pury's preparedness to discuss that matter is incompatible with the Defendants' case that Mr de Pury had reached a prior agreement with Mr Bennett to lie to Mr Staechelin about the earlier offer of $230 million."

28. Ultimately, on 10 September 2014 the trustees agreed to sell the painting to the Emir of Qatar for $210 million. But they have refused to pay Mr de Pury's commission.

Appeals on fact

29. If I may repeat something I have said before (*Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5, [2014] FSR 29 at [114]):

> "Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. …The reasons for this approach are many. They include
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> i. The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.

> ii. The trial is not a dress rehearsal. It is the first and last night of the show.
>
> iii. Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.
>
> iv. In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.
>
> v. The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).
>
> vi. Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done."

30. Thus, it is a long settled principle, stated and restated in domestic and wider common law jurisprudence, that an appellate court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong: *McGraddie v McGraddie* [2013] UKSC 58, [2013] 1 WLR 2477. What does "plainly wrong" mean? The Supreme Court explained in *Henderson v Foxworth Investments Ltd* [2014] UKSC 41, [2014] 1 WLR 2600 at [62]:

> "Given that the Extra Division correctly identified that an appellate court can interfere where it is satisfied that the trial judge has gone "plainly wrong," and considered that that criterion was met in the present case, there may be some value in considering the meaning of that phrase. There is a risk that it may be misunderstood. The adverb "plainly" does not refer to the degree of confidence felt by the appellate court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appellate court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached."

31. The mere fact that a trial judge has not expressly mentioned some piece of evidence does not lead to the conclusion that he overlooked it. That point, too, was made in *Henderson* at [48]:

> "An appellate court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration."

32. At [57] Lord Reed added:

> "I would add that, in any event, the validity of the findings of fact made by a trial judge is not aptly tested by considering

> whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although, as I have explained, it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him, subject only to the requirement, as I shall shortly explain, that his findings be such as might reasonably be made. An appellate court could therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration *only if the judge's conclusion was rationally insupportable*." (Emphasis added)

33. More recently, in *Perry v Raleys Solicitors* [2019] UKSC 5, [2019] 2 WLR 636 the Supreme Court summarised the constraints on interfering with findings of fact at [52]:

> "They may be summarised as requiring a conclusion either that there was no evidence to support a challenged finding of fact, or that the trial judge's finding was one that no reasonable judge could have reached."

34. It cannot be said that in the present case there was *no* evidence on which the judge based his finding. Quite apart from anything else, there was Mr de Pury's relevant evidence which he accepted. Can it be said that the judge's finding was "one that no reasonable judge could have reached" or was "rationally insupportable"?

35. The high hurdle imposed by the more recent case-law does not mean that a trial judge's findings are inviolable. Mr Wardell QC, on behalf of the trustees, relied heavily on the decision of this court in *Yaqoob v Royal Insurance (UK) Ltd* [2006] EWCA Civ 885. The issue in that case was whether Mr Yaqoob was complicit in a fire such as to preclude him from making a claim on an insurance policy. It was common ground that:

    i) The fire was started deliberately;

    ii) The arsonist had keys to the property;

    iii) The arsonist had keys to an intruder alarm; and

    iv) The arsonist had tried to make it appear that access had been gained by a break-in.

36. In addition, it was in dispute whether there was an abnormally low level of stock on the premises; but the trial judge did not resolve the conflict of evidence. The judge decided the case by reference to Mr Yaqoob's credibility. The relevant part of his judgment was as follows:

> "I have observed the demeanour of Mr Yaqoob closely over part of two days whilst he was rightly subjected to a searching cross-examination by Mr Lord [counsel for the insurers]. I detected no indication that he was being mendacious, nor was his evidence materially undermined. Placing that in the scales

> together with all the other evidence is sufficient to tip the balance in his favour."

37. What seems to have been the deciding factor for the trial judge was Mr Yaqoob's demeanour in the witness box. At [36] Chadwick LJ held that the finding was flawed because it failed to deal with the real issues of credibility, namely (a) the conflict of evidence (b) the agreed profile of the arsonist and (c) the low level of stock on the premises. In short, the judge had not taken advantage of the benefits of seeing and hearing the witnesses. Chadwick LJ concluded at [38]:

> "If, as I have sought to explain in the present case, the judge has not taken proper advantage of that opportunity — by failing to make findings of fact which were essential, by failing to address the question of credibility and by failing to analyse and given proper weight to the necessary conclusions to be drawn from the forensic evidence as to the profile of the perpetrator — then it cannot be enough for this court simply to say, "Oh well, the judge believed the witness and so must we"."

38. It is, to my mind, of critical importance that the trial judge based his evaluation on the demeanour of Mr Yaqoob in the witness box. For the reasons that Leggatt LJ explained in *R (SS) (Sri Lanka) v Secretary of State for the Home Department* [2018] EWCA Civ 1391 a conclusion simply based on the demeanour of a witness is not built on a solid foundation.

39. Mr Wardell also relied on a judge's duty to give reasons for his decision. The principle is clear. The judge must give reasons in sufficient detail to show the parties and, if need be, the Court of Appeal the principles on which he has acted and the reasons that have led him to his decision. They need not be elaborate. The judge's duty is to give reasons for his *decision*. He need not give reasons for his reasons: *Secretary of State for Communities and Local Government v Allen* [2016] EWCA Civ 767 at [19]. There is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case. His function is to reach conclusions and give reasons to support his view, not to spell out every matter as if summing up to a jury. Nor need he deal at any length with matters that are not disputed. It is sufficient if what he says shows the basis on which he has acted: *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605, [2002] 1 WLR 2409; *Fage* at [115]. Where there is a conflict of fact between witnesses, it may be enough for the judge to say that one witness was preferred to another because he had a clearer recollection of events, or the other gave answers which demonstrated that his answers could not be relied on: *English* at [19].

Criticisms of the judge's findings

40. Two matters may be put to one side at the outset. First, Mr Wardell cross-examined Mr and Mrs de Pury in an attempt to establish that the business structure through which they operated was designed to evade tax in the UK. This was not a pleaded issue and had nothing to do with what the case was actually about. To the extent that it was permissible at all, it simply went to credit. The judge dealt with this allegation at [27]:

> "I accept the evidence of Mr and Mrs de Pury that they were advised that they could proceed in that way to save tax and avoid the need to charge VAT although I do not need to decide whether such a scheme would indeed have those tax consequences."

41. He added at [28]:

> "Undoubtedly, in the course of cross-examination, the way the de Purys had gone about matters could be made to look as if it involved the making of statements which they knew to be false and dishonest. However, I do not think that Mr and Mrs de Pury were guilty of conscious wrongdoing in the way in which they handled matters. It may be possible to criticise their readiness to adopt what they were advised would be a tax saving scheme and it is certainly possible to criticise their attention to the detail as to how the scheme was intended to work. However, these criticisms do not persuade me that they were guilty of conscious wrongdoing or were dishonest in these respects."

42. Mr Wardell submitted that the judge was wrong; and that no reputable adviser would have advised Mr and Mrs de Pury to proceed in that way. The rock on which this submission founders is that the judge found that Mr and Mrs de Pury *were* advised that they could act as they did. Since the question of alleged tax evasion was not a pleaded issue, and went only to credit, it was not a matter on which the trustees were entitled to call rebutting evidence. The judge's finding is a complete answer to this point. Mr Wardell did not pursue this point after discouraging interventions from the Bench.

43. The second matter relates to observations that the judge made during the course of Mr Wardell's closing submissions. He said that he was inclined to think that Mr and Mrs de Pury "have been very economical" with their description of the events of 7 July. Mr Wardell pressed the judge with his submission that they had told "a stonking lie" and that "people lie for a reason". The judge was well aware of the weaknesses in Mr and Mrs de Pury's evidence. At [109] he described part of Mrs de Pury's evidence on the subject as "astonishing".

44. In the criminal context, as the Court of Appeal held in *R v Lucas* [1981] QB 720:

> "The jury should in appropriate cases be reminded that people sometimes lie, for example, in an attempt to bolster up a just cause, or out of shame or out of a wish to conceal disgraceful behaviour from their family."

45. That point was echoed in the civil context by Peter Smith J in *EPI Environmental Technologies Inc v Symphony Plastic Technologies plc* [2004] EWHC 2945 (Ch), [2005] 1 WLR 3456 at [74]. So the fact (if it is the fact) that a witness lies about one thing does not show that he is lying about everything.

46. Quite apart from this, what the judge says during the dialogue between Bench and Bar in the course of submissions does not necessarily reflect the judge's considered view. A judge is entitled to test submissions, to think aloud, to see where a particular train of thought leads and so on. In the calm of his room and after reconsideration of all the evidence, he may come to an entirely different conclusion. Reliance on what the judge said during the course of closing submissions is, in my judgment, utterly misconceived. To be fair, Mr Wardell wisely did not press this argument orally.

47. Mr Wardell accepted (and indeed relied upon) the judge's self-direction at [26]:

> "The result of these assessments is that I will obviously give considerable weight to the contemporaneous documents when making my findings as to what really happened. I will treat much of the evidence given by Mr de Pury, Mrs de Pury and Mr Staechelin, in so far as it is not supported by the documents, or which is not corroborated by another reliable witness, with caution. I am likely to accept evidence from a witness where the evidence is against his interests in this dispute. However, these techniques will not be enough on their own to resolve the conflicts in the evidence in this case. Some of the evidence relates to oral discussions where there is no contemporaneous document, or corroboration, which is of much assistance. In those instances, where I am faced with two conflicting accounts from witnesses, neither of whom is wholly reliable, I will have to assess the overall probability of one version as compared with the other."

48. His complaint was that the judge did not follow his own "road map". In summary his criticisms were:

i) The judge failed to weigh the dishonesty of Mr and Mrs de Pury. This manifested itself in two principal ways. First, the evidence that they ultimately gave differed considerably from a number of iterations of their pleaded case which they had verified by statements of truth. The judge had found that part of Mr de Pury's evidence had been deliberately misleading. Second, the judge rejected part of Mrs de Pury's evidence as "astonishing" yet failed to take that into account in evaluating Mr de Pury's reliability.

ii) On the basis of his own findings, the judge held that Mr and Mrs de Pury had not told him the whole truth. That ought to have been weighed in the balance.

iii) The judge ought to have appreciated that, in telling the lie that he did in the e-mail of 7 July 2014, Mr Bennett was taking a considerable risk. The risk was that if the lie were to have been exposed, the proposed sale would go off. It would have made no sense for Mr Bennett to have taken that risk unless he had procured Mr de Pury's agreement not to reveal the truth.

iv) The judge failed to consider the conduct of Mr and Mrs de Pury after the critical events of 7 July 2014.

v) The judge failed to refer to text messages: both those which had been produced on disclosure; and those which were alleged to have been lost.

49. These criticisms were a precursor to Mr Wardell's secondary attack on the judge's findings. That was to the effect that, if the judge had in fact taken these matters into account, he had failed adequately to explain how. Thus, it was argued, the judge had not given adequate reasons for his decision.

The big picture

50. The thrust of the trustees' case is that Mr Bennett and Mr de Pury agreed that Mr de Pury would not tell Mr Staechelin that Mr Bennett's assertion that he had not made an earlier offer of $230 million was false. The suggestion is that Mr Bennett could not risk the truth coming out; and needed Mr de Pury to be on side. Mr de Pury did not contact Mr Staechelin because he did not want to jeopardise the deal and put his commission at risk. It must be emphasised that there is no direct evidence to support that case. If it is to be made out, it must be made out by inference.

51. I am prepared to accept that this is a possible analysis. But is it so compelling that any other analysis is incapable of rational explanation? I am firmly of the view that it is not.

52. Underlying the submission are three factual premises: first, that Mr Staechelin did not know that Mr Bennett had previously made an offer of $230 million; second, that if Mr de Pury had told Mr Staechelin that Mr Bennett was wrong to deny having made the previous offer, Mr Staechelin would have believed him; and third that Mr Staechelin was giving reliable evidence.

53. As far as the first of these is concerned, Mr de Pury *had* told Mr Staechelin about the offer twice; and it had been the subject of a meeting in which both Mr Staechelin and Mr Bennett had participated. As Mr Cohen QC put it, Mr Staechelin had heard about that earlier offer "from the horse's mouth". The judge found as a fact at [64] that at that meeting "Mr Staechelin *knew* that Mr Bennett had made an offer of $230 million the previous year" (emphasis added). The judge's conclusion "that Mr de Pury believed that Mr Staechelin knew as well as he did that Mr Bennett had made an earlier offer of $230 million" is fully grounded in the evidence. So, too, is his observation at [111] that the reference in Mr Bennett's e-mail to a "formal offer" "seemed to be intended by Mr Staechelin and Mr Bennett to be consistent with what they both *knew* as to the earlier offer". That is reinforced by the fact that the judge found that during the telephone call on 11 July Mr Staechelin said that he wanted to "understand why the final deal would be for $20 million less than the previous offer". Mr Wardell attacked the judge's finding about the contents of that conversation, on the basis that Mr de Pury's account was incredible. But Mr Staechelin had no recollection of the conversation; so the judge was entitled to accept Mr de Pury's evidence about it, even though he rejected other parts of his evidence. Moreover, at some points in his cross-examination Mr Staechelin appears to me to have accepted that Mr de Pury raised the question of the earlier offer at $230 million, but that Mr Staechelin had cut him off. In addition, in an e-mail sent immediately after the conversation (which was pleaded in the Defence as a record of the conversation) Mr Staechelin referred to a future discussion "about the 230 offer". That is consistent (to put it no higher) with the judge's finding. There may be some room for debate about

what exactly Mr Staechelin accepted in the course of his cross-examination; and what was the precise import of the e-mail; but the scope of that debate cannot lead to the conclusion that the judge's finding was "rationally unsupportable".

54. As far as the second is concerned, Mr Staechelin, when presented with two contradictory accounts, claimed to have believed Mr Bennett and disbelieved Mr de Pury. There is no reason to suppose that a further attempt at explanation by Mr de Pury would have changed his mind.

55. It is true that, as Mr Wardell submitted, the judge did not find Mr de Pury's evidence wholly reliable and treated it with caution. But it must not be overlooked that he made equally unfavourable comments about Mr Staechelin's evidence. Mr Cohen QC overstated the judge's view by submitting that Mr Staechelin was dishonest. The judge did not make that finding; but he undoubtedly found that Mr Staechelin's evidence was unreliable (as, indeed, was Mr Paisner's). In that situation it was for the judge to do his best with the material available. Any trial judge will have been faced with the task of trying to do a jigsaw puzzle when some of the pieces are missing; and many of the others do not precisely fit together.

56. In addition, on the other side of the scale was the question why Mr Staechelin should ask Mr Bennett to write in the terms that he did. The judge asked and answered that question. He did it in an attempt to deprive Mr de Pury of his agreed commission; and because he did not want to jeopardise the sale. That is a rational explanation of what happened and why.

The particular criticisms

57. At [18] the judge said:

> "Both sides were able to draw attention to significant discrepancies between various versions of the pleadings and the witness statements and between the witness statements and the oral evidence. In relation to both sides to this dispute, these discrepancies have caused me to be cautious about the evidence of witnesses who now profess to recall specific matters which were originally described by them in different terms."

58. The judge was therefore alive to changes in the account given by all the witnesses (including Mr and Mrs de Pury). He said that he would exercise an appropriate degree of caution; and there is no reason to suppose that he did not do so. He was also well aware that Mr de Pury had given, as he put it, "deliberately misleading" evidence; and that the fact that he had done so damaged his case. Thus at [20] he said that that, too, would make him cautious about what parts of his evidence he could accept. At [21] he made the same observation about Mrs de Pury; and at [109] he described her claim not to have recollected communications between Mr Bennett and Mr de Pury as "astonishing".

59. I do not think that Mr Wardell is correct in saying that the judge made a positive finding that he had not been told the whole truth. At [110] he said:

> "It may be that there were more communications between Mr Bennett and Mr de Pury on 7 July 2014 than I have been told about and the conversations between them may have been more elaborate than I was told."

60. That is no more than a tentative observation. It is not, to my mind, a finding. But even if it was, it is no more than a reason supporting the judge's caution about accepting the evidence of Mr and Mrs de Pury.

61. I found it difficult to understand what was the big risk that Mr Bennett was said to have been taking; and which required Mr de Pury's silence. Mr Wardell explained that the risk was that the lie about the non-existence of the previous offer of $230 million would be exposed, with the consequent loss of the proposed sale. But Mr de Pury had already told Mr Staechelin at least twice that there had been such an offer. Mr Staechelin had also heard it from Mr Bennett himself at the meeting on 17 June. The judge found that Mr Staechelin knew that the offer had been made. There was no written record of the previous offer (apart from Mr de Pury's e-mail of 20 March 2013); so all that Mr de Pury could have done was to have repeated what he had already said. Mr Staechelin already had the two conflicting accounts; and had specifically requested Mr Bennett to confirm that no offer had been made. Why should Mr Bennett have thought that if Mr de Pury repeated what he had already told Mr Staechelin, this time Mr Staechelin would believe him? And from Mr de Pury's perspective he thought (rightly it would seem on the evidence) that Mr Staechelin *did* know that such an offer had been made.

62. Contrary to Mr Wardell's contention, the judge did consider the conduct of Mr de Pury after 7 July 2014. Indeed, his consideration of that conduct was one of the foundations of his rejection of the trustees' case. He found that Mr de Pury did attempt to contact Mr Staechelin in the telephone call of 11 July. As the judge observed, that was inconsistent with the "big picture" case advanced by the trustees.

63. The last point related to the text messages. There were only a few in evidence. Mr Wardell submitted that they (and the frequency of text messages and/or telephone calls between Mr and Mrs de Pury on the one hand, and Mr Bennett on the other) demonstrated a growing anxiety on the part of Mr and Mrs de Pury that their commission was at risk; an anxiety that they denied and which pointed to their awareness that they had behaved improperly towards Mr Staechelin. Once again, that is no more than an inference. Although it is a possible inference, it is not a compelling one.

The conversation of 11 July

64. As I have said, the judge placed weight on the fact that Mr de Pury telephoned Mr Staechelin on 11 July. That was four days after Mr de Pury is said to have agreed with Mr Bennett to "lie low". If that had been the agreement, then Mr de Pury was taking a serious risk in contacting Mr Staechelin. One obvious question that the latter could have raised was to ask Mr de Pury about the discrepancy between what he had previously told Mr Staechelin and what Mr Bennett's e-mail had said. If confronted with such a question, what was Mr de Pury to answer? The mere fact that a conversation took place at all is inconsistent with the trustees' case. In my judgment

the judge was fully entitled to place considerable weight on the fact of that conversation.

65. Mr Wardell had another point to make about the judge's finding. The point was that there was an internal inconsistency in the judge's reasoning. The judge accepted Mr Staechelin's evidence that he was in shock to discover that the offer of $230 million had not been made. He accepted Mr Staechelin's evidence that he thought that Mr de Pury had lied to him. In those circumstances, Mr Wardell submitted, Mr Staechelin could not have said that he would want a conversation so that he could understand why the final deal would be for $20 million less than the previous offer. His state of mind was that there had been no such offer.

66. There are a number of answers to this point. First, Mr de Pury said that he recalled this conversation, but Mr Staechelin said that he did not. So as far as this particular conversation was concerned, there was no conflict of evidence for the judge to resolve. Indeed, in the course of his cross-examination Mr Staechelin disavowed the evidence that he had given about this conversation in his witness statement; as well as what had been pleaded about it in the Defence. Second, when pressed in cross-examination, there are parts of Mr Staechelin's evidence which seem to accept that Mr de Pury attempted to raise the question of the previous offer of $230 million. Third, there is the judge's finding that Mr Staechelin knew that the offer had been made. Fourth, there is the enigmatic e-mail from Mr Staechelin sent on the same day which said:

> "I had a very short conversation today with Simon and told him that it is not the time yet to discuss commission. That we will do this with Guy (and possibly Martin) also speaking about the 230 offer."

67. That phrasing also suggests that Mr Staechelin knew that there had been a "230 offer". But at all events, even if it is open to a different interpretation, it is (to put it no higher) not inconsistent with the judge's finding.

68. Another judge, given the same material, might have come to a different conclusion. But that is a long way from saying that this judge's findings of fact are incapable of rational justification. I would reject this ground of appeal. The judge's findings of fact must stand.

Breach of fiduciary duty

69. Mr Wardell's next argument was that, on the basis of the facts found by the judge, Mr de Pury was guilty of a breach of fiduciary duty such as to disentitle him to his commission. It is not entirely easy to discern what the alleged breach was. Mr Wardell made much of the offer of $230 million. But that was an offer that Mr Bennett made on behalf of a different client, and in a different market. Mr Staechelin knew that the offer had been made. Mr Bennett had made it clear in June 2014 that that offer would not be repeated. Mr Staechelin heard him say that. Moreover, Mr Pury had made that clear to Mr Staechelin too. So one may ask: why was it so important for Mr de Pury to contradict what Mr Bennett had said? However, Mr Wardell submitted even if Mr de Pury was fobbed off by Mr Staechelin, he ought to have contacted Mr Paisner, and told him about Mr Bennett's lie.

70. Once again, this argument founders on the judge's findings of fact. As he put it at [165]:

> "As regards the allegation that Mr de Pury agreed with Mr Bennett that he would not inform the trustees or Mr Staechelin that Mr Bennett's statement was false, I have found that Mr de Pury did not make any such agreement with Mr Bennett. As regards the narrower allegation that Mr de Pury committed a breach of fiduciary duty by not informing the trustees or Mr Staechelin that Mr Bennett's statement was false, I hold that Mr de Pury did not commit any breach of duty in this respect. I have already made a number of findings which are relevant in this context. I have held: (1) after Mr Staechelin was told by Mr Bennett that he had not made an earlier formal offer of $230 million, Mr Staechelin did not want to hear from Mr de Pury what he had to say about that; Mr Staechelin reached the firm view that Mr de Pury had earlier told him a lie about this offer whereas Mr de Pury had not told any lie;
>
> (2) Mr Bennett told Mr de Pury that Mr Staechelin did not want to hear from him and that was indeed the case;
>
> (3) on 11 July 2014, Mr de Pury attempted to discuss Mr Bennett's email of 7 July 2014 with Mr Staechelin but Mr Staechelin refused to discuss that matter with Mr de Pury;
>
> (4) Mr de Pury was entitled to try to communicate with the trustees by speaking to Mr Staechelin; it was not necessary or even appropriate for Mr de Pury to disregard Mr Staechelin's statement that he did not want to discuss the matter with Mr de Pury and to attempt to raise the matter with Mr Paisner or the third trustee."

71. Mr Wardell attacked the last part of this conclusion. He said that the trustees as a body were Mr de Pury's clients; and that if Mr Staechelin refused to speak to Mr de Pury, then it was the latter's duty to communicate with the other trustees (or at least with Mr Paisner).

72. There was some debate about whether this point was open to Mr Wardell; or whether the judge had ruled against it in the course of the trial. The judge's extempore ruling is capable of being interpreted either way. But even if the point is open, I do not consider that it is a good one.

73. In *Keppel v Wheeler* [1927] 1 KB 577 estate agents were retained to obtain a purchase for a block of flats. They obtained an offer, subject to contract, from a prospective purchaser, which their client accepted. But before contracts had been exchanged, the agents received a higher offer. The agents did not communicate that offer to their principal. They accepted that while they remained agents, they were under a duty to disclose the existence of the higher offer. But they argued that once they had introduced a willing purchaser, their agency came to an end. This court disagreed; and held that the agency continued until exchange of contracts. It therefore followed that

the agents were in breach of duty in failing to disclose the higher offer to their principal. However, despite that breach of duty, the court unanimously held that the agents were entitled to recover their commission.

74. There are four significant points of distinction between that case and this. First, in *Keppel*, the principal was unaware of the existence of the higher offer. In the present case, on the judge's findings, Mr Staechelin had been told by Mr de Pury of the previous offer but chose not to believe him. Second, in *Keppel*, the offer in question was a current offer, capable of acceptance. In the present case the offer of $230 million was a historic offer made in a more buoyant market on behalf of a different client; and Mr Bennett had made it clear that it would not be repeated. Third, Mr Staechelin wanted to keep Mr de Pury out of the sale in order to avoid paying commission. Fourth, Mr de Pury did attempt to discuss the question with Mr Staechelin who refused to speak to him about it.

75. Mr Wardell said that the reason why the agents were held to be entitled to their commission in *Keppel* was that their failure to reveal the existence of the higher offer was a breach of contract, rather than a breach of fiduciary duty. There are certainly passages in the judgment of Atkin LJ which suggest that to be the case; although he also spoke of "breach of duty" without specifying what kind of duty it was. This analysis of the case does not assist Mr Wardell's argument. A failure, amounting to a breach of contract, to pass on information may result in an award of damages at common law. But it does not entail forfeiture of a commission. The trustees do not allege any loss flowing from the failure to pass on information. Moreover, if the failure on the part of the estate agents in *Keppel* was no more than a breach of contract which did not disentitle the agents from recovering their commission, I fail to see why a less egregious breach in the present case should be classified as a breach of fiduciary (as opposed to contractual) duty.

76. Mr Cohen also put the point in a different way. The duty of a fiduciary towards his principal is that of loyalty. It is not a duty to exercise skill and care. As Millett LJ explained in his seminal judgment in *Bristol & West Building Society v Mothew* [1998] Ch 1, 18 a servant who loyally does his incompetent best is not guilty of a breach of fiduciary duty. On the judge's findings, Mr de Pury was not disloyal. He loyally attempted to communicate the fact of the previous offer to Mr Staechelin. He submitted that in the case of a secret profit it is easy to conclude that the fiduciary has been disloyal. It cannot be consistent with a duty of loyalty to accept remuneration from a counter-party. Where the alleged breach is a failure to pass on relevant information, then even if that is a breach of fiduciary duty, it is not one which will disentitle a fiduciary to his remuneration, unless it is accompanied by bad faith or dishonesty. Once the allegation of conspiracy with Mr Bennett had failed, it was not independently alleged that Mr de Pury had acted in bad faith in failing to contact Mr Paisner.

77. As I have said, *Keppel v Wheeler* was a case of failure to pass on information. Bankes LJ said at 588:

> "The appellant contended that the agents have disentitled themselves to recover the commission, but I do not take that view at all. It seems to me that an agent might quite properly claim his commission, and yet have to pay damages for

> committing a bona fide mistake which amounts to a breach of duty. In these circumstances, I think the respondents are entitled to the claim which they make for commission."

78. Atkin LJ said at 592:

> "Now I am quite clear that if an agent in the course of his employment has been proved to be guilty of some breach of fiduciary duty, in practically every case he would forfeit any right to remuneration at all. That seems to me to be well established. On the other hand, there may well be breaches of duty which do not go to the whole contract, and which would not prevent the agent from recovering his remuneration; and as in this case it is found that the agents acted in good faith, and as the transaction was completed and the appellant has had the benefit of it, he must pay the commission."

79. It is fair to say that it is not entirely clear from these passages whether the breach of duty to which Bankes and Atkin LJJ referred were breaches of fiduciary duty or contractual duty.

80. The point was next considered by the Privy Council in *Kelly v Cooper* [1993] AC 205. Counsel for the appellants submitted that:

> "An agent may be deprived of his commission even though he has not acted dishonestly."

81. Their Lordships were so unimpressed with that submission that they did not even call on counsel for the respondent to answer it. Lord Browne-Wilkinson said at 216:

> "As to the defendants' claim for commission, even if a breach of fiduciary duty by the defendants had been proved, they would not thereby have lost their right to commission unless they had acted dishonestly. In *Keppel v Wheeler* [1927] 1 KB 577 the agents admitted an honest breach of fiduciary duty by mistake and yet were entitled to their commission. In the present case the plaintiff did not allege, nor did the judge find, any bad faith by the defendants. Even on the view the judge took therefore there was no ground for depriving the defendants of their commission."

82. That observation does clearly treat the failure to pass on information as a breach of fiduciary (rather than merely contractual) duty. But it makes dishonesty the litmus test for forfeiture of commission. In *Premium Real Estate Ltd v Stevens* [2009] NZSC 15, [2009] 2 NZLR 384 the Supreme Court of New Zealand held that the law about forfeiture of commission was as stated in *Keppel*. Elias CJ said at [30] (omitting footnotes):

> "Commission was payable to Premium under the terms of its contract with Mr and Mrs Stevens. An agent in breach of fundamental duties of loyalty imputed by equity cannot sue to

> recover commission to which he would otherwise have been entitled. The converse, that an agent cannot retain commission in circumstances where he is in breach of such duties, also follows. In *Keppel v Wheeler* Atkin LJ expressed the view that it was "well-established" that "in practically every case" such agent would "forfeit any right to remuneration at all". He allowed, however, that breaches which "do not go to the whole contract", by an agent acting in good faith (as through honest mistake), would not result in such forfeiture. A similar exception to the forfeiture of commission where breach of duty was not "dishonest" was acknowledged in *Kelly v Cooper*."

83. At [90] Blanchard J (giving the joint reasons of himself and McGrath and Gault JJ) summarised the position by saying:

> "The remuneration is forfeited because it has not been earned by good faith performance in relation to a completed transaction."

84. Mr Wardell submitted that these cases were inconsistent with the decision of this court in *Imageview Management Ltd v Jack* [2009] EWCA Civ 63, [2009] Bus LR 1034. I do not agree. At [18] Jacob LJ cited with approval a passage from the judgment of Lord Alverstone CJ in *Andrews v Ramsay & Co* [1903] 2 KB 635, 638:

> "A principal is entitled to have an honest agent, and it is only the honest agent who is entitled to any commission."

85. Both *Keppel v Wheeler* and *Kelly v Cooper* were cited to the court, among other authorities. Jacob LJ did not think it necessary to refer to them all. But at [44] he said:

> "I accept Mr Lopian's submission that there can be cases of harmless collaterality. And that there can be cases where there is just an honest breach of contract such as *Keppel's* [case] [1927] 1 KB 577. But this is simply not such a case. This is a case of a secret profit obtained because Mr Berry/Imageview was Mr Jack's agent. And there was a breach of a fiduciary duty because of a real conflict of interest."

86. The distinction between fiduciary and non-fiduciary duties was comprehensively considered by Millett LJ in *Bristol & West BS v Mothew*. The building society instructed solicitors to act on its behalf in connection with a house purchase. It was willing to lend money to the buyers on condition that the balance of the purchase price was funded without resort to further borrowing. In fact, the buyers arranged for an existing bank loan to be secured by a second charge on the property. But although the solicitors knew that, they did not inform the building society of that fact. One of the issues was whether that failure was a breach of fiduciary duty. The argument for the building society, as reported at 5G, was:

> "The non-disclosure of the proposed further borrowing was a breach of trust."

87. So, the question whether a failure to disclose relevant information was a breach of fiduciary duty was plainly in issue. Millett LJ dealt with the point at a number of places in his judgment. At 15 he said:

> "It is not alleged that the defendant deliberately concealed the arrangements which the purchasers had made with their bank from the society or that he consciously intended to mislead it. Nothing in this judgment is intended to apply to such a case. My observations are confined to the case like the present where the provision of incorrect information by a solicitor to his client must be taken to have been due to an oversight."

88. At 20 he said:

> "It is not alleged that he acted in bad faith or that he deliberately withheld information because he wrongly believed that his duty to the purchasers required him to do so. He was not guilty of a breach of fiduciary duty."

89. At 21 he said:

> "Where such failure [i.e. a failure to disclose relevant information] is to the advantage of the other party, the court will jealously scrutinise the facts to ensure that there has been nothing more than inadvertence, but there can be no justification for treating an unconscious failure as demonstrating a want of fidelity."

90. Accordingly, the solicitor was not guilty of a breach of fiduciary duty in failing to pass on relevant information.

91. In my judgment, therefore, Mr Cohen is justified in saying that a failure to pass on information does not stand on the same footing as a case of a secret profit. It does not matter for present purposes whether the correct analysis is that there was no breach of fiduciary duty at all; or whether there was such a breach, but it was not of a character such as to result in a forfeiture of the commission. Either way, an agent will not lose his commission on account of a failure to pass on information if he has neither been dishonest nor acted in bad faith.

92. There is one further point to be made. As Lord Millett pointed out in his influential article "*Equity's place in the law of commerce*" (1998) LQR 214

> "What distinguishes the role of equity from that of the common law is that equity is proscriptive not prescriptive. It forbids the fiduciary to act for himself. *It does not tell him what to do for his principal.* And if, in breach of his fiduciary duty, he does act for himself, he is treated as if he had acted for his principal." (Emphasis added)

93. Any breach of duty by Mr de Pury in the present case is far less serious than that considered in *Keppel*. In my judgment, even if Mr de Pury did commit a breach of duty by failing to contact Mr Paisner, it does not disentitle him from his commission.

94. I would dismiss this ground of appeal.

Trustees' liability

95. The judge found that, on the proper construction of the trust instrument, all trustees were liable. He held, in the alternative that, if he were wrong, the two trustees who promised to pay commission (Messrs Staechelin and Paisner) were personally liable. The trustees say that he misconstrued the trust instrument; and that the finding of personal liability was wrong.

96. Article III of the trust instrument sets out the trustees' powers. These include: the power to employ agents (Article III (C) (2)) and to enter into contracts (Article III (C) (17)). Article III (E) provides:

> "*Exoneration of Third Parties*. No person dealing with the Trustees shall be bound to see to the application or disposition of cash or other property transferred to them or to inquire into the authority for or propriety of any action by the Trustees."

97. "Trustees" are defined as "each Trustee and all Trustees serving under this Trust Agreement at any time."

98. Article X provides:

> "(A) Any Trustee, at any time or from time to time, may decline to participate in any one or more decisions to be made by the Trustees. Any such refusal shall be set forth in a written instrument signed by such Trustee or on his, her or its behalf and delivered to the other co-Trustees.
>
> (C) Except as otherwise provided, all decisions as to the Trust authorized or required to be made hereunder by the Trustees shall be made by a majority of the Trustees who are not precluded by law or this Trust Agreement from making the decision and who have not declined to participate in the decision, but their ministerial duties (such as signing of checks, execution of brokerage transactions relating to securities or commodities, and execution of applications for life insurance) may be executed by any one Trustee."

99. Mr Wardell argued that the starting point is that trustees under a private trust must act unanimously. Although it is possible for a trust instrument to make different provision, if it does so it must do so clearly and expressly. A trustee not only has a right to vote on any decision the trustees are called upon to make, he or she also has a right to try to persuade the other trustees to vote in a particular way. Looking at Article X as a whole, although Article X (C) empowers a decision to be made by a

majority of trustees, it does not empower two out of three trustees to make a decision without consulting or even informing the third trustee.

100. Mr Wardell supported his submission by reference to two South African cases. The first was the decision of the Supreme Court in *Land and Agricultural Bank of South Africa v Parker* [2004] ZASCA 56. Before coming to the passages on which Mr Wardell relied it is important to be clear about what the issue was. Mr and Mrs Parker were the only two trustees of a trust, whose trust instrument required a minimum of three trustees. They borrowed money from the bank, purporting to bind the trust. When the bank called in the loan, it obtained provisional orders sequestrating the estates of both Mr Parker and the trust. It failed to obtain an order sequestrating Mrs Parker's estate because it could show no benefit to creditors (which I take to mean that she had no assets). The provisional order was confirmed, and Mr Parker was refused permission to appeal against it. But the trust obtained such permission. Accordingly, the only issue before the court was whether the bank was entitled to maintain its sequestration order against the trust assets. Mr Parker's personal liability was no longer in issue. The court held that while there was a shortfall in the required number of trustees, the trust could not be bound. Mr and Mrs Parker subsequently appointed their son as a third trustee. The bank claimed that under the terms of the trust instrument the two trustees (Mr and Mrs Parker) could bind the trust which provided for decisions to be taken by majority vote. Cameron JA rejected that argument. He said at [17]:

> "The bank contended that since the Parkers were a majority of the trustees in office, and since they could form a quorum at trust meetings, they could bind the trust acting together. But this is to confuse power to act with its due exercise. The deed empowered the majority of the trustees to meet and to make decisions. To this extent the joint action requirement was abrogated – but the majority remained part of a three-trustee complement, and it had to exercise its will in relation to that complement. The bank does not suggest that any meeting or consultation of the trustees was convened, or that any vote took place in which the majority will was exercised. On the contrary, on the evidence which it has chosen not to challenge no such meeting, consultation or majority decision ever occurred. In these circumstances the Parkers on their own were not entitled to bind the trust."

101. That case was followed in the High Court of South Africa in *Van der Merwe v Hydraberg Hydraulics CC* [2010] ZAWCHC 129 in which Binns-Ward J held that even where a trust instrument contains provision for majority decision-making, a decision is not validly made unless all trustees have notice of a meeting in which they are entitled to participate. The question of the trustees' personal liability was raised in that case. But Binns-Ward J held that statutory formalities for the making of a contract for the sale of land precluded such a finding.

102. Both cases are referred to in the fourth supplement to Lewin on Trusts (19th ed) at para 29-024 in which the editors doubt the correctness of the judge's judgment in the present case. They comment that it does not follow from a majority voting provision that it is open to a majority to act without reference to the minority. They consider

that all trustees must have the opportunity to participate in a decision, unless the trust instrument provides to the contrary.

103. Based on these authorities, the argument for the trustees is that a trustee cannot validly decline to participate in a decision unless he or she knows that it is being proposed. Since there are formal requirements applicable to declining to participate in a decision in article X (A), it must follow that article X (C) should be read as empowering a majority decision only after consultation with the other trustees, excluding those who have declined to participate in the decision in question. It is only if the third trustee has formally declined to participate in a decision under article X (A) that the two remaining trustees can take decisions on their own.

104. Mr Cohen objected that this argument was not open to Mr Wardell; and that the judge was wrong to entertain it. The Defence had originally pleaded that Messrs Staechelin and Paisner could not have contracted with Mr de Pury without the agreement of the third trustee. But after the Re-Amended Reply had pleaded the majority voting provision of the trust instrument, and Mr Cohen had opened the case to the judge, the Defence was amended. The amendment deleted the assertion that the agreement of the third trustee was needed. Thereafter, the trustees' pleaded case contained no further reference to any limitation imposed by the trust instrument. The point was not raised again until Mr Wardell's closing submissions after the close of the evidence. Ms McCaffrey, the third trustee, gave evidence; and Mr Cohen cross-examined her. But because no issue was raised on the trustees' powers or limitations on those powers, he did not explore a number of issues with her. Those included whether Mr Staechelin had her actual authority to contract; and whether she had ratified the agreement made by Messrs Staechelin and Paisner. In addition, the trust is governed by the Law of New York State. As long as no legal issues about the trust were raised, the parties had been content to proceed on the basis that the law of New York was the same as the law of England and Wales. But once legal issues were in play, the claimants ought to have had at least the chance to instruct an expert on New York law. Mr Cohen objected in the course of his closing submissions to the point being taken, pointing out to the judge that the majority voting point had been expressly conceded. The judge declined to give a ruling; but said that he would hear submissions. He considered the substantive point in his judgment. Although in fact he held in the claimants' favour on the question of construction, he did not explain why he permitted the point to be taken at all; given that any reliance on limitations in the trust instrument had been deleted from the Defence. Mr Cohen revived his objection in the Respondents' Notice.

105. Mr Wardell contended that this was a case management decision by the trial judge; and we should not interfere with it. In this instance, as it seems to me, Mr Wardell's reliance on a judge's duty to give reasons for his decision; and his insistence on the parameters of the pleaded case, work against him. The judge did not explain why he thought it appropriate to entertain the point; or deal with the matters of prejudice to the claimants on which Mr Cohen relied. In my judgment the judge's decision to entertain the point was unfair. In terms of CPR Part 52.21 it was unjust because of a serious procedural or other irregularity. In my judgment, this point is not open to Mr Wardell on this appeal.

106. But in any event, the point is a bad one. In my judgment it is important to distinguish between the internal governance of a trust, and external legal relations between a trustee or trustees and a third party dealing in good faith with a trustee or trustees.

Article III (E) is there for the protection of persons dealing with the trustees. Such persons are not required to inquire into the authority for or propriety of any action by the Trustees. The purpose behind such a provision is that a person dealing with the trustees is entitled to take decisions at face value. In the light of that provision, a person dealing with the trustees need not inquire whether a third trustee (assuming that he knows there is one) has or has not formally declined to participate in a decision in the manner required by article X (A). None of the cases to which we were referred considered such a provision; and nor does the extract from Lewin which we were shown. It is analogous to the so-called "indoor management rule" applicable to persons dealing with companies: see *Mahoney v East Holyford Mining Co* (1875) LR 7 HL 869, 894 and Companies Act 2006 s 40 (1). If that rule were to be applied to the trust in the present case, the reader of the trust instrument would find that a majority of the trustees could make a decision; and even if that required that the third trustee be consulted or informed of the prospective decision, the reader would be entitled to infer that that had been done.

107. The starting point in English law is that where a trustee enters into a contract for the benefit of the trust, he is personally liable on the contract. That is so, even though the counterparty knows that he is a trustee, as the Privy Council made clear: *Investec Trust (Guernsey) Ltd v Glenalla Properties Ltd* [2018] UKPC 7, [2018] 2 WLR 1465 at [59]. Lewin on Trusts makes the same point at para 21-011 and 21-012. I do not consider that the editors' comments in the supplement on the judge's decision in this case can have been intended to qualify that general principle.

108. A trustee, acting properly within the terms of the trust, will be entitled to indemnity out of the trust assets. But that is a separate and different question. If and to the extent that the South African cases are inconsistent with these principles, I consider that we should follow the Privy Council. But in fact, I consider that the two South African cases are consistent with this. What was in issue in those cases was not whether the trustees were bound personally, but whether the trust was. Even that is a rather imprecise way of putting the point; because as Lord Hodge explained in *Investec* at [59]:

> "(vi) A creditor has no direct access to the trust assets to enforce his debt. His action is against the trustee, who is the only person whose liability is engaged and the only one capable of being sued. A judgment against the trustee, even for a liability incurred for the benefit of the trust, cannot be enforced directly against trust assets, which the trustee does not beneficially own. The creditor's recourse against the trust assets is only by way of subrogation to the trustee's right of indemnity: *In re Johnson* 15 Ch D 548.
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> (vii) Because the creditor's recourse to the assets is derived from the trustee's right of indemnity, it is vulnerable. It is exercisable only to the extent that that right exists. It may be defeated if there are insufficient trust assets to satisfy his debt, or if the trustee's right of indemnity is defeated, for example because the debt was unreasonably or improperly incurred and the indemnity does not extend to such debts, or because the trust deed excludes it on account of the trustee's wilful default

> or gross negligence. More generally a breach of trust by the trustee, even in relation to a matter unconnected with the incurring of the relevant liability, will, to the extent that it creates a liability to account on the part of the trustee, stand in the way of the enforcement of the indemnity. As has frequently been observed, this can be hard on the creditor, who will usually have no knowledge of the state of account between the trustee and the beneficiaries. But the creditor can in principle protect his position, for example by taking a fixed charge over the trust assets, or, as in the present case, by stipulating for a personal guarantee from the principal beneficiary."

109. It follows that although success on this ground of appeal would eliminate the liability of the third trustee; it would leave the liability of Messrs Staechelin and Paisner unaffected.

110. Mr Wardell objected that personal liability on the part of Messrs Staechelin and Paisner had not been pleaded. In my judgment that is also a bad point. Mr de Pury's action was an "action … against the trustee, who is the *only* person whose liability is engaged and the *only* one capable of being sued." In addition, the fact of the agreement was properly pleaded at paragraph 40 of the Particulars of Claim. The legal consequences of the pleaded facts were a matter for argument. It is true that the third trustee was also joined; but if she escapes liability that does not abrogate the liability of the two trustees who actually entered into the contract. Mr Wardell also argued that, looked at objectively, it could not be concluded that Mr Staechelin and Mr Paisner intended to become personally liable, or to contract otherwise than as trustees of the trust. But this argument also falls foul of the principles stated by Lord Hodge:

> "(iii) The legal personality of a trustee is unitary. Although a trustee has duties specific to his status as such, when it comes to the consequences English law does not distinguish between his personal and his fiduciary capacity. It follows that the trustee assumes those liabilities personally and without limit, thus engaging not only the trust assets but his personal estate. As Lord Penzance put it in *Muir v City of Glasgow Bank* (1879) 4 App Cas 337, 368, where debts are incurred by a trustee for the benefit of the beneficiaries, the trustee
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> "could not avoid liability on these debts by merely shewing that they arose out of matters in which he acted in the capacity of trustee or executor only, even though he should be able to shew, in addition, that the creditors of the concern knew all along the capacity in which he acted."
>
> (iv) This liability may be limited by contract, but the mere fact of contracting expressly as trustee is not enough to limit it. It merely makes explicit the knowledge of the trustee's capacity which Lord Penzance regarded as insufficient: see *Lumsden v Buchanan* (1865) 3 M (HL) 89. There must be words negativing the personal liability which is an ordinary incident of trusteeship."

111. There are no such words negativing personal liability in this case. I would reject this ground of appeal as well.

Result

112. In my judgment, despite Mr Wardell's sustained submissions, the judge's overall conclusion is unimpeachable. For these reasons, I would dismiss the appeal.

Lord Justice Lindblom:

113. I agree.

Lady Justice Rose:

114. I also agree.