

**JOINT VENTURES:**  
**A PROTEAN CONCEPT IN PROPERTY LITIGATION**

This Note is prompted by the recent first instance decision of Russell v Cartwright & ors [2020] EWHC 31 (Ch) (“Russell”) to which I refer further below.

In the context of arrangements providing for the sharing of costs and profits from property development, the reader will, of course, know that the idea of a “joint venture” is a common one. Most obviously, such arrangements will take the form of contractual alliances of varying complexity.

The most obvious advantages of such an arrangement are a relative lack of formality, ease of termination, autonomy, potential for tax efficiencies (particularly in the early years) and flexibility. However, the relative informality of the arrangements can potentially also give rise to disadvantages in giving rise to ill-defined obligations (and unintended consequences thereof), as well difficulties in transferring or monetising an interest with a third party. A good example is that the joint venturers may very well refer to themselves and each other as “partners” when, as a matter of law, they usually are not.

The title of this Note suggests that a joint venture is protean in the sense that it is variable or shifting, depending upon the context. As is often noted, the term “joint venture” is not a term of art and does not have a precise legal meaning: being a term that can be used to describe a variety of possible arrangements. However, it also protean as to its content: depending upon the fact specific context, the parties may be held to owe duties and obligations going well beyond that which subjectively they anticipate when first they entered into the arrangement.

Typically, the individuals engaged in the joint venture will enter into a Joint Venture Agreement, either individually or through a corporate SPV or LLP. Alternatively, the parties enter into a shareholders agreement in relation to their shareholding in a corporate vehicle. Usually, the property the subject-matter of the development will also be held in a separate company in which the joint venturers have an interest. Notwithstanding the corporate structures and the obvious separation of corporate and individual personality, the issue to which joint venture cases most obviously give rise is how in practice the parties conduct the relationship between them, when it comes to the operation of the object of the joint venture.

This note discusses two aspects of the significance of the relationship (i) the existence (and content) of fiduciary duties and (ii) the implication of a (contractual) duty of good faith. Separately, the existence of such duties affects the remedies to which a claimant is entitled, to which I turn in the third part of the Note.

## **Fiduciary Duties**

The starting point is that which was said by Lord Walker in Cobbe v Yeoman's Rowe [2008] UKHL 55: in the context of commercial relationships the Courts will be slow to introduce equitable concepts such as fiduciary duties in circumstances where well-advised parties have entered into a negotiated agreement. In Al Nehayan v Kent [2018] EWHC 333 (Comm) ("Al Nehayan"), the Judge (Legatt LJ sitting in the Commercial Court) went further in stating that it was exceptional for fiduciary duties to arise except in certain settled categories of relationship (e.g. trustee/beneficiary; partners, company directors, principal and agents).

However, outside such categories, the task of determining whether or not a fiduciary relationship exists is not straightforward, given that there is no generally accepted definition of a fiduciary. Nevertheless, the fact that the parties are in a contractual relationship does not preclude the existence of fiduciary duties; indeed it has been said that contract may be the "foundation for the erection of a fiduciary relationship" (Hospital Products Ltd v United States Surgical Products (1984) 156 CLR 41 – High Court of Australia).

So how does one make sense of this? The Courts have for the time being settled as its starting point on what was said in Bristol & West v Mothew [1998] Ch 1 that there must at least be evidence that someone has undertaken to act for or on behalf of another person in circumstances giving rise to a relationship of trust and confidence. As the Judge said in Al Nehayan (paragraph 159):

*Fiduciary duties typically arise where one person undertakes and is entrusted with authority to manage the property or affairs of another and to make discretionary decisions on behalf of that person... The essential idea is that a person in such a position is not permitted to use their position for their own private advantage but is required to act unselfishly in what they perceive to be the best interests of their principal... Loyalty in this context means being guided solely by the interests of the principal and not by any consideration of the fiduciary's own interests*

The position of a particular party in the context of the furtherance of the design of the joint venture may thus explain why an individual is held to owe fiduciary duties in certain circumstances. In Murad v Al-Saraj [2004] EWHC 1235 (Ch) ("Murad"), the claimants were wholly dependent upon the defendant in respect of his advice and recommendation in deciding to purchase a hotel, the purchase and operation of which was going to be the subject-matter of the joint venture. Similarly, in Ross River v Waverley Commercial Limited [2012] EWHC 81 ("Ross River"), WCL (and its director Mr Barnett) had control

over all aspects of the management of the joint venture project, over the disposal of the funds arising from it and the assets comprised in it.

By contrast, in *Al Nehayan* the fact that the claimant and the defendant had trust and confidence in each other was not of itself sufficient. In that case, the counterclaiming defendant asserted that the relationship of trust and confidence manifested itself by reference to the Claimant's control of the investment (made periodically but not on an open-ended basis) into the hotel group which Mr Kent, the defendant, was running. The existence of trust and confidence did and does not necessarily lead to the conclusion that fiduciary duties existed. So for instance in *Re Goldcorp Exchange Ltd (in receivership)* [1995] 1 AC 74, the Privy Council rejected an argument that a company was a fiduciary because it had agreed to keep gold bullion in safe custody for customers, in circumstances where the customers were totally dependent on the company and trusted the company to do what it had promised, without in practice there being any means of verification that it was doing so.

The claimant in *Russell* ran into similar difficulties. Again the "partners" in the property development business had trust and confidence in each other. The key question (so the judge determined) was whether the nature of relationship was such that Mr Russell could trust in the loyalty of the defendants to put Mr Russell's interests first, and act in what they perceived to be his best interests instead of their own. The evidence she said showed throughout that the parties were only looking after their own interests.

### **Content of a fiduciary relationship**

If a fiduciary relationship is found to exist, what are the duties imposed thereby. The problem here again is that the content of the duty falls "to be moulded and informed by the terms of the contractual relationship" (*Hilton v Barker Boots & Eastwood* [2005] UKHL 8). So it is not at all clear whether or not a breach has been committed, where the exact content of the duty needs to be determined by the terms of the contract.

The starting point is again *Bristol & West v Motthew*: in considering the overarching obligations of loyalty, Millett LJ considered that loyalty required a fiduciary (i) to act in good faith (ii) not to make a profit out of his trust (iii) not to put himself in a position where his duty and interest may conflict (iv) not to act for his own benefit or that of a third party without the informed consent of the principal.

In a joint venture situation, it may very well be that the provisions of an Agreement or the arrangements between the parties has placed the defendant in a position where his duty and own interests may potentially conflict. The restraint imposed by the fiduciary duty tends to be either that he should not, given that he occupies that position, make a profit on his own account or take a benefit without consent.

At first instance, the judge in *Ross River* determined that the defendant has not taken an unlawful benefit because it paid away monies to third parties in circumstances where it believed, in good faith that it would not jeopardise the distribution of profits to the claimant. The Court of Appeal said that impermissibly introduced a further requirement into the claim: all that the claimant needed to show, the Court of Appeal said, was that the payments were not for the benefit of the joint venture and were not paid with the claimant's consent. In *Murad*, the breach of fiduciary duty was constituted by the defendant's failure to reveal to the claimants that his contribution to the venture came not from his own contributions, but from commissions owned to him by the vendor. That resulted in an unauthorised profit.

### **Implied duty of good faith**

Ever since his judgment in *Yam Seng Pte v International Trade Corp* [2013] EWHC 111, Lord Leggatt (as he is soon to be) had been equally lauded and castigated for attempting to introduce into English law what many commentators considered to be a concept that should be confined to continental European civil systems. However, building on the English law principles that underpin the implication of terms (as most recently analysed by the Supreme Court in *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2016] AC 742), the implication of a requirement of good faith may be accommodated in English Law. The question is whether or not an obligation of good faith was obviously meant or its implication was essential to the proper working of the contract since it would otherwise lack commercial or practical coherence.

In *Al Nehayan*, it was made clear that the fact that there was no fiduciary relationship did not mean that the defendant's right to act in his own interests was untrammelled. As in *Yam Seng*, the Judge referred to a particular species of contractual relationship known as a relational contract:

[I]n which the parties are committed to collaborating with each other, typically on a long term basis, in ways which respect the spirit and objectives of the venture but which they have not tried to specify and which it may be impossible to specify exhaustively in a written contract.

Over the years, the Courts have shown a willingness to accept the implication of such a term in agreements relating to joint ventures (see for instance *Bristol Groundschool Ltd v Intelligent Data Capture Ltd* [2014] EWHC 2145). In *Al Nehayan*, the Judge found that the arrangement required a high degree of co-operation in circumstances where there was (until a written agreement dealing with the demerging of their interests) no written agreement.

Contrast that position with the agreement governing the relationship in Russell. The Claimant's principal difficulty the judge found was that the JV agreement contained, in some provisions, specific obligations of good faith:

*The JV Agreement is a relatively detailed document. It contained limited express obligations of good faith... the existence of express good faith obligations indicate that when the parties intended to impose an obligation of good faith they did so, strongly suggesting that implying more general good faith obligation would be inconsistent with the express term*

With respect to the Judge, that seems to be too sweeping a dismissal of the test in the relational contract. Simply because the question of good faith had been thought about in some context does not necessarily cut across the implication of a good faith obligation in another. In this circumstance, the fact that the parties had entered into an agreement contemplating some good faith obligations, put the claimant, in Russell, in a worse position than the claimant in Al Nehayan.

### **Nature of obligations imposed**

The starting point is again rather quick-silver: in Al Nehayan, the Judge stated that it was unnecessary indeed perhaps impossible spell out an exhaustive description of what the obligation involved. In Russell, the Judge rejected the implication of the term on the secondary basis that the claimant has been unable to formulate consistently what the obligation entailed.

Having said that, the authorities suggest that the obligation of good faith goes at least as far as requiring an obligation to act honestly and with fidelity to the bargain; an obligation not to act dishonestly and not to act to undermine the bargain entered into or the substance of the contractual benefit bargained for; an obligation to act reasonably and with fair dealing having regard to the interests of the parties. Overall, the obligation is not to act in a manner which reasonable and honest people would consider commercially unacceptable.

All those concepts, and the standards imposed by them, clearly depend upon the commercial context in which they exist. Unlike the obligation of good faith imposed by a fiduciary relationship, a party is not required to prefer the interests of a co-venturer over his own. However, in the context of a property joint venture, conduct designed to be disadvantageous in the context of the joint venture's object (e.g. hiving off an opportunity that arose in the course of the joint venture, is likely to be in breach. In Al Nehayan, the Judge found that behaviour he characterised as "furtive" or "opportunistic" would cross the line.

## Remedy

To some degree, the content of the obligations overlap – the obligation not to make an unauthorised profit for instance appears to be a breach of the fiduciary and contractual obligation. However, it is important to keep in mind that the remedy for a breach of the implied term is contractual. For that reason, the claimant's remedy is in damages requiring him to satisfy the requirements of causation and foreseeability of loss.

By contrast, the remedies for a breach of fiduciary duties potentially go wider. It gives rise to the possibility of a claim for equitable compensation, even when the defendant is not a party to the joint venture agreement (Ross River) or an account of profits, even where the claimants has suffered no loss (Murad). Further, a breach of fiduciary duty gives rise to the prospect of pursuing a proprietary claim and a claim against a third party recipient in knowing receipt of gains made in breach of fiduciary duty.

## Conclusion

The obligations imposed upon parties to joint ventures depend upon the context and nature of the relationship and the arrangements made between them. Even where matters are regulated by a detailed contract, additional requirements may be imposed where there are breaches of good faith (either contractual or fiduciary). The Courts are still working out the boundaries of these concepts. Unfortunately for Mr Russell, he was the wrong side of the line.

James Hanham

April 2020

The logo for Maitland Chambers is displayed within a dark purple rectangular box. The word "maitland" is written in a lowercase, white, sans-serif font, with the letters spaced out. Below it, the word "CHAMBERS" is written in a smaller, uppercase, white, sans-serif font, also with spaced-out letters.

maitland  
CHAMBERS

*This paper is provided free of charge for educational purposes only. It is not intended to, and does not, give or contain legal advice on any particular issue or in any particular circumstances. Its contents should not be relied on as a basis for taking any course of action, nor should it be relied on to give legal advice. Members of Maitland Chambers are continuing to work remotely during the current pandemic and are well placed to provide legal advice and representation to clients on all matters within our areas of expertise. For contact information please see our website: [www.maitlandchambers.com](http://www.maitlandchambers.com).*