Neutral Citation Number: [2023] EWCA Civ 1433

Case No: CA-2022-002093

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BIRMINGHAM
His Honour Judge Rawlings (sitting as a Judge of the High Court)
28 June 2022 and 5 October 2022

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 29 November 2023

Before :

LORD JUSTICE LEWISON
LORD JUSTICE BEAN
and
LORD JUSTICE SNOWDEN

- -

Between :

(1) NEIL LESLIE HUMPHREY **(2) FIONA MARGARET HUMPHREY**	**Respondents/ Cross-Appellants/ Claimants**
- and -	
(1)PAUL CRAIG BENNETT	**Appellant/ First Defendant**
- and –	
(2) ALISON MARY MURPHY	**Respondent to Cross-Appeal/ Second Defendant**

- -

Steven Reed and Harry Samuels (instructed by **Else Solicitors LLP**)
for **Mr. Bennett and Ms. Murphy**
Gideon Roseman (instructed by **Newhall Solicitors**) for **Mr. and Mrs. Humphrey**
Hearing dates : 12-13 July 2023

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Approved Judgment

Remote hand-down: This judgment was handed down remotely at 11 a.m. on Wednesday 29 November 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Lord Justice Snowden :

1. There are two appeals before the Court in a derivative claim (the "Claim") brought by Neil Humphrey and Fiona Humphrey ("Mr. and Mrs. Humphrey") against Paul Bennett ("Mr. Bennett") and his partner, Alison Murphy ("Ms. Murphy"). In the Claim it is alleged that Mr. Bennett and Ms. Murphy breached their statutory and fiduciary duties as directors of Esprit Land Limited ("the Company") by causing the Company to dispose of a piece of land and diverting an opportunity to acquire an adjoining piece of land to a second company called Esprit Homes Construction Limited ("Construction") of which Mr. Bennett and Ms. Murphy were directors, and Mr. Bennett was the sole shareholder.

2. The first appeal is by Mr. Bennett against the order of HHJ Rawlings (the "Judge") made on 28 June 2022, finding that Mr. Bennett had no real prospect of being granted any relief under section 1157 of the Companies Act 2006 ("the 2006 Act") and granting summary judgment and ordering an account of profits in respect of the breaches of fiduciary duty alleged against him.

3. The second appeal is by Mr. and Mrs. Humphrey against the subsequent order of the Judge made on 5 October 2022, refusing to grant summary judgment against Ms. Murphy and permitting her to amend her Defence inter alia to include a defence under section 1157.

The basic facts

4. The essential facts were not in dispute and can be shortly stated.

5. The Company was originally owned by Mr. Bennett and Ms. Murphy, who were also its directors. Mr. Bennett and Ms. Murphy carried out a property development business through a number of other companies, and in that capacity had formed a relationship with Mr. and Mrs. Humphrey, who owned and controlled a construction company ("NHC") that had done some building works for them.

6. In 2015 Mr. Bennett and Ms. Murphy invited Mr. and Mrs. Humphrey to acquire a 49% shareholding in the Company and they were appointed directors of it in addition to Mr. Bennett and Ms. Murphy. The initial plan was that the Company was to be used to acquire and develop sites in Donington and Rugby, financed by a loan of £500,000 to the Company by Mr. and Mrs. Humphrey and external finance arranged by Mr. Bennett and Ms. Murphy.

7. On 20 June 2018, the Company also bought a piece of land at Wyken Grange Road, Coventry (the "Wyken Grange land") for £107,500. It was landlocked and did not have planning permission, but the intention was to develop it. Mr. Bennett subsequently submitted a planning application on behalf of the Company in respect of the Wyken Grange land and an adjoining piece of land at 61 Ansty Road, Coventry (the "Ansty Road land"). The intention was for access to the Wyken Grange land to be provided over the Ansty Road land, and for the Company to build ten houses on the Wyken Grange land and two houses on the Ansty Road land. To that end, in February 2019, Mr. Bennett negotiated with the owner of the Ansty Road land for the Company to acquire that land for £450,000. I shall refer to the two adjoining plots of land

collectively as "the Ansty Road site" and the proposal to develop them together as "the Ansty Road project".

8. The Company's development of the Donington and Rugby sites was completed in February 2019 and all units were sold by August 2019.

9. On 23 January 2020, Mr. Bennett and Ms. Murphy caused the Company to transfer the Wyken Grange land, with the benefit of planning permission that had been obtained, to Construction for the same price that the Company had paid for it prior to the grant of planning permission.

10. On 1 April 2020, Ms. Murphy's nephew bought the Ansty Road land for £452,000 using loans provided by two other companies owned by Mr. Bennett and Ms. Murphy. He then agreed to transfer part of the Ansty Road land to Construction to enable it to carry out the Ansty Road project in accordance with the planning permission that had been obtained.

11. When Mr. and Mrs. Humphrey subsequently complained that they had not been informed about what had happened to the proceeds of sale of the Donington and Rugby sites, or about the transfer of the Wyken Grange land to Construction, they were removed by Mr. Bennett and Ms. Murphy as directors of the Company.

The Claim

12. On 17 December 2020, Mr. and Mrs. Humphrey obtained permission from the court pursuant to section 260 et seq. of the 2006 Act to bring the Claim on behalf of the Company against Mr. Bennett and Ms. Murphy.

13. In their Particulars of Claim, Mr. and Mrs. Humphrey alleged that as directors, Mr. Bennett and Ms. Murphy owed the full range of statutory duties to the Company as set out in sections 172-177 of the 2006 Act, together with equivalent fiduciary duties and duties of care at common law. They then alleged that Mr. Bennett and Ms. Murphy breached those duties,

    a. by diverting monies from sale of the houses in Donington and Rugby to other developments in Buxton and around the Coventry area with which the Company was not involved;

    b. by diverting the Wyken Grange land and the opportunity to acquire the Ansty Road land, "both of which had been intended and earmarked for purchase and use for profit by the [Company], for the benefit of unconnected third parties and/or themselves, thus depriving the [Company] of those assets and of the opportunity to profit therefrom"; and

    c. by using the Company's money to pay for legal advice in connection with the issues in the Claim.

14. On 5 February 2021, a freezing order was made in respect of the proceeds of sale of properties from the Ansty Road project. Shortly thereafter, Mr. Bennett and Ms. Murphy filed a joint Defence which responded to the allegations regarding the Ansty Road project as follows, (using the abbreviations in this judgment),

> "The Company did initially purchase the Wyken Grange land with a view to undertaking substantial works of redevelopment … However, the Company did not have the available resources to complete the Ansty Road project and, despite being given the opportunity to do so, Mr. and Mrs. Humphrey were not prepared to match Mr. Bennett and Ms. Murphy's proposed injections of capital required to fund the Ansty Road project. Accordingly, it was determined that the Ansty Road project would be undertaken by [another of Mr. Bennett's and Ms. Murphy's companies][1], Construction, and the Wyken Grange land was sold to Construction for the price that the Company had paid for it, namely £107,500. The Ansty Road land was acquired after the Company had sold its interest in the Wyken Grange land, in order to allow access to the otherwise landlocked development."

15. In May 2021, Mr. Bennett and Ms. Murphy were ordered to provide a response to a detailed request for further information in relation to their Defence. On 1 June 2021 a winding up petition that they had presented against the Company was struck out, and further interim injunctions were granted against them.

16. Mr. Bennett and Ms. Murphy eventually provided some answers to the request for further information in June 2021. Among other things, that response made clear that Mr. Bennett and Ms. Murphy were not contending that any board meeting or general meeting of the Company had been held to approve the sale of the Wyken Grange land to Construction. It was, however, asserted that prior to the sale, Mr. and Mrs. Humphrey had made clear to Mr. Bennett that they were unwilling to provide any investment to the Company in order to meet the costs of the proposed Ansty Road project and did not wish to pursue it, irrespective of whether the access issues were resolved.

17. On 1 July 2021 Mr. and Mrs. Humphrey applied to strike out the Defence and/or for summary judgment. Mr. Bennett filed evidence in opposition. On 4 November 2021, 5 days before the hearing of that application, solicitors acting for Mr. Bennett and Ms. Murphy sought consent from Mr. and Mrs. Humphrey to amend their Defence. That request was refused, and so a formal application was made to the court on 8 November 2021 for permission to rely upon a draft Amended Defence attached to the application.

18. After setting out an account of the developments in Donington and Rugby, the material parts of the draft Amended Defence continued, (again using the abbreviations adopted in this judgment),

> "20. Throughout the development of the Donnington Site and the Rugby Site, Mr. and Mrs. Humphrey, either directly or through NHC, withdrew money from the Company. For example, Mr. and Mrs. Humphrey made use of the Company's supplier and CIS accounts in the approximate sum of £115,000 and, in addition to the return of their £500,000 investment, had

[1] In the original this reads "another of the Defendants' companies". The meaning of this pleading was a matter of contention at the second hearing in relation to Ms. Murphy. See paragraph 49 below.

£306,000 (£255,000 plus VAT) returned to them by NHC invoicing for works it had not actually done.

21. The books for the Donnington Site and the Rugby Site have now been reconciled. All parties and third parties have received the proper amounts due to them. There has been no diversion of funds.

22. Following the successful development of the Donnington Site and the Rugby Site, Mr. Bennett and Ms. Murphy were keen to explore further collaboration with Mr. and Mrs. Humphrey and, in April 2019, Mr. and Mrs. Humphrey and Mr. Bennett met at a Carluccio's restaurant in Leamington Spa.

…

22.2. By this time, the Company had purchased the Wyken Grange land with the intention of developing it. However, development of the land had not progressed because i) Mr. and Mrs. Humphrey had not yet decided to invest any money in the development, despite being invited to (it was estimated that each party would need to invest about £1 million each), ii) the land was landlocked, and so any development was dependent on obtaining access to the land, whether by the purchase of the adjoining Ansty Road land or otherwise (on 28 February 2019, the vendor of the Ansty Road land had confirmed that the Company's offer to purchase that piece of land had been rejected) and iii) planning consent had yet to be obtained; …

23. After the meeting, Mr. Bennett messaged Mr. Humphrey asking for an update. In response, Mr. Humphrey called Mr. Bennett and informed him that Mr. and Mrs. Humphrey were not interested in investing in either the Ansty Road site [or another development site in Kingswood that had been suggested]. In the circumstances, it was plain to Mr. Bennett and Ms. Murphy from what Mr. and Mrs. Humphrey had said and their actions in refusing to invest any capital, that Mr. and Mrs. Humphrey did not wish to proceed with developing either the Ansty Road site or the Kingswood site through the Company and that therefore the Wyken Grange land would need to be disposed of. Furthermore, it was understood by the parties that Mr. Bennett and Ms. Murphy would not simply abandon the Ansty Road project as a result of Mr. and Mrs. Humphrey's refusal to invest but would continue to pursue it outside of the Company.

24. Consequently, on 21 January 2020, the Company sold the Wyken Grange land to Construction for the same price that the Company had paid for it, being £107,500. The Ansty Road land was later purchased by Mr. Bennett's nephew, who wished to locate his consultancy business on the land, but only after the

vendor failed to sell the land on the open market or otherwise and at a higher price than that offered by the Company.

25. In the premises, [the allegation of breach of duty] is denied.

25.1 Mr. Bennett and Ms. Murphy have not acted in breach of any of their duties as directors with regards to the Wyken Grange land or the Ansty Road land.

25.2 Mr. and Mrs. Humphrey were not willing to invest and take any risk in the development and Mr. Bennett and Ms. Murphy were under no obligation to procure that Construction or [two other named companies] should loan the necessary money instead.

25.3 It was not in the best interests of the Company and its shareholders to hold onto the Wyken Grange land, a significant non-income generating asset in relation to which the Company had no money to fund a planning application and subsequent development, rather than sell it and use the net proceeds to satisfy any liabilities of the Company before returning any surplus to the shareholders.

25.4 The land was sold to Construction at its full market value.

25.5 The parties understood and agreed that the venture between them had come to an end, that Mr. Bennett and Ms. Murphy would not simply abandon the Ansty Road project, and that Mr. Bennett and Ms. Murphy would pursue the Ansty Road project outside of the Company. Therefore, whether under sections 175 and 177 of the 2006 Act, or the Duomatic principle, any conflicts of interests which Mr. Bennett and Ms. Murphy had were properly declared and/or authorised, and/or Mr. Bennett and Ms. Murphy had no need to make a specific declaration or to seek specific authorisation given that all of the directors and shareholders were aware of the potential conflict of interest. At no point did Mr. and Mrs. Humphrey, who were at all relevant times directors and shareholders of the Company, object to the sale of the Wyken Grange land to Construction.

25.6 In the alternative, Mr. Bennett and Ms Murphy acted honestly and reasonably in the circumstances in believing that the venture between them and Mr. and Mrs. Humphrey was over, and that there was an implicit, if not explicit, understanding that they could pursue the Ansty Road project outside of the Company. It would therefore be fair to relieve Mr. Bennett and Ms. Murphy of some or all liability pursuant to section 1157 of the 2006 Act."

19. On 9 November 2021 an unless order was made for Mr. Bennett and Ms. Murphy to respond to various outstanding parts of the request for further information and the applications for summary judgment and the cross-application to rely upon the draft Amended Defence were adjourned.

20. The various applications came back before the Judge on 27 and 28 June 2022.

21. In his *ex tempore* judgment, the Judge first held that there had been substantial compliance with the earlier unless order and so Mr. Bennett's and Ms. Murphy's Defence, and their application to rely upon the Amended Defence had not been struck out. He then indicated that he intended to grant summary judgment against both Mr. Bennett and Ms. Murphy on the basis that they had acted in breach of their statutory and fiduciary duties to the Company in connection with the sale of the Wyken Grange land to Construction.

22. However, after judgment had been given, counsel for Mr. Bennett and Ms. Murphy raised for the first time the point that Ms. Murphy was not a shareholder of Construction and asserted that she therefore had no relevant interest in it for the purposes of the 2006 Act. This caused the Judge to reconsider the terms of his judgment. He adjourned the applications in relation to Ms. Murphy for further argument and subsequently revised the transcript of his judgment to address the position of Mr. Bennett only. The applications by and against Ms. Murphy were subsequently determined at a hearing on 5 October 2022.

The Judgment against Mr. Bennett

23. In his judgment of 28 June 2022, the Judge set out the relevant provisions of sections 175 and 177 of the 2006 Act. In summary, section 175(1) requires a director to avoid a situation in which he has a direct or indirect interest that conflicts, or possibly may conflict with the interests of the company. However, section 175(3) provides that this duty does not apply to a conflict of interest in relation to a transaction or arrangement with the company, and section 175(4)(b) provides that the duty shall not be infringed if the matter has been authorised by the directors. Sections 175(5) and (6) further provide that such authorisation may be given by the directors by the matter being proposed to and authorised by the directors at a meeting which is quorate without counting the director in question or any other interested director.

24. Section 177(1) provides that if a director is interested in a proposed transaction or arrangement with the company, he must declare the nature and extent of that interest to the other directors. Section 177(2) provides that the declaration may (but need not) be made at a board meeting, and section 177(3) provides that if a declaration of interest becomes inaccurate or incomplete, a further declaration must be made. Finally, section 177(6)(b) provides that the director need not declare an interest "if, or to the extent that, the other directors are already aware of it (and for this purpose the other directors are treated as aware of anything of which they ought reasonably to be aware)".

25. The Judge held that section 177 applied to the sale of the Wyken Grange land by the Company to Construction by reason of Mr. Bennett being the only director and shareholder of Construction; and that section 175 applied to the various steps taken by Mr. Bennett to facilitate the purchase by Mr. Harding of the Ansty Road land and resale

of part of it to Construction so as to enable Construction to carry out the Ansty Road project.

26. Before turning to the questions of whether there had been a breach of sections 175 or 177, the Judge dealt with a submission on behalf of Mr. and Mrs. Humphrey that the Judge could summarily disbelieve the critical allegation sought to be pleaded in paragraphs 23 and 25.5 of the draft Amended Defence, namely that following Mr. and Mrs. Humphrey's refusal to provide funding for the Ansty Road project, it was understood and agreed between the parties that the venture between them had come to an end, and that Mr. Bennett and Ms. Murphy would not simply abandon the Ansty Road project but would pursue it outside of the Company.

27. In this respect, counsel for Mr. and Mrs. Humphrey placed reliance upon an email exchange between Mr. Bennett and Mr. Humphrey dated 23 July 2019 in which Mr. Humphrey had asked "Any update on the Ansty Road site?" and Mr. Bennett had responded "No movement." He also relied upon a text message from Mr. Humphrey to Mr. Bennett dated 14 October 2019, in which Mr. Humphrey asked, "Can you keep me up to date with the Ansty Road site?". Counsel claimed that these communications showed that, contrary to Mr. Bennett's case, Mr. and Mrs. Humphrey had not agreed that Mr. Bennett and Ms. Murphy were free to pursue the Ansty Road project outside the Company.

28. The Judge rejected the submission that he could summarily determine this issue, and decided that it should go to trial. He explained that it was possible that Mr. Humphrey's inquiries related to the disposal of the Wyken Grange land rather than the progression of the Ansty Road project.

29. The Judge then turned to the question of whether Mr. Bennett had breached his duties under sections 175 and 177 of the 2006 Act.

30. The Judge first considered, at [59], Mummery LJ's statement of the common law requirements for disclosure by a director in order to obtain the fully informed consent of shareholders in Gwembe Valley Construction Company v Koshy [2003] EWCA Civ 1048 at [65]-[68] ("Gwembe").

31. In Gwembe, Mr. Koshy had procured the claimant company of which he was a director, to receive loans totalling Zambian kwacha 56.4 million, in respect of which it acknowledged a liability to repay US$5.8 million at the then prevailing official exchange rate, to a company known as Lasco. The trial judge found that although some of the directors knew that Mr. Koshy had some sort of connection with Lasco, he never formally declared to the shareholders (i) that he was in fact the two-thirds beneficial owner of Lasco, (ii) that the kwacha had been acquired by Lasco for only a little over US$1 million as part of a foreign exchange scheme run by the Bank of Zambia, and (iii) that accordingly Mr. Koshy stood to make a profit of about US$3.2 million from the transactions when the loans were repaid.

32. Against that background, Mummery LJ held that at common law, to avoid breaching his duty not to make an unauthorised profit from a transaction involving a company in which the director has an interest which conflicts with his duty to the company, the director must make full disclosure of all material facts to all of the shareholders. The requirements of full disclosure are not confined to the nature of the director's interest,

but must include the extent of the interest, including the source and scale of the profit to be made, so that the shareholders "are fully informed of the real state of things".

33. The Judge held that these principles were broadly analogous to the requirements for disclosure to the board in order to obtain authorisation of a conflict of interest under section 175, or for the purposes of compliance with the duty to declare the "nature and extent" of an interest under section 177.

34. At [60], the Judge then held that on the facts of the instant case, these principles required Mr. Bennett to disclose to the other directors,

    a. the fact that Construction proposed to purchase the Wyken Grange land and the price that it proposed to purchase it for;

    b. the fact that Mr. Harding proposed to purchase the Ansty Road land and transfer to Construction the land necessary to give access to the Wyken Grange land so as to enable houses to be built on the site in accordance with the planning permission;

    c. that Construction was owned and controlled by Mr. Bennett; and

    d. the profit which it was anticipated that Construction would make from carrying out the Ansty Road project in place of the Company.

35. At [64]-[67], the Judge summarised Mr. Bennett's argument, based upon his existing Defence, his responses to the request for further information, and his evidence, to the effect that his conflict of interest had been properly authorised (for the purposes of section 175) and that he had sufficiently disclosed his interest (for the purposes of section 177), because he had invited Mr. and Mrs. Humphrey to agree to contribute funding for the Ansty Road project and they had declined.

36. The Judge rejected that contention. The Judge recorded at [68] that Mr. Bennett had not asserted that he had told Mr. and Mrs. Humphrey of any of the matters that the Judge had set out in [60] of his Judgment (above). Nor was it pleaded or contended by Mr. Bennett that Mr. and Mrs. Humphrey knew or ought to have known of such matters.

37. The Judge then held, at [70], that the fallacy in Mr. Bennett's argument was that even following the alleged request and refusal to fund the Company to carry out the Ansty Road project, the Wyken Grange land and the opportunity to exploit the Ansty Road project still belonged to the Company. The Judge continued, at [71],

> "The conflict of interest for the purposes of section 175 existed because Mr. Bennett wanted Construction, a company which he alone owned, to carry out the Ansty Road project instead of the Company (in which he only owned 25% of the shares). It was in his interests for Construction to acquire that opportunity from the Company as cheaply as possible, whereas it was in the Company's interests (assuming in Mr. Bennett's favour that the Company could not carry out the Ansty Road project itself) to obtain as much as it could, in consideration of transferring that opportunity to another party."

38. The Judge pointed out that when Mr. and Mrs. Humphrey declined to fund the Company to carry out the Ansty Road project, they were not fully informed of what Mr. Bennett intended that Construction should subsequently do, or of how he intended that the Company should enable Construction to achieve its ends. The Judge observed that in the event, Mr. Bennett procured that the Company obtained no more for the Wyken Grange land than it had paid for it, and hence nothing at all for giving Construction the opportunity to exploit the Ansty Road project.

39. The Judge further held, at [72],

> "The transaction for the purpose of section 177 was the sale by the Company of the Wyken Grange land to Construction. It was in the interests of the Company to sell that land, which had the benefit of planning permission, to another party for the highest possible price (again on Mr. Bennett's case that the Company could not take the project forward itself). It was in the interests of Mr. Bennett for Construction to acquire the Wyken Grange land as cheaply as possible. That transaction was not (even on Mr. Bennett's case) disclosed to Mr. and Mrs. Humphrey, who were two of the Company's directors, and the price that Construction paid to the Company, in order to acquire the Wyken Grange land from it was the price which the Company had paid for it before planning permission was obtained … there is no pleading that Mr. and Mrs. Humphrey were aware or ought to have been aware of the proposal to transfer the Wyken Grange land to Construction before it happened, let alone the proposal to do so at the same price at which the Company acquired it."

40. For these reasons the Judge concluded that Mr. Bennett's original Defence disclosed no reasonable grounds to defend the claim for breach of duty under sections 175 and 177.

41. The Judge then referred to paragraphs 22-25 of the proposed draft Amended Defence (set out in paragraph 18 above), and concluded, at [75] of his Judgment, that they did not advance Mr. Bennett's case, because they also did not plead that he had disclosed any of the matters which the Judge had identified in [60] of his judgment (see paragraph 34 above); nor did they allege that Mr. and Mr. Humphrey were otherwise aware of such matters when they declined to fund the Company to carry out the Ansty Road project.

42. The Judge then turned to the question of whether he should grant permission to Mr. Bennett to amend his Defence to rely upon section 1157 of the 2006 Act. That provides, in summary, that if in proceedings for negligence or breach of duty against a director of a company, it appears to the court that the director is or may be liable, but that he acted honestly and reasonably and that having regard to all the circumstances of the case he ought fairly to be excused, the court may relieve him either wholly or in part from his liability on such terms as it thinks fit.

43. The Judge explained at [78], that the burden under section 1157 is on the director, who must establish (i) that he acted honestly, (ii) that he acted reasonably (which is to be

determined objectively), and (iii) that having regard to all the circumstances it is fair[2] to excuse him. The Judge also referred to the decision of Jonathan Crow QC in Re In a Flap Envelope Company Ltd [2003] EWHC 3047 at [64] as authority for the proposition that it would require an extremely powerful case to persuade the court to exercise its discretion to relieve a director from liability if he has obtained a material benefit from his breach of duty.

44. The Judge then summarised the contentions on behalf of Mr. Bennett (i) that the question of relief under section 1157 could only be determined after a trial in light of all the circumstances and not summarily, and (ii) that because Mr. Bennett believed that he and Ms. Murphy had an implicit understanding with Mr. and Mrs. Humphrey that they could pursue the Ansty Road project outside the Company, this satisfied section 1157 and meant that he should be allowed to keep some or all of the profit that Construction had made from the project.

45. The Judge rejected that argument. He first held, at [83], that Mr. Bennett was aware of all the factors that he could put forward to justify the court making an order under section 1157, because he knew what he had done and why, and it was highly unlikely that anything else would come out on disclosure, or in witness statements, or at trial that Mr. Bennett was not currently aware of that might assist him.

46. Secondly, the Judge observed that even assuming that Mr. and Mrs. Humphrey refused to join in funding the Company to carry out the Ansty Road project and that there was a tacit understanding between them that Mr. Bennett and Ms. Murphy would not abandon that project, the Company was still the owner of the Wyken Grange land for which planning permission had been obtained, which therefore must have been worth more than the Company paid for it, and yet all that the Company received for enabling Construction to obtain the benefit of the Ansty Road project was the money back that it had paid for the Wyken Grange land.

47. Thirdly, the Judge reasoned,

> "It is, in my judgment, very unlikely that that, with nothing more, would afford Mr. Bennett a defence under section 1157. How could Mr. Bennett be acting reasonably (an objective test) (even if honestly, a subjective test), without informing Mr. and Mrs. Humphrey that his company (Construction) would acquire the Wyken Grange land and the Ansty Road project opportunity for the price that the Company originally paid for the Wyken Grange land before it had planning permission. How could it be fair in those circumstances, to excuse him from liability to account for profit that Construction (his wholly owned company) made as a result of his breaches of sections 175 and 177 (another objective test)."

48. Fourthly, the Judge observed that he had been shown no case in which a director had ever been allowed to keep a profit made from breaching his duties to a company, that it would be "highly unusual" for that to occur, and that the matters pleaded by Mr.

[2] The Judge in fact used the word "reasonable" rather than "fair" but used the correct word later in his judgment when applying the test (see paragraph 47 below).

Bennett "come nowhere near" the type of factors that might satisfy section 1157. The Judge stated that this was particularly so in circumstances in which Mr. Bennett failed to disclose to Mr. and Mrs. Humphrey what he was doing, or the terms upon which the Ansty Road project opportunity were to be diverted to Construction (including that the Company would give Construction the benefit of that opportunity for no consideration) and that Mr. Bennett had failed to obtain any authority from Mr. and Mrs. Humphrey for what he was causing the Company to do.

The Judgment in favour of Ms. Murphy

49. In his subsequent judgment on 5 October 2022, the Judge rejected a submission that the reference in the original Defence to Construction being "another of the Defendants' companies" was a clear admission by Ms. Murphy that she had a beneficial interest in the shares of Construction. He also held that it was arguable that merely being a director of Construction was insufficient to give rise to a duty upon Ms. Murphy to obtain authorisation from the board of the Company for the pursuit of the Ansty Road project under section 175, or to make disclosure for the purposes of section 177 of her interest in the transaction by which Construction acquired the Wyken Grange land.

50. As to section 1157, the Judge distinguished Ms. Murphy's case from that of Mr. Bennett. He explained that he had taken the view that because Mr. Bennett had obtained a benefit from his breach of duty (by reason of having a beneficial interest in Construction) he had no real prospect of invoking section 1157. But, the Judge held, since he had not been able to determine whether Ms. Murphy had a similar interest in Construction, the same reasoning did not apply to her.

51. The Judge therefore dismissed the application for summary judgment against Ms. Murphy and gave her permission to amend her Defence, essentially in the form of the draft Amended Defence.

Mr. Bennett's Appeal

52. The first ground of appeal advanced by Mr. Reed on behalf of Mr. Bennett was that there was a procedural irregularity because the Judge should not have granted summary judgment on the basis of Mr. and Mrs. Humphrey's Particulars of Claim. He contended that the pleading did not adequately identify which specific duty or duties alleged to have been owed by Mr. Bennett to the Company were breached. Mr. Reed contended that it only became clear from Mr. and Mrs. Humphrey's Skeleton Argument for the hearing in June 2022 that reliance was being placed on sections 175 and 177 of the 2006 Act. He said that this was litigation by ambush.

53. There is nothing in this point. Although the Particulars of Claim are brief and hardly a model pleading, they do refer to the relevant duties under sections 175 and 177, and essential facts of this case are simple enough. It would have been perfectly obvious to Mr. Bennett's legal advisers what the case against Mr. Bennett was. At no time did Mr. Bennett seek clarification of the Particulars of Claim, and he filed a Defence which, although it objected that other paragraphs of the Particulars of Claim were deficient, simply admitted the existence of the relevant duties and made no complaint about the particularity of the allegations in relation to the Ansty Road project. There is thus no basis for the suggestion that Mr. Bennett or his legal team were "ambushed" or in any way prejudiced in their defence of the summary judgment application.

54. Logically, it is appropriate to deal with Mr. Bennett's third ground of appeal next. That is that the Judge wrongly gave summary judgment when (it is said) Mr. Bennett's proposed draft Amended Defence contained a viable defence with a real prospect of success to the claim for breach of sections 175 and 177 of the 2006 Act.

55. Mr. Reed relied in this respect upon the factual matters pleaded in paragraphs 20-25 of the draft Amended Defence as set out in paragraph 18 above, and stressed the informal manner in which the affairs of the Company had been conducted, as exemplified by the manner in which Mr. and Mrs. Humphrey had used the Company's assets and supplier and CIS accounts for their own benefit.

56. It is convenient to analyse the issues in this regard separately as regards section 175 and then 177.

57. As to section 175, it was obvious that the essence of the proposed Ansty Road project was for the Ansty Road land to be purchased so as to give access to the Wyken Grange land and for the two parcels of land to be developed together. If (as alleged) Mr. and Mrs. Humphrey rejected the suggestion that the project should be pursued through the Company and it was understood and agreed that Mr. Bennett and Ms. Murphy could instead pursue it outside the Company, I consider that there is a realistic prospect that a trial judge could find that constituted the necessary authority for the purposes of section 175 for Mr. Bennett and Ms. Murphy to buy the Ansty Road land and pursue the opportunity to develop it for themselves rather than pursuing the Company's offer for that land.

58. Whilst I accept that any such authority must be based upon sufficient disclosure, I also accept that on the particular facts of this case, it is realistically arguable that it would not have been necessary for Mr. Bennett and Ms. Murphy to have told Mr. and Mrs. Humphrey of the details of how their purchase of the Ansty Road land would take place, or the particular corporate vehicle that Mr. Bennett and Ms. Murphy might use, or their expectations about what profit they might ultimately make from pursuing the Ansty Road project.

59. In this regard, I consider that it is realistically arguable that the Judge's application of the dicta in Gwembe was incorrect, and that the facts of Gwembe are distinguishable because it was in essence a section 177 case involving a transaction between the claimant company to which Mr. Koshy owed his duties, and a company in which Mr. Koshy was interested. In Gwembe, it would have been relevant to the claimant company to know how much Mr. Koshy personally stood to gain as a result of the obligation which it was to assume to its contractual counterparty. In contrast, at least so far as the acquisition of the Ansty Road land and the pursuit of the Ansty Road project was concerned, it could be argued that the decision allegedly made by Mr. and Mrs. Humphrey was not to fund the Company, which would therefore not be involved, and so the precise detail of how the other directors might pursue the opportunity, or the anticipated profit they might make, would be irrelevant.

60. On behalf of Mr. and Mrs. Humphrey, Mr. Roseman contended at the hearing of the appeal, and repeated in written submissions after circulation of this judgment in draft, that Mr. Bennett's and Ms. Murphy's grounds of appeal did not challenge the correctness of the Judge's application of Gwembe to the facts of this case, in particular his finding in the first judgment at [60] of the essential matters that should have been

disclosed for the purposes of sections 175 and 177 as set out in paragraph 34 above. Mr. Roseman contended that the appeal had to be conducted on the basis that the Judge was correct in this regard and that it was not open to this court to base its decision on a suggestion that the Judge might have been wrong.

61. I do not accept those submissions. The case pleaded in paragraph 25.5 of the draft Amended Defence was that Mr. Bennett's and Ms. Murphy's conflict of interest was obvious from the terms of the alleged agreement and understanding between the parties, and that this was sufficient to comply with the disclosure and authorisation requirements of section 175. Mr. Bennett's Grounds of Appeal contended that the Judge was wrong to find that he "had not given detailed enough particulars [in that draft pleading] about the disclosure given which, on his case, avoided liability under section 175…". But since Mr. Bennett has never sought to suggest that he did disclose to the other directors any of the four specific matters identified by the Judge in [60], and hence could not ever have pleaded that he did, I consider that it is implicit that he was contending on appeal that the Judge was wrong to find that those were the minimum requirements of compliance with section 175.

62. That is also what I understood Mr. Reed to be submitting – albeit somewhat obliquely, in his Skeleton Argument on behalf of Mr. Bennett when he contended that paragraph 25.5 of the draft Amended Defence "necessarily implied" that full disclosure of the conflicts of interest had been given, and that the Judge's approach was "supererogatory (and not sanctioned by the case of Gwembe whose guidance the Judge has followed)".

63. I therefore think that the question of the correctness of the Judge's application of Gwembe to the facts of this case in [60] of his first judgment was within the scope of this appeal.

64. In that regard I would also observe, in passing, that Ms. Murphy was given permission by the Judge to amend her Defence so as to incorporate the same pleading advanced by Mr. Bennett in paragraphs 20-25 of the draft Amended Defence (set out in paragraph 18 above). Although Mr. and Mrs. Humphrey's Grounds of Cross-appeal contended that the Judge was wrong to find that Ms. Murphy did not have an interest in the relevant transactions by reason of being a shareholder in Construction (as to which see further below), they did not separately suggest that the Judge was also wrong to give her such permission in light of the findings in [60] of the first judgment.

65. My conclusion in this respect is also not affected by the arguments advanced by Mr. Roseman based upon the two communications between Mr. Bennett and Mr. Humphrey in 2019 which are referred to in paragraphs 26-28 above. Those arguments were rejected by the Judge, but repeated in response to Mr. Bennett's appeal by way of a Respondent's Notice, and (by inference) on the appeal against the Judge's decision in relation to Ms. Murphy. In my judgment, the Judge was entirely right, for the reasons that he gave, to conclude that those communications were not unambiguous, and that they were not of sufficient probative value to establish at this stage and without a trial, that there was no understanding or tacit agreement by Mr. and Mrs Humphrey to Mr. Bennett and Ms. Murphy pursuing the Ansty Road project outside the Company.

66. I have greater difficulty with Mr. Bennett's arguments in relation to compliance with section 177 in respect of the sale by the Company of the Wyken Grange land to Construction.

67. There is considerable force in the Judge's reasoning to the effect that even if the parties had reached an understanding and agreement in 2019 that Mr. Bennett and Ms Murphy would be free to pursue the Ansty Road development outside the Company, that did not extend to giving them *carte blanche* thereafter to do anything that they wished with the Company's existing property, and in particular the Wyken Grange land. The sale of that land was a transaction with the Company in which Mr. Bennett, as the owner of Construction, had an interest which conflicted or potentially conflicted with that of the Company, and as the Judge pointed out, there was no pleading or suggestion that Mr. or Mrs. Humphrey were ever told of the specific terms upon which Mr. Bennett intended that the Company should dispose of the Wyken Grange land until after the sale to Construction had taken place.

68. However, and not without some hesitation, I consider that on the basis of the facts sought to be pleaded in the draft Amended Defence, Mr. Bennett also has a realistic prospect of success in defending this aspect of the Claim which should be allowed to go to trial. That is because it is arguable that the scope of the alleged understanding or agreement between the four directors must be considered in the context of what they all must have known that the Ansty Road project would involve, together with Mr. Bennett's contentions as to the informal manner in which the directors had previously conducted their own businesses and dealt with the assets of the Company.

69. The starting point is that section 177(6)(b) of the 2006 Act provides that a director need not declare his interest in a proposed transaction with the company "if, or to the extent that, the other directors are already aware of it (and for this purpose the other directors are treated as aware of anything of which they ought reasonably to be aware)".

70. If, as Mr. Bennett contends, Mr. and Mrs. Humphrey agreed to Mr. Bennett and Ms. Murphy pursuing the Ansty Road project outside the Company, it is, first, plainly arguable that Mr. and Mrs. Humphrey ought to have appreciated that it would be necessary for the Company to sell the Wyken Grange land (upon which the majority of houses were to be built) to Mr. Bennett and Ms. Murphy (or one of their companies). As I have indicated, development of the Wyken Grange land together with the Ansty Road land was the essence of the Ansty Road project.

71. Secondly, it does not appear to have been disputed that after formation of the Company, the four directors ran the Company informally and continued to pursue other property businesses on their own account, outside the Company. In that regard, paragraphs 20 and 21 of the draft Amended Defence (to which the Judge did not refer in his Judgment), alleged that during the development of the Donington and Rugby sites, Mr. and Mrs. Humphrey used the Company's accounts and resources for their own benefit or the benefit of companies with which they were connected – albeit that this had then been accounted for.

72. Against this background, I think that there is a realistic argument that if, as Mr. Bennett contended, Mr. and Mrs. Humphrey agreed that he and Ms. Murphy would be able to pursue the Ansty Road project outside the Company, they also ought to have appreciated that this would necessarily involve them acquiring the Wyken Grange land from the Company at an appropriate (full) value.

73. Mr. Roseman also complained that this argument was not open to Mr. Bennett on appeal because he had not sought to challenge the Judge's conclusion, in [60] of his first

judgment, that section 177 required Mr. Bennett to disclose to Mr. and Mrs. Humphrey (inter alia) the fact that he intended that the Company should sell the Wyken Grange land to Construction, and the price proposed to be paid for it.

74. Again, however, and for similar reasons to those that I have given above in relation to section 175 of the 2006 Act, in my judgment it was implicit in Mr. Bennett's Grounds of Appeal that he did not accept that the Judge had correctly defined the minimum requirements for compliance with section 177. Mr. Bennett's Grounds of Appeal contended that the Judge was wrong to find that he "had not given detailed enough particulars [in that draft pleading] about the disclosure given which, on his case, avoided liability under … section 177", and also that the Judge was wrong to find that he "had failed to plead … the necessary elements of the defence under section 177(6)(b) of the 2006 Act that [Mr. and Mrs. Humphrey] were in any event aware of the alleged conflict of interest." I read those Grounds as a contention that the Judge was wrong not to allow Mr. Bennett to go to trial on a pleading that asserted that something other than satisfaction of the Judge's minimum requirements in [60] was sufficient disclosure for the purposes of section 177. In my judgment the correctness of [60] in this respect was within the scope of the appeal.

75. In that regard, and specifically on the issue of price, I note that although the Judge placed significant weight upon an assumption that the Wyken Grange land had been worth more in 2020 with the benefit of planning permission than the Company had paid for it without planning permission in 2018, he did not have any evidence on that point. The Judge also did not address Mr. Bennett's contention in paragraph 25.4 of the draft Amended Defence that, "The [Wyken Grange] land was sold to Construction at its full market value."

76. Accordingly, I consider that Mr. Bennett should be allowed to raise the substance of his defence to the claim under section 177 at a trial. I would also note, as Lewison LJ observed during the hearing, that Mr. and Mrs. Humphrey did not descend into any particulars in the evidence of what they actually did or did not know as regards the fate of the Ansty Road project at any relevant time.

77. I therefore would allow Mr. Bennett's appeal against the Judge's decision to refuse him leave to raise these matters in his Amended Defence and to grant summary judgment against him.

78. I next turn to the second ground of appeal which concerns section 1157 of the 2006 Act.

79. I should first emphatically reject an argument advanced by Mr. Reed on behalf of Mr. Bennett that because section 1157 refers to the court having "regard to all the circumstances of the case", it cannot ever, or at least can only in the clearest possible case, be appropriate for a court to grant summary judgment against a director who indicates that he intends to ask the court for relief under section 1157. That contention is manifestly unsustainable. If he has no other viable defence, a director or other officer of a company who is sued for negligence or some other breach of duty cannot avoid summary judgment by the simple expedient of throwing a reference to section 1157 into his pleading, and then arguing that the court cannot rule upon this issue until after a trial.

80. Section 1157 should be approached like any other defence. A defendant who wishes to avail himself of section 1157 should plead the specific facts and matters upon which he intends to rely in order to demonstrate that there is a realistic prospect of a court granting him relief under that section at trial. If the matters pleaded by the defendant are inadequate, it will be open to the court to determine on a summary basis that he has no realistic prospect of obtaining such relief.

81. Turning to the facts of the instant case, the only pleaded basis for Mr. Bennett's intention to rely upon section 1157 was to be found in paragraph 25.6 of the draft Amended Defence (see paragraph 18 above). Although not a model of clarity and barely particularised, the plea appears to be to the effect that Mr. Bennett acted honestly and reasonably in believing that the venture with Mr. and Mrs. Humphrey was over, and that there was an implicit, if not explicit, understanding that he and Ms. Murphy could pursue the Ansty Road project outside of the Company, so that it would be fair to allow them to retain some or all of the profits from carrying out the project.

82. The Judge's reasons for rejecting that proposed defence – which I have summarised in paragraphs 47 and 48 above - were essentially the same reasons that he had relied upon for rejecting Mr. Bennett's defence to the breach of duty claim itself - namely that Mr. Bennett had not made full disclosure of all of the matters summarised in [60] of his judgment. The Judge also relied upon the fact that Mr. Bennett, via Construction, stood to make a profit from the Ansty Road project.

83. I have already indicated why I consider that the Judge was wrong summarily to reject Mr. Bennett's defence to the Claim, and I think that it must follow that his reliance on the same factors summarily to reject a defence under section 1157 also cannot stand.

84. In that regard, I do not accept Mr. Roseman's contention that it is necessarily fatal to an attempt to rely upon section 1157 for a director to have failed to make the disclosure of his interest as required by section 175 or to have failed to obtain the authority of the board to a transaction with the company in which he was interested in the manner provided by section 177.

85. Depending on the facts, I accept that a failure to use the routes that Parliament has specified to avoid a breach of duty may provide some support for an argument that the director had not acted reasonably. However, in the same way as Hoffmann LJ held in Re D'Jan of London Limited [1994] 1 BCLC 561 that someone who has been found to have acted negligently, which involves a failure to take reasonable care, can nevertheless obtain relief on the basis that they have acted reasonably for the purposes of section 1157, so also it may be that a director who has failed to use, or has insufficiently used, the mechanisms provided by the 2006 Act to avoid a breach of duty under sections 175 and 177 might nevertheless be found to have acted reasonably for the purposes of section 1157.

86. In the instant case, there is, for example, the possibility that a trial judge might find that Mr. Bennett was not in breach of his duties under section 175 in respect of the dealings with the Ansty Road land or the pursuit of the Ansty Road development more generally, albeit that his disclosure in respect of the sale of the Wyken Grange land to Construction was inadequate. I also do not think that it can be ruled out at this stage that such a finding would necessarily mean that Mr. Bennett's genuine perception of what he had

been authorised to do with the Wyken Grange land was also unreasonable for the purposes of section 1157.

87. Secondly, I think that the Judge may well have attached too much importance to the fact that he had not been taken to any case in which a director who had received a benefit from his breach of duty was allowed to keep it, together with the comments of Jonathan Crow QC in Re In a Flap Envelope Company Ltd to the effect that a director who has obtained a material benefit from his own negligence or breach of duty will have to show an extremely powerful case to obtain relief under section 1157.

88. Whilst the underlying sense that it may not be "fair" for a director to be able to retain a material benefit from his breach of duty – especially if the result is that the company and its stakeholders have to bear a corresponding loss - is understandable, that formulation begs the question of what a "material" benefit might be, and in many cases will be an oversimplification. Whilst the court must plainly exercise its discretion to do what is "fair" under section 1157 by reference to some objectively relevant criteria, I do not think that Jonathan Crow QC was intending to lay down a definitive test in relation to the application of section 1157, or that his words should be treated as a gloss on the section.

89. So, for example, in Dickinson v NAL Realisations (Staffordshire) Ltd [2020] 2 BCLC 120, this court held that relief under section 1157 was not limited to personal claims, but was potentially available to a defendant against whom a proprietary claim was made. *Ex hypothesi*, these will be claims where the director will be in possession of property belonging to the company as a result of his breach of duty, and as Newey LJ pointed out at [44], the grant of relief under section 1157 in such a case may have the effect of transferring ownership of the property from the company to the director. Although Newey LJ expressed the view that this might "very often … be a weighty factor to put into the balance" he was careful not to elevate it to a statement of principle.

90. Or, as an illustration of the complexities that might arise, take a case in which a director of a public company is guilty of negligence or breach of duty in relation to the payment of a dividend. The director may receive, by reason of his personal shareholding in the company, a benefit that in absolute money terms is significant; but in proportion to the overall dividend paid, is tiny. Does that qualify as receipt of a "material benefit" by the director requiring an "extremely powerful" case to exempt the director from liability for the much greater loss caused to the company? Should the answer under section 1157 be any different if the claim is brought at the instigation of new owners following a takeover of the company at a price that assumed the validity of the dividend, or when the company has become insolvent and the claim is being pursued by a liquidator in the interests of unsecured creditors?

91. I would therefore also allow Mr. Bennett's appeal against the Judge's refusal to permit him to plead section 1157 in his draft Amended Defence. Although the pleading is far from ideal and may benefit from some further information, it should have been permitted.

Mr. and Mrs. Humphrey's cross-appeal in relation to Ms. Murphy

92. The main issue raised on Mr. and Mrs. Humphrey's cross-appeal was that the Judge was wrong to think that there was any distinction to be drawn between Mr. Bennett and

Ms. Murphy by reason of the fact that Ms. Murphy contended that she had no beneficial interest in the shares of Construction, but was merely a director of that company.

93. Mr. Roseman had two main points. He first contended that the Judge was wrong not to treat the statement in the Defence that Construction was "another of the Defendants' companies" as sufficient to bring sections 175 and 177 into play. Secondly, he contended that it was well-established at common law that a person who is a director of two companies on different sides of a transaction is sufficiently interested so as to be in a position of conflict of interest and required to disclose that fact. He therefore submitted that the Judge should not have drawn any distinction between Ms. Murphy and Mr. Bennett for the purposes of sections 175 and 177.

94. I agree with the Judge on the first of these points – namely that the rather loose pleading in the Defence cannot be taken as determinative of the issue of whether sections 175 and 177 applied to Ms. Murphy.

95. However, I think that Mr. Roseman is right on his second point. It has been long settled that the common law rule against a director of a company acting in a situation in which he has a conflict of interest is triggered if the director is also a director of the second company with which the first is proposing to deal.

96. So, for example, in Transvaal Land Company v New Belgium (Transvaal) Land and Development Company [1914] 2 Ch 488 at 502 and 503, the Court of Appeal explained the position as follows,

> "The law was thus stated by Sir Richard Baggallay, in the Privy Council, in North-West Transportation Co. v Beatty 12 App Cas 589, 593:
>
> > "A director of a company is precluded from dealing, on behalf of the company, with himself, and from entering into engagements in which he has a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound by fiduciary duty to protect; and this rule is as applicable to the case of one of several directors as to a managing or sole director."
>
> …
>
> Where a director of a company has an interest as shareholder in another company or is in a fiduciary position towards and owes a duty to another company which is proposing to enter into engagements with the company of which he is a director, he is in our opinion within this rule. He has a personal interest within this rule or owes a duty which conflicts with his duty to the company of which he is a director. It is immaterial whether this conflicting interest belongs to him beneficially or as trustee for others. He is bound to do as well for his *cestuis que trust* as he would do for himself."

It would be most surprising if the codification of the common law in relation to the duties of directors in sections 175 and 177 of the 2006 Act had been intended to alter the law in this respect.

97. However, since I consider that Mr. Bennett, who is clearly a director and shareholder of Construction, should have been given leave to amend his Defence, it must follow that even if Mr. Roseman is right on this second point, the end result can be no different for Ms. Murphy. Accordingly, the appeal against the Judge's decision in relation to her must fail.

Disposal

98. For the reasons that I have given, I would allow Mr. Bennett's appeal and dismiss Mr. and Mrs. Humphrey's cross-appeal.

Lord Justice Bean:

99. I agree with the judgment of Snowden LJ and with the order he proposes. I also agree with the supplementary observations of Lewison LJ.

Lord Justice Lewison :

100. I also agree. It must be emphasised that in this case the judge gave summary judgment against Mr. Bennett. In Doncaster Pharmaceuticals Group Ltd v The Bolton Pharmaceutical Co 100 Ltd [2006] EWCA Civ 661, [2007] FSR 3 Mummery LJ warned against the over-ready use of summary judgment. As he explained at [18]:

> "In my judgment, the court should also hesitate about making a final decision without a trial where, even though there is no obvious conflict of fact at the time of the application, reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case."

101. As Snowden LJ has pointed out, a director is under no duty to disclose matters of which his fellow directors were already aware or of which they ought to have been aware. In the present case, Mr. and Mrs. Humphrey have not been forthcoming about what they did and did not know. The Company appears to have been run on a very informal basis, without decisions being recorded at board meetings. It is also the case that the draft Amended Defence pleads that the Wyken Grange land was sold by the Company to Construction for its full market value. If that is the case, then it is not fanciful to suppose that if Mr. and Mrs. Humphrey had declined the opportunity to participate in the Ansty Road project, Mr. Bennett might be held to have acted reasonably in procuring a sale of that land to Construction at full market value. In addition, whether a director can make out a defence under section 1157 in the case of an informally run company like the present is (or at least may be) highly fact-sensitive. This is, in my judgment, a case in which a fuller investigation into the facts of the case might well alter the outcome.