Rabiah Bee Bte Mohamed Ibrahim v Salem Ibrahim
[2007] SGHC 27

Case Number : Suit 1079/2003

Decision Date : 23 February 2007

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Edmond Pereira and Looi Teck Kheong (Edmond Pereira & Partners) for the plaintiff; Jimmy Yim SC and Kelvin Tan (Drew & Napier LLC) for the defendant

Parties : Rabiah Bee Bte Mohamed Ibrahim — Salem Ibrahim

Companies – Directors – Duties – Whether sole director of joint-venture companies owing fiduciary duties to partner in joint venture – Whether partner in joint venture proper plaintiff to make claim in respect of fiduciary duties owed by sole director of joint-venture companies to joint-venture companies

Legal Profession – Solicitor-client relationship – Brother and sister agreeing to enter into joint venture with each other – Brother lawyer by profession – No express agreement or assertion that brother to act as solicitor for sister on joint venture matters – Whether solicitor-client relationship between brother and sister ought to be imputed such that brother owing duty of care to sister to protect or advance individual interest of sister in joint venture matters

Partnership – Tests of partnership – Whether joint venture involving purchase and refurbishment of residential properties for letting or sale constituting partnership – Applicable principles – Section 2 Partnership Act (Cap 391, 1994 Rev Ed)

Restitution – Quantum meruit – Difference between contractual and restitutionary quantum meruit – Factors considered by court when determining whether contractual or restitutionary quantum meruit applicable

23 February 2007 Judgment reserved.

Judith Prakash J:

Background

1 The plaintiff, Rabiah Bee binte Mohamed Ibrahim, who is also known by her married name of Rabiah Weiss, is the elder sister of the defendant, Salem Ibrahim. Well known as a successful businesswoman in the fashion industry in Singapore in the 1970s and 1980s, the plaintiff sold her business in 1988 and moved to London. There she went into property investment. By 1994, the plaintiff owned four houses in London. In early 1996, she bought two more. The plaintiff used the rental received from some of the houses to support herself and her children.

2 The defendant started practice as a lawyer in Singapore in 1989. Prior to that, he had been in the insurance industry. By 1996, the defendant was a partner in M/s Harry Elias & Partners ("M/s HEP"). He left that practice at the end of May 1997 to establish his own legal firm which he still heads.

3 In mid 1996, the defendant and her husband, Pierre-Alain Weiss, spent some days in Singapore as house guests of the defendant. During that stay, the siblings had discussions about jointly entering the property market in Greater London ("the venture"). The talks ended in an agreement ("the oral agreement") to buy and refurbish residential properties ("the JV properties") with the intention of

letting or selling them at a profit. On the plaintiff's return to London, the venture was put into effect and between October 1996 and February 1998, the plaintiff arranged for the purchase of eight properties, at least seven of which were, indisputably, intended for the venture. The ownership of the eighth property is in dispute.

4 Despite the apparent financial success of the venture, the personal and commercial relationship of the siblings broke down. In 2000, the plaintiff accused the defendant of not keeping proper accounts and of using the venture's moneys for his own purposes. In mid 2001, another sibling, Victor Adam Ibrahim ("VAI") brokered a truce between the two. They signed a settlement agreement by which they agreed to dissolve the venture, retain their respective capital contributions and split the remaining proceeds in equal shares. The settlement agreement did not, however, end the matter. Subsequently, there was a dispute as to the obligations imposed by the settlement agreement and each side accused the other of reneging on his/her respective promises.

The action

5 This action was started in November 2003. The plaintiff has amended her statement of claim three times with the last amendment being made in the course of the trial after the plaintiff had given her testimony and while the defendant was in the course of cross-examination. The defendant filed a defence and counterclaim and that pleading has also been amended several times in order to meet the changes in the plaintiff's pleading.

6 Since the parties were given ample leeway to amend their pleadings, both before and during the trial of the action, and have thus had every opportunity to define and re-define their respective cases, I do not think it would be unfair in any way to hold them strictly to their respective pleadings. The last set of proposed amendments to the statement of claim was hotly contested by the defendant and I allowed some but not others. The defendant appealed against my order but subsequently this appeal was discontinued. The plaintiff did not appeal and therefore must be taken as accepting that only those amendments that I allowed were valid amendments and that the other proposed amendments had no further relevance to the case. In view of these developments, I do not propose to consider, let alone decide on, any issue that has not been raised by the pleadings. It would therefore be helpful if I set out in brief exactly what was pleaded by each side.

Statement of claim

7 The first version of the statement of claim was endorsed on the writ in November 2003. The final version of the statement of claim was filed in late October 2005.

8 The first few paragraphs set out the background of the parties and the venture. In para 5, the plaintiff set out what she alleged were the express terms of the oral agreement. These were:

> (a) the capital for the venture would be provided by the parties in equal shares with an initial contribution of £100,000 each;
>
> (b) legal title to the JV properties would be held by companies incorporated outside the United Kingdom ("the offshore companies" or "the JV companies");
>
> (c) the beneficial interest in the JV properties would be held by the JV companies on trust for the parties in equal shares as tenants-in-common;
>
> (d) the defendant would be responsible for all financial and legal aspects of the purchases,

including managing the capital jointly provided by the parties, incorporating the JV companies and handling their affairs, procuring mortgages from banks to finance the purchase of the JV properties and making the relevant payments in respect of such mortgages;

(e) the plaintiff would identify suitable properties to be purchased and would refurbish them, arrange for them to be rented out and then manage them;

(f) the rental proceeds and the profits from the resale of the JV properties would be shared equally; and

(g) the plaintiff would be entitled to reasonable compensation for the time, effort and expense incurred and expended by her in performing her obligations to the venture.

As an alternative to the claim made under para 5(g), para 6 asserted that it was an implied term of the venture that the plaintiff would be entitled to reasonable compensation for her effort and expenditure. This issue was further taken up in paras 29 and 30 wherein the plaintiff asked for "reasonable" compensation or alternatively for a *quantum meruit* calculated at 15% of the gross rental proceeds of the JV properties during the currency of the venture.

9 In para 6(a), it was asserted, as a further implied term of the venture, that the plaintiff and the defendant would account to each other for all their respective dealings and property and assets coming into their hands or under their control in the course of and by reason of the venture, including the JV properties and the JV companies, and that a joint venture account would be opened and operated for this purpose.

10 Paragraphs 7 to 15 set out the manner in which seven properties were purchased between October 1996 and February 1998 with each property being registered under the ownership of a different offshore company. At para 13, the plaintiff averred that to the best of her knowledge, the purchase of the JV properties was financed in part by loans obtained from Hill Samuel Merchant Bank ("Hill Samuel") (this bank and the loans were subsequently taken over by Lloyds Bank) which loans were secured by mortgages over the respective properties to which they related. She further averred that all arrangements relating to the loans and mortgages were handled solely by the defendant pursuant to the terms of the venture and/or in his capacity as the plaintiff's solicitor.

11 Paragraphs 27 and 28 dealt with an eighth property, 71A Glengarry Road ("Glengarry"). The plaintiff averred that Glengarry was not purchased as a JV property but that she had told the defendant that she was purchasing Glengarry as a home for her son, David Fleming ("DF"). She asserted that she had asked the defendant to pay for this property because he was holding moneys belonging to the venture which he had not disbursed to the plaintiff.

12 In paras 16 to 30, the plaintiff set out her allegations in relation to the defendant's alleged failure to discharge his duty to account to her. She stated that in late 2000, the venture and the relationship of solicitor and client between the defendant and herself was terminated by mutual consent as a result of a breakdown in their relationship. She averred that the defendant was in receipt of funds from the venture and that he was a trustee of those funds and under fiduciary duty to render a full and proper account of the funds to the plaintiff as beneficiary, and also to account for all property and assets he controlled. This included the JV companies and the joint venture account.

13 The plaintiff said that she had asked for accounts of these matters repeatedly from late 2000 to early 2003. In March or April 2003, she received an account from the defendant which had been prepared by a company called M/s Gane Shawn & Partners ("GSP") that had allegedly been verified by

a chartered accountant, one Duncan Merrin. The plaintiff was dissatisfied with these accounts because no supporting documents accompanied them and Mr Merrin had reviewed the accounts without evidence of the manner in which the loans from Lloyds Bank ("Lloyds") had been used or of the interest rates Lloyds had charged.

14 Paragraph 25 of the statement of claim contained particulars of the defendant's alleged breaches of duty to the plaintiff as a joint venture partner and as the director of the JV companies. It was alleged that he had failed:

(a) to disclose to the plaintiff that there was no bank account for the venture and that he was using his own personal bank accounts instead;

(b) to disclose to the plaintiff that he had used the bank accounts that he shared with his wife to receive the plaintiff's contribution to the venture;

(c) to disclose to the plaintiff that he had kept the moneys drawn down from the loans in a personal account that he maintained with his wife;

(d) to disclose to the plaintiff that he had used the venture's funds for his personal expenses;

(e) to keep and maintain proper records of all the JV properties purchased and sold by the JV companies;

(f) to keep and maintain proper records of all documents pertaining to the sale and purchase and mortgage of the JV companies in particular:

(i) the sale and purchase agreements;

(ii) valuation reports;

(iii) completion statements;

(iv) letters of offer;

(v) mortgage documents;

(vi) annual and quarterly mortgage interest statements;

(vii) copies of title deeds;

(viii) all correspondence relating to the loans.

(g) to secure the best possible price for the sale of 49 Peckham Rye ("Peckham Rye"); and

(h) to disburse the sales proceeds in respect of 22 St. Aidans Road ("St Aidans") and 79 Mundania Road ("Mundania") to the plaintiff.

15 The plaintiff asked for the following main reliefs:

(a) an order that the defendant furnish a full and proper account of his dealings with respect to the venture, the JV properties and the JV companies;

(b) an order that he pay the plaintiff such sums as may be found due to her upon the taking of the account together with interest, alternatively, damages for breach of his duty to account;

(c) an order awarding her reasonable compensation for her effort in performing her obligation under the venture either contractually or on a *quantum meruit* basis;

(d) an order that the defendant pay her for her loss and damage arising from his breach of his fiduciary duties; and

(e) a declaration that Glengarry was not one of the JV properties but belonged to DF.

Defence and counterclaim

16 The defendant's version of events started in para 3 of the defence. He agreed that the venture had been created by an oral agreement concluded in mid 1996. In para 4, the defendant set out his version of the express terms of the venture. These were:

(a) the parties would purchase up to 20 properties;

(b) they would from time to time contribute equally to such sums as were necessary to pay for 20% of the purchase price of such properties (it would be noted he did not accept that they had agreed to each put up initial capital in the sum of £100,000);

(c) the defendant's personal sterling bank accounts would be used by the parties for tax efficiency;

(d) the properties would be put in the names of offshore companies in which each party would have an equal shareholding;

(e) each offshore company would have legal title to one property;

(f) the decision to purchase any particular property would be taken by the parties in consultation with each other;

(g) the purchase of each property would be jointly managed by the parties in consultation with each other;

(h) the legal aspects of each purchase would be handled by solicitors appointed in England by the plaintiff;

(i) the plaintiff would identify suitable properties, manage the refurbishment of the properties and collect rent from the tenants which she would deposit into her own account, all these acts being done in consultation with the defendant;

(j) the defendant would arrange the financing for each JV company/property and obtain mortgage facilities;

(k) the defendant would use his income statements to support the loan applications;

(l) the defendant would make various payments from his personal bank accounts for the purchase of the properties and to the mortgagee bank;

(m) through the JV companies, the plaintiff and the defendant would share equally in the profits from the sale of the properties and the rental received from the letting of the properties; and

(n) the parties would not compete with the venture in the Fulham and Dulwich areas.

The defendant rejected the plaintiff's version of the express terms except where this was in agreement with his version.

17 At para 7(a) of the defence, the defendant agreed with the plaintiff that there was a mutual obligation to account for all the moneys, properties and assets dealt with in the course of the venture. Accordingly, the plaintiff was at all material times obliged to account for property and assets in relation to the venture that were received or handled by herself or by her management company, Pertama Properties Limited ("Pertama").

18 At paras 8 and 9, the defendant insisted that Glengarry was a property that belonged to the venture and that it was owned by one of the JV companies.

19 The defendant denied, in paras 10 to 14, that his relationship with the plaintiff was a partnership relationship or that he was the plaintiff's solicitor in relation to any of the actions that he took in connection with the venture. The relationship between the plaintiff and the defendant was one of brother and sister and the defendant acted in his personal capacity.

20 At paras 17 to 40, the defendant set out his version of the settlement agreement, its failure and how he accounted to the plaintiff. In his view, the breakdown in the relationship was precipitated by the plaintiff's accusation that he had not provided a full account of moneys held pursuant to the venture, and in particular, moneys and interest held in accounts with Lloyds. The defendant averred that there was an oral agreement in September 2000 to "retire the outstanding loans on the basis of the cash summary sheets dated 11 September and 17 September 2000" and this agreement was carried out by the defendant but not the plaintiff.

21 In paras 22 to 31, the defendant dealt with the settlement agreement signed on 3 August 2001 and the events that followed. By this agreement, he averred, the parties had agreed to fully and finally settle the dispute that they had in relation to the JV properties including Glengarry. The terms of the settlement agreement provided, *inter alia*, that:

(a) the parties would be refunded their capital contributions;

(b) if either party had put up more than 50%, the excess amount would be returned with interest;

(c) each party would account to the other for all moneys held in relation to the venture;

(d) each party would account for the interest on the moneys held;

(e) the parties would deduct interest, cost and expenses from the moneys they held and the remainder would be used to settle the bank loans in such proportions that would result in each party having an equal amount of cash in hand;

(f) the unsold properties would be valued and the plaintiff would have the right of first refusal to purchase such properties at 50% of their valuation prices failing which the properties would be sold to third parties and the net proceeds split equally between the plaintiff and the defendant;

(g) the plaintiff would immediately pay £121,000 to retire the outstanding loan from Lloyds;

(h) the defendant would procure that Lloyds would release the plaintiff from her personal and continuing guarantees;

(i) on discharge of the mortgages, the title deeds to the unsold properties would be handed to VAI to hold as stakeholder for the parties; and

(j) Duncan Merrin would take accounts in both London and Singapore.

22 The defendant asserted that he had carried out his obligations under the settlement agreement by arranging on 13 August 2001 for the mortgages to Lloyds to be redeemed and by remitting his share of the redemption amount (being £6,081.81) to Lloyds. On 16 August 2001, Lloyds confirmed in writing to the plaintiff and the defendant that they had been discharged from all liability as guarantors for the facilities in respect of five of the properties and that upon redemption of the loans for the remaining properties they would be discharged from their liabilities in respect of those properties. In breach of her obligations under the settlement agreement, however, the plaintiff failed to pay the sum of £121,000 to Lloyds.

23 The defendant averred that the respective obligations of the plaintiff and the defendant to account to each other were replaced by the obligations contained in the settlement agreement. Further, in para 33 he said that the plaintiff had waived or was otherwise estopped from claiming for accounts to be rendered prior to the date of the settlement agreement. In para 34, the defendant alleged that he had fully accounted to the plaintiff for the moneys that he held. He gave particulars of this assertion.

24 At para 42, the defendant denied again that he was in partnership with the plaintiff whether in relation to the venture or at all. He further denied that he owed the plaintiff any duties in the capacity of director of the JV companies. He averred in para 44 that he had fully discharged his duties to the plaintiff in relation to the venture. In any case, he said in para 45 that by reason of the settlement agreement, the plaintiff had waived and/or was estopped from claiming in respect of any breach of the defendant's duties to her.

25 At paras 46 to 49, the defendant insisted that the plaintiff had agreed to and was aware of the use of his personal bank accounts. Detailed particulars of this allegation were given. He pleaded that she too had used her own personal bank accounts to hold money belonging to the venture. Accordingly, the plaintiff had waived and/or was estopped from claiming against the defendant in relation to his use of the mixed moneys in his personal bank account for his personal expenses.

26 The defendant averred at para 50, that he had discharged his duty to keep proper records. The plaintiff was the donee of powers of attorney from each of the JV companies and was in receipt of documents relating to the sale and purchase of the JV properties. Further, it was Mapletoft & Co ("Mapletoft"), a firm of English solicitors instructed by the plaintiff to act in the purchase of the JV properties, whose duty it was to maintain the records.

27 At para 51, the defendant denied para 25(g) of the statement of claim and asserted that he had had no duty to obtain the best possible price for Peckham Rye. This property was sold by Lloyds as mortgagee because of the plaintiff's refusal, in breach of her obligations under the settlement agreement, to redeem the outstanding mortgages over certain of the JV properties. Accordingly, it was Lloyds that had a duty as mortgagee to obtain the best price for this property. In any event, Peckham Rye was sold, in an open and publicised public auction, at a fair market value.

28 As regards the allegation in relation to the disbursements of the proceeds of sale of St Aidans and Mundania, the defendant replied in para 52 that he was not required under the terms of the oral agreement to automatically disburse the proceeds of sale of any JV property immediately upon the sale of that property. Further, the plaintiff had not asked for the proceeds to be disbursed and she knew that the proceeds were not to be disbursed.

29 At para 54, the defendant insisted that Glengarry was a JV property. The parties had orally agreed that DF would be allowed to reside there rent-free and that the defendant's daughter would be allowed to reside at one of the other JV properties. Neither child would, however, have any beneficial interest in the property in which he or she resided.

30 The counterclaim was set out in paras 59 to 66. In brief, the defendant claimed that the plaintiff was obliged to account for all the moneys that she held, including rental and other fees charged and collected. He averred that the plaintiff had failed to provide any adequate account of the moneys handled by her in connection with the JV properties and that she was obliged to provide him with documents relating to the accounts, including tenancy agreements, bank statements, list of tenants and documents relating to the cost of repairs and payments to suppliers of goods and services for the JV properties.

31 The defendant's counterclaim prayed for, *inter alia*, the following main reliefs:

(a) a declaration that Glengarry was owned by the venture through Elsenham Consultant Ltd and was to be included in the accounts of the venture;

(b) an account of all moneys received and paid by the plaintiff in connection with the JV properties, including rent received, costs of renovations, maintenance and other works done on the JV properties, and other expenses necessarily incurred in respect of the JV properties; and

(c) an order for payment by the plaintiff to the defendant of such sum as may be found due upon taking such account.

Reply and defence to counterclaim

32 Most of the reply and defence to counterclaim consisted of denials of the allegations made by the defendant. In addition, the plaintiff insisted, at paras 5A and 5B that it was the parties' intention that a joint venture account be opened by the defendant and that such intention was reflected in correspondence from the defendant and in representations that he had made to her. The defendant's position was that a joint venture account outside of the United Kingdom was required so that the venture could achieve tax efficiency.

33 At paras 8 and 9, the plaintiff averred that despite being obliged to consult her on matters pertaining to the JV companies and his dealings with the banks, at no time did the defendant so consult her. In para 11, whilst the plaintiff accepted that there had been an oral agreement to terminate the joint venture and to retire the outstanding loans, she denied that the loans were to be retired on the basis of the cash summary sheets prepared by the defendant.

34 Paragraph 16 dealt with the settlement agreement. The plaintiff averred that:

(a) the settlement agreement made no reference to "fully and finally" settling the differences between the parties;

(b) the settlement agreement set out the method by which the relevant accounts were to be taken and was not intended to impose the legal obligation on the parties to provide accounts;

(c) under cl 13 of the settlement agreement, it was a condition precedent to the plaintiff's payment of £121,000 to Lloyds that the defendant would deliver up the certificates of title and/or title deeds to the unsold JV properties directly to VAI; and

(d) clause 14 of the settlement agreement stated that "for the purposes of taking accounts, we engage Chartered Accountant Duncan Merrin FCA and his associates in London who shall be a Chartered Accountant to take accounts in the respective countries and the accounts shall be certified in London" and this was not what had been pleaded at para 24.12 of the defence.

35 At para 18, the plaintiff admitted receiving various documents, including documents from Lloyds, from the defendant in or around February 2001 but she otherwise denied the allegation in para 26 of the defence that on 23 February 2001, the defendant had sent her supporting bank statements in respect of each of the bank accounts. She averred that the documents sent by the defendant were not organised in any coherent manner.

36 In paras 24A and 24B, the plaintiff took the position that the settlement agreement had been rendered inoperative by reason of the defendant's failure to fulfil the condition precedent and that, consequently, she had been released from her obligation to pay the £121,000.

37 From paras 25 to 43, the plaintiff dealt in detail with various assertions by the defendant as to information given to her and denied most of those assertions and also explained why she should not be taken to have the knowledge that the defendant wanted to have imputed to her. Whilst admitting receipt of certain spreadsheet accounts in March 2003, she insisted that she did not receive documents supporting the accounts and that other documents sent to her were not arranged in any intelligible manner.

38 In para 43C, the plaintiff reasserted that at all material times, the defendant's rights and obligations were governed by the terms of the oral agreement as expressed in para 5 of the statement of claim. The defendant had failed to discharge his obligation under the agreement and, in addition to the breaches of duty stated in para 25 of the statement of claim, the defendant had also failed to:

(a) disclose to the plaintiff the details of the Hill Samuel loan application;

(b) disclose to the plaintiff when the loans were approved and/or drawn down;

(c) disclose to the plaintiff that the powers of attorney did not give the plaintiff the authority to buy and/or sell properties without a board of directors' resolution signed by the defendant;

(d) advise the plaintiff on the significance of the continuing letters of guarantee for the loans;

(e) explain to the plaintiff how she would personally benefit from the purported tax efficient loan structure and the offshore company arrangement;

(f) disclose to the plaintiff that he was not filing tax returns for the JV companies with the Inland Revenue authority in the UK; and

(g) keep a proper record of all moneys received and dispensed.

39 Paragraphs 44 to 51 formed the defence to the counterclaim. The plaintiff averred that she had discharged her obligation to provide a full account of the money that she had handled. She asserted that the defendant as the sole director of the JV companies must have known that he had the responsibility to submit accounts for tax purposes. She reserved her right to make a claim against him for any loss or damage that she might suffer as a result of fines or penalties arising from unpaid taxes or the failure to file tax returns in respect of the JV companies.

Additional facts

40 The following facts are also worth mentioning. First, the undisputed JV properties purchased and the respective owning JV companies are as follows:

(a) 57 Silvester Road ("Silvester") owned by Untong Properties Ltd and purchased on 25 October 1996;

(b) 22 St Aidans Road ("St Aidans") owned by Senang Properties Ltd and purchased on 6 November 1996;

(c) 79 Mundiana Road ("Mundiana") owned by Anak Properties Ltd and purchased on 15 November 1996;

(d) 48 Hansler Road ("Hansler") owned by Bintang Properties Ltd and purchased on 25 November 1996;

(e) 1 Upland Road ("Upland") owned by Mutiara Properties Ltd and purchased on 7 March 1997;

(f) 49 Peckham Rye ("Peckham Rye") owned by Tanah Merah Properties Ltd and purchased on 8 January 1997; and

(g) 24 Goodrich Road ("Goodrich") owned by Greenholme Assets Ltd and purchased on 19 February 1998.

The last property purchased was Glengarry which was purchased on 8 April 1998 and registered under the ownership of Elsenham Consultant Ltd ("Elsenham"). Elsenham is a company incorporated in the British Virgin Islands. All the other JV companies were incorporated in the Republic of Seychelles.

41 Mr Donal O'Sullivan of Mapletoft acted in the purchase and mortgage of the first six JV properties. Another law firm, Loxleys, acted in the purchase and mortgage of Goodrich and Glengarry.

42 Hill Samuel agreed to provide financing equivalent to the aggregate of the purchase prices of the first six JV properties (totalling £510,000). Hill Samuel was then acquired by Lloyds and the loans were booked in Lloyds' books. On 12 December 1996, the plaintiff and the defendant signed and accepted facility letters from Lloyds in respect of the first six JV companies. On 15 May 1997, Lloyds disbursed the sum of £309,400 in respect of the loan facilities out of which a total of £300,000 was paid to the defendant's sterling accounts. A further sum totalling £146,100 remained in blocked interest-earning deposit accounts in Lloyds, in accordance with the terms of the facility letters. The sum of £54,500 remained undrawn.

43 Following the purchases of Goodrich and Glengarry, another two facility letters were executed. Both properties were mortgaged to Lloyds.

44 All of the JV properties (except Glengarry) were let out immediately after purchase and refurbishment and earned rental income at various times. Glengarry was let only in September 2002 after the termination of the venture. In 1997, the plaintiff incorporated Pertama in the UK to collect rent earned by the JV properties.

45 In 1998, the plaintiff and the defendant decided to sell St Aidans and Mundania. The sales were completed in early 1999 and the mortgages on the two properties were redeemed and the loans taken by their respective owning companies were repaid at the same time.

Proceedings in the action

46 The plaintiff commenced this action on 12 November 2003. At that time, she claimed only:

(a) an account of the venture and payment of moneys due to her on the account; and

(b) remuneration for her work in renting out and maintaining the JV properties.

47 On 27 September 2004, the plaintiff obtained an order against Lloyds for the examination of banker's books pursuant to Part IV of the Evidence Act (Cap 97, 1997 Rev Ed). This permitted her to take copies of all Lloyds' documents pertaining to the loans taken by the JV companies.

48 In September 2004, on the defendant's application, the court appointed Mr Tam Chee Chong of Deloitte & Touche to act as the court expert to reconstruct the venture's accounts. On 7 January 2005, Mr Tam issued a report setting out his findings upon completion of his reconstruction of the accounts. On 8 July 2005, following correspondence with and queries from the parties, Mr Tam issued an addendum report. Mr Tam presented both reports at the trial and was cross-examined on his findings.

49 At the time the action was commenced, four JV properties had been sold. Thereafter, Silvester, Hansler and Goodrich were also sold. The sales realised a profit and the net proceeds of about £1m are currently being held in a stakeholder's account by M/s Shook Lin & Bok, the plaintiff's former solicitor. Glengarry remains unsold. The mortgage on it has, however, been redeemed out of the venture's funds.

Issues

50 The issues that arise from the pleadings are as follows:

(a) what was the nature of the commercial relationship between the defendant and the plaintiff and, in particular:

(i) was he her solicitor?

(ii) was he her partner?

(iii) was he a counter party in a contractual relationship with her?

(b) whether the defendant's position as director of the JV companies imposed any fiduciary duties on him vis-à-vis the plaintiff;

(c) did the defendant fail:

(i) to disclose to the plaintiff that there was no joint venture bank account and that he was using his and his wife's personal accounts to receive joint venture funds;

(ii) to disclose to the plaintiff that he was using joint venture funds for his personal expenses;

(iii) to keep and maintain proper records of the JV properties, their purchase, mortgage and sale;

(iv) to secure the best price available for the sale of Peckham Rye;

(v) to disburse the proceeds of sale of St Aidans and Mundania to the plaintiff;

(d) if the defendant failed to do any of the matters alleged above, whether such failure was a breach of duty and if so whether it caused loss to the plaintiff;

(e) whether the performance of the plaintiff's obligations under the settlement agreement was dependent on the defendant's prior performance of his obligations under cl 13 of the settlement agreement;

(f) whether Glengarry is a JV property;

(g) whether the plaintiff is entitled to payment for her efforts in managing and maintaining the JV properties;

(h) whether the defendant has failed, neglected or refused to provide a full and proper account of all his dealings with respect to property and assets coming into his hands or under his control in the course of and by reason of the venture;

(i) whether the plaintiff has failed to provide an adequate account of the moneys handled by her in connection with the venture, in breach of the venture and the settlement agreement; and

(j) whether Mr Tam's reports should be accepted in full or in part or at all.

The nature of the relationship between the parties (issues (a) and (b))

A solicitor-client relationship?

51 The issue of what sort or sorts of relationship the parties were in must be dealt with first because the type of duties that the defendant owed the plaintiff depended on the role that he played in relation to her. The plaintiff's position is that he owed her fiduciary duties because he was her solicitor and also her partner in the venture. The defendant denied having agreed to act as the plaintiff's solicitor and asserted that the venture was a pure contractual arrangement which did not result in a partnership relationship between him and the plaintiff.

52 First I will deal with the sub-issue of whether there was a solicitor-client relationship between the parties. The submissions of the plaintiff on this issue went as follows. First, she stated that it was common ground that the defendant had acted as her solicitor when she was conducting her fashion business. On the balance of probability, therefore, it was not wrong for her to believe that the client and lawyer relationship followed through into the venture. The defendant did not expressly tell her that he would not be acting in his capacity as a lawyer for the venture. To dispel the plaintiff's firm

belief that he acted as her lawyer, the defendant should have appointed an independent lawyer for the venture.

53 The plaintiff pointed to several matters that she submitted substantiated her contention that the defendant had acted as a lawyer for the venture and for the plaintiff. He had, she said, acted for Mutiara Properties Ltd in a dispute involving Upland; had instructed Queen's Counsel; had liaised with, and arranged for loans and mortgages from, lending institutions; and had charged fees for procuring the incorporation of the JV companies and annually renewing their licences. Further, there was no other lawyer representing the JV companies and the venture. Mr O'Sullivan of Mapletoft had acted for the JV companies only on conveyancing matters. At various times too, the defendant had written to various professionals on matters relating to the venture and for this purpose he had used the letterhead of his practice. By reason of all these circumstances, the plaintiff was entitled to draw the conclusion that the defendant had been acting as her solicitor.

54 The defendant submitted that he was never the plaintiff's solicitor. No evidence was given of an express retainer and there was no evidence of behaviour on his part that indicated an implied retainer. The allegations that he was her solicitor prior to the venture and that he acted for her in negotiations for the sale of her fashion business were not true. The evidence showed, he said, that the firm of M/s Amarjit, Rubin & Partners and not the defendant acted for the plaintiff in that transaction. At that time, the defendant was still serving his pupillage and any advice that he gave her was given as her brother and not as her lawyer. The plaintiff had not been able to point to any retainer or correspondence with the defendant in a solicitor and client capacity. She had also admitted in court that he did not ask for nor receive any solicitor's fees from her.

55 The defendant relied on the evidence indicating that Mapletoft had acted as the venture's solicitors in respect of the purchase and mortgage of the first six JV properties. The plaintiff had suggested using Mapletoft as that firm had acted for her previously in relation to her own property purchases. In her oral testimony, the plaintiff had tried to draw a distinction by saying that Mapletoft was the firm acting for the purchase of the JV properties but not for the mortgages. When confronted with Mapletoft's fee notes, the plaintiff had admitted that Mapletoft had charged fees for acting in the purchase and mortgage of six JV properties but she still denied that she had instructed Mapletoft to act in the mortgages. When she was shown documents indicating that she was the one who corresponded with Mapletoft on the loans, the plaintiff had evaded the issue by stating that both she and the defendant dealt with Mapletoft in relation to the venture. Finally, however, the plaintiff had admitted that there was no written correspondence between the defendant and Mapletoft and that all the correspondence was between Mapletoft and herself. Mr O'Sullivan had also testified that it was the plaintiff who had instructed him on the mortgage of the JV properties to Lloyds.

56 The defendant criticised the plaintiff's evidence that the defendant was her solicitor in the venture because there was no other solicitor except the defendant. She had said that since the defendant was contributing his legal expertise for the purposes of the venture, he must be her solicitor. The defendant submitted that this reasoning was flawed. As a retainer between a solicitor and client is a contract, there must be an express agreement or circumstances which indicate that an intention to enter to such a contractual relationship ought fairly and properly to be imputed to all the parties. See *Cordery on Solicitors*, (LexisNexis Butterworths) vol 1 issue 14 para 425. In this case, the defendant submitted, there were no facts or circumstances which necessarily warranted the implication of a retainer because:

(a) the defendant never represented or conducted himself as the plaintiff's solicitor;

(b) there was no written retainer, no correspondence with the defendant in his capacity as a

solicitor and no fees paid to the defendant as a solicitor;

(c) the defendant would have been in a position of conflict of interest if he had been both the plaintiff's solicitor and a party to the venture with her;

(d) the only work that the defendant was involved in that may be regarded as legal work was when M/s HEP, in which the defendant was then a partner, procured the incorporation and renewal of the JV companies, but this was the kind of corporate secretarial work that is regularly performed by parties who are not solicitors and did not involve providing legal advice to the plaintiff vis-à-vis the venture;

(e) the defendant had not charged professional fees in respect of the JV companies but only incorporation costs and the only professional fees that were charged for the incorporation were the professional fees of the defendant's partners minus the defendant's share.

57 In relation to the plaintiff's claim that the defendant had sent letters on his practice letterheads and this showed that he was her lawyer, the defendant's response was that the bundle of documents referred to by the plaintiff in her submissions had never been placed before the court and therefore was not in evidence. Some of the documents in the bundle had not been disclosed previously by the plaintiff. In any event, these letters related to the dispute over Upland where the defendant had written to the other side's solicitors as solicitor for the venture. In that case, he had been acting for the venture and not as solicitor for the plaintiff personally.

58 Having considered the evidence, I find that the defendant was not the plaintiff's solicitor. There was no express retainer. There was no document issued by the defendant in which he purported to act as the plaintiff's solicitor or gave any legal advice to the plaintiff in her personal capacity as a participant in the venture. As *Cordery* noted, in the absence of an express agreement or an express assertion of authority to act on her behalf, in order to establish the existence of a solicitor and client relationship, the plaintiff would have to prove that an objective consideration of all the circumstances would draw one to the conclusion that an intention to enter into such a relationship ought fairly and properly be imputed to both the plaintiff and the defendant. The implication that a solicitor and client relationship existed must be so clear that the solicitor ought to have appreciated it. In the present case, I cannot, on an objective consideration of the circumstances, find sufficient evidence to enable me to impute a clear intention on the part of both parties to enter into a solicitor and client relationship.

59 The strongest and most telling circumstance that prevents such an implication being made is the fact that the defendant as a lawyer would have been fully aware that if he had purported to act as solicitor for the plaintiff in regard to her participation in the venture with him, he would have been placing himself in a clear conflict of interest situation. It would have been an invidious position because, as he must have known, the plaintiff's interest as a participant in the venture might not always coincide with his own interest in the venture. Whilst lawyers have been known to put themselves into such situations, it is not easy to infer that they have done something so contrary to good sense (and in this case without any compelling need) when there is no external evidence of such a course being taken. The plaintiff and the defendant had, prior to the venture, been in one other business investment together and in that too, they were simply doing business together and were not in a solicitor and client relationship. Further, I do not accept the plaintiff's evidence that the defendant had acted as a solicitor for her when she sold her business. At that time, he was only a pupil and could not have performed this role even though her solicitors on record were the firm in which the defendant was serving his pupillage. Even if the plaintiff had had the impression that the defendant was her solicitor at the time, it was not reasonable for her to assume that such

relationship would automatically carry itself over into a drastically different situation arising about 8 years later.

60 The fact that the defendant may have from time to time acted on behalf of the venture did not make him the plaintiff's personal solicitor. In going into the venture with him, the plaintiff would have expected him to use his legal expertise on behalf of the venture in the same way as she used her expertise in the London property market to the advantage of the venture. There was no proof that, at any time, she asked him to give her, personally, legal advice. Any advice that the defendant gave to the plaintiff was advice that he gave her in his capacity as her business partner and with the aim of protecting and advancing the interest of the venture. It was not directed to protecting or advancing the individual interest of the plaintiff. In this connection, the case of *Richards v French* (1870) 18 WR 636 is instructive. The English High Court found that the defendant solicitor there had given advice to the plaintiff as her brother-in-law. He did not seek any fee and had no solicitor and client relationship with her. The court took into consideration that no bill of costs was made out and when it was necessary to resort to professional advice, the plaintiff instructed another solicitor. The court also took into account the fact that the plaintiff was well able to take care of her own interests. The facts in this case make it even more difficult for the plaintiff here to establish that she thought that the defendant acted as her solicitor. She was a successful businesswoman. She was the one with the experience of investment in the London property market and she also had solicitors in England whom she had instructed six times prior to the formation of the venture. The evidence showed that she had no problem obtaining any professional help, whether from a law firm or from an accountant's firm, as and when she required the same.

Were the parties partners?

61 According to s 1 of the Partnership Act (Cap 391, 1994 Rev Ed) ("the Act"), a "partnership is the relation which subsists between persons carrying on a business in common with a view of profit". There are three limbs to this definition: there must be (a) a business, (b) carried on by two or more persons in common and (c) with a view to profit. There are, also, rules for determining whether or not a partnership exists. The main rules as set out in s 2 of the Act are:

> (1) Joint tenancy, tenancy in common, joint property, common property, or part ownership does not of itself create a partnership as to anything so held or owned, whether the tenants or owners do or do not share any profits made by the use thereof.
>
> (2) The sharing of gross returns does not of itself create a partnership …
>
> (3) The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business, but the receipt of such a share …, does not of itself make him a partner in the business.

62 The plaintiff submitted that the venture was a partnership and that it was for the court to look at the transactions between the parties and determine what the relationship was. In this case, the venture met all the criteria specified by s 1 of the Act. First, in view of the broad definition of "business", that word must include the business of investing in residential property in London in order to rent out or resell the investments. Secondly, there were two persons carrying on that investment business in common and thirdly, the whole aim of the exercise was that the parties should profit from it. The argument made by the defendant that what the parties had was a joint venture and not a partnership was, the plaintiff submitted, misconceived. The term "joint venture" was simply a label and did not preclude the true relationship between the parties being that of partnership.

63 The defendant did not really differ on the legal principles. In reply, he cited the statement of *Lindley & Banks on Partnership* (Eighteenth Ed) London Sweet & Maxwell 2002 ("*Lindley & Banks*") at p 73 to the effect that to determine the existence of a partnership, one must pay regard to the true contract and intention of the parties as it appears from all the facts of the case. I note that in effect, this statement was a distillation of the following dicta of Cozens-Hardy M.R. in *Weiner v Harris* (1910) 1 KB 285 that the plaintiff relied on:

> Two parties enter into a transaction and say "It is hereby declared there is no partnership between us." The Court pays no regard to that. The Court looks at the transaction and says "Is this, in point of law, really a partnership? It is not in the least conclusive that the parties have used a term or language intended to indicate that the transaction is not that which in law it is."

64 I agree that it is clear from the above dicta and the Act that a partnership is not a contract but a relationship that arises from a contract and therefore one has to study exactly what the contract concerned entailed in order to ascertain what relationship the parties to it were actually in. *Lindley & Banks* had also said (at p 74) that whilst all partnerships involve a joint venture, the converse proposition does not hold good. In this case, the defendant submitted, the relationship between the parties was that of participants in a contractual joint venture and there was no intention on the part of either party to enter into a partnership.

65 The defendant cited the case of *Canadian Pacific (Bermuda) Ltd v Nederkoorn Pte Ltd* [1999] 2 SLR 18 (Court of Appeal) and [1998] 3 SLR 309 (High Court) ("*Canadian Pacific*") to demonstrate that there can be a joint venture without a partnership. The appellant and respondent in that case had entered into a joint venture to operate a shipping business, on the terms contained in a memorandum of understanding ("MOU"). Pursuant to the MOU, companies were incorporated in Singapore and Bermuda the intention being that the joint venture business should be carried on by the Bermuda company with the Singapore company acting as its agent and manager. After the end of the joint venture, the appellants sued the respondents claiming reimbursements of advances made to and expenses incurred for the joint venture business. The trial judge dismissed the claim on the grounds that the parties were not partners and there was no obligation to account personally for the profits and losses of the joint venture business. He construed the MOU as providing that there would be a joint venture company which would carry on the joint venture business and held that a partnership business was not contemplated by or mentioned in the MOU. The Court of Appeal allowed the appeal (in part) because it found that the original intention of the parties that the joint venture business would be developed and carried on by the joint venture companies with the parties simply being shareholders had not been completely put into effect at the time of the termination of the joint venture. At that time, the joint venture business was carried on by one or both of the joint venture parties and even if it was not so carried on by them, the costs and expenses of conducting such business were funded by one or both of the parties. No shareholders' agreement had yet been executed and the relationship of the parties was therefore still governed by the MOU. Under the MOU, the parties were obliged to bear the losses of the joint venture equally. Thus, the court held that if one party had provided more funds than the other for the joint venture business, it was entitled to look to the other for reimbursement to the extent of 50% of the excess.

66 The partial success of the appeal does not however detract from the useful observations on the concept of a joint venture and the difference between that and a partnership found in the first instance judgment delivered in *Canadian Pacific*. The trial judge, Selvam J, explained in [44] of his judgment how the joint venture came to exist:

> The concept of a 'joint-venture' was first created by American jurists to overcome the disability of American corporations to form a partnership and carry on business as such. The words 'carry

on business' imply doing business on a continual basis. This disability was not part of English law since the Partnership Act permitted the formation of a partnership by corporations. If therefore two corporations in Singapore combined for the purpose of an one-off business venture without intending to *carry on business* in general or of a particular kind the joint-venture would not be treated as a partnership for the simple reason that it does not entail a continuing relationship among the participants which is an essential element of a partnership. If an unincorporated joint-venture is intended to carry on business, that is on a continual basis, it would be partnership. 'The principal difference between a partnership and a joint-venture' says *Rowley On Partnership* (2nd Ed) at pg 482 'is said to be that "while a co-partnership is ordinarily formed for the transaction of a general business of a particular kind, a joint-venture is usually, but not necessarily, limited to a single transaction." Stated otherwise, a single or isolated and non-continuing undertaking usually constitutes a distinguishing feature between a "joint-venture" and a "partnership."'. Another American authority, *A Treatise on the Law of Contracts by Williston* (3rd Ed) at p 553 says that… 'a joint-venture is a special combination of two or more persons, whether corporate, individual or otherwise, where in some specific venture a profit is jointly sought *without the necessity of any actual partnership or corporate designation*.' A true joint-venture therefore need not be registered under the Business Registration Act because it is not a partnership formed to carry on business on a continual basis. On the other hand an unincorporated joint-venture formed by two or more persons to carry on business on a continual basis making transaction after transaction will be a partnership and if it is formed in Singapore must be registered under the Business Registration Act.

[emphasis in the original]

From the above statement of the law, I derive the principle that, generally, when parties join together to transact a single piece of business or a business of a particular kind which has a limited duration they would not be partners as partnership implies a continuing relationship.

67 The above principle can also be seen to underline the decision in *Vekaria v Dabasia*, an unreported appeal heard by the English Court of Appeal who delivered judgment on 1 December 1998. In that case, Mr Vekaria and Mr Walji contributed to the purchase of the freehold for three floors in a commercial property with a view to refurbishing and reselling them at a profit. The property was purchased by a company which was owned and controlled by Mrs Vekaria. The issue that arose was whether Mr Vekaria and Mr Walji were partners. The English Court of Appeal held that the arrangement was a joint-venture and not a partnership because for a partnership it was necessary to show not merely that there was an acquisition in common from which the participators hoped to obtain a profit but there was something additional. In his judgment, Peter Gibson LJ pointed out that the circumstances of the transaction pointed away from it being a relationship like a partnership, based on mutual trust and confidence and strongly towards it being a joint investment in that:

(a) Mr Vekaria and Mr Walji did not know each other personally;

(b) Mr Vekaria wanted Mr Walji to purchase the leasehold outright with no joint ownership;

(c) this was an isolated transaction.

(d) the parties made no agreement to govern the carrying of the business of a partnership, none of the ordinary terms of a partnership were agreed;

(e) the agreement that the only expenditure which could increase the payer's proportion of the proceeds of sale had to be agreed expenditure was a pointer away from the parties having the

trust in each other which is appropriate for partnership; and

(f) there was nothing in the case to indicate that the partners constituted each other the agent for each other which is a feature of a partnership.

68 Using the principles enunciated in the above cases, the defendant submitted that the following facts in this case showed that he and the plaintiff were not in a partnership:

(a) Each JV property was bought pursuant to a specific agreement between the plaintiff and the defendant and in the name of a JV company. As such, the purchases of the JV properties were a series of single transactions which required the plaintiff's and the defendant's agreement in each instance.

(b) Neither the plaintiff nor the defendant held out to any third party that they were partners and when the plaintiff purchased items or engaged services in respect of a JV property, she did so either in her own name or in the name of a particular JV company. Mr O'Sullivan of Mapletoft was not aware of the partnership and issued his invoices to the respective JV companies.

(c) The plaintiff bought at least two other properties in her own name during the venture. If indeed the parties were in a partnership she could not have done this as under s 30 of the Partnership Act, a partner has a duty not to compete with the firm. The plaintiff, however, gave evidence that she had no obligation not to compete with the venture and that she would not have entered it had there been such a term.

(d) The parties owned the JV properties through shares in the JV companies and this method of ownership had been agreed from the start. When the plaintiff lodged cautions against the JV properties in 2001, she did so on the basis of her 50% shareholding in the JV companies and alleged payment of 50% of the purchase price, not on the basis of a partnership. Her conduct therefore was inconsistent with a partnership with the defendant.

69 The starting point in this discussion must be the definition of partnership in the Act. Of the three elements contained in that definition at least two, *i e.*, the first and the third, are satisfied. The defendant emphasised the point that under s 2(2) of the Act, the sharing of profits does not in itself create a partnership. However, as Lord Lindley himself, in his Supplement to the English Partnership Act 1890 noted:

> The rules contained in [s 2] *only* state the weight which is to be attached to the facts mentioned, *when* such facts stand alone. Those facts, when taken in connection with the other facts of the case, may be of the greatest importance, *but when there are other facts to be considered this section will be found to be of very little assistance.* [Emphasis added] (see *Lindley & Banks* at p 72)

As the same authority goes on to note, in such situations to determine whether there is a partnership one looks at the true contract and the intention of the parties as appears from the whole facts of the case.

70 While the sharing of profits does not in itself create a partnership, the fact that profits are shared tends towards the existence of a partnership. Also, while s 2(1) indicates that the mere fact that parties are co-owners of a property does not make them partners, HY Yeo in *Partnership Law in Singapore* (2000, Butterworths) suggests at p 33:

> However, if the jointly-owned property is used for the purposes of carrying on a business … it may be possible for the co-owners to be viewed as operating a partnership. Similarly, the frequency of the activity can be taken into consideration as another relevant factor: for example, *the selling of a jointly-owned piece of property can be regarded as part of a business if the co-owners had been regularly buying and selling properties together and there is every indication that they will continue to do so on a frequent basis.* Whilst remaining a question of fact, it does – to a certain extent – turn on the degree of activity (whether contemplated or executed) and the mode in which the property has been dealt with. [Emphasis added]

This suggestion is in line with the statement of law found in *Lindley and Banks* that I have referred to above.

71 When I consider all the circumstances of this case and the agreement between the parties, I am driven to conclude that the relationship between them was a partnership relationship. It is clear from the accounts given by both of them that under the agreement they were to go into business together for an indefinite period. The plaintiff said that the original intention was to buy 50 properties whilst the defendant denied that and said that they were only going to buy 20 properties. There was some corroboration of the plaintiff's account by way of her contemporaneous statements to Mr O'Sullivan but I do not think it matters very much whether they intended to buy 20 or 50 properties. In either case, the number of properties would have been an expression of desire rather than a contractual obligation since they were starting out in a new venture without very much capital (even on the plaintiff's account the initial capital was to be only £200,000). This was a flexible arrangement and it was intended to be an on-going venture. There was no time limit agreed within which all the investments had to be sold and the profits realised. The fact that each property was bought in the name of a single joint venture company did not change the relationship. There was an overarching agreement between them that the way that they would operate the venture, for tax efficiency (and perhaps also for limitation of liability vis-à-vis third parties), would be by putting each asset acquired by the venture in the name of a separate company. The business conducted by the parties, however, was not just seven or eight separate ventures with seven or eight separate companies. It was a single venture expressed through several corporate vehicles.

72 As I have pointed out above, what generally distinguishes a joint venture from a partnership is whether the business carried on is of a one-off nature or not. In the *Canadian Pacific* case, Selvam J expressly stated "[i]f an unincorporated joint-venture is intended to carry on business, that is on a continual basis, it would be partnership". Here, there was not just one purchase but a number of purchases and an indefinite time period. The situation was far from that in the *Vekaria* case where all the parties did was to contribute money. Instead, from the very beginning they agreed on what each other's responsibilities would be and set out defined roles for themselves. This was not just a passive provision of money to the acquisition of an investment but the active effort to improve the investments and gain both income and capital gains from them. The *Canadian Pacific* case is helpful in this respect because the decision on appeal placed primary importance on the fact that the parties had continued to conduct the business themselves after the formation of the joint venture companies and therefore it was found that their relationship continued to be governed by the MOU and they were not simply shareholders in the joint venture companies they had formed. In this case too, it was the parties who carried on the business not the JV companies who were merely shells. The defendant himself in cross-examination stated that the companies were formed as a façade. He must therefore have known (and it must therefore have been the parties' intention) that it was not the JV companies who were conducting business but the partnership who was acting through them. The plaintiff who played such a large part in the development of the business was not a director of the JV companies or even an employee of these companies nor had it been thought necessary that she should be a director as might have been the case had the parties intended to turn over the running of the

business to the JV companies. At the time the JV properties were acquired, the plaintiff was quite content to leave their formation to the defendant and did not insist either on being a director or on having her own representative as one of the directors.

73 Since the parties had chosen to acquire the JV properties in the name of the JV companies, it really was not necessary for them to hold out to third parties that they were partners or to expressly state when purchasing items or engaging services that they were doing so as partners. One of the advantages of using individual corporate vehicles to acquire each property was to ensure that the liabilities incurred in relation to such property were restricted to the owning company and could not be claimed from the other properties. It would have completely destroyed this advantage had the plaintiff or the defendant contracted directly as the partner of the other in relation to the business. The fact that the partnership was not apparent to third parties cannot prevent their relationship from in fact being that of partners. Further, whilst the plaintiff may, as the defendant alleged, have been in breach of the partnership when she bought other properties in her own name (a matter which I mention but do not decide), the fact that she acted in breach again does not mean that there was no partnership.

Did the defendant owe the plaintiff fiduciary duties by reason of his position as sole director of the JV companies?

74 The JV companies were incorporated in the Seychelles and in the British Virgin Islands and therefore, the laws of those countries would govern the officers and shareholders of the companies and determine whether a director owed a shareholder fiduciary duties. The plaintiff who wanted to establish that duty had the onus of pleading and proving that under the relevant foreign laws the duty existed. Since she failed to plead and prove such foreign law, the court will presume that the foreign law is the same as Singapore law and will apply Singapore law to this issue.

75 The plaintiff did not cite any legal authority in support of her submission that in his capacity as sole director of the JV companies, the defendant owed her, as a shareholder of those companies, fiduciary duties. Instead, she relied on an exchange during cross-examination by her counsel. This was as follows:

Q. Did you as a director, sole, only director, owe any duty to the shareholders?

A. Under Seychelles company law, perhaps.

Q. What do you mean perhaps, you were the registrar as I understand?

A. Yes, but I am not competent to opine on Seychelles law.

That was the limit of the evidence that the plaintiff adduced on Seychelles law.

76 Whilst the defendant may have been the registrar of companies of the Seychelles at the material time, there was no evidence that he had any expert knowledge of Seychelles law nor that he needed to have such knowledge to hold what could very well have been simply an administrative post. In the absence of the necessary evidence on foreign law therefore, I must decide this issue according to Singapore law. Under Singapore law, a director is in a fiduciary relationship *qua* the company and not *qua* the members. This is because, as a consequence of a doctrine of separate legal personality, the company is a separate legal entity from the members and the director is its officer not theirs. Also, if a director breaches his duty, it is the company that directly suffers the loss. The situation may possibly be different in the case of a legal regime where shares are bearer shares and only one

director is required. I have no knowledge of that. In any case I am not dealing with such a regime but with the one applicable in Singapore. Further, the defendant submitted that this action was not brought as a derivative action and under the proper plaintiff rule, the plaintiff was precluded from claiming in respect of the fiduciary duties owed to the JV companies. That submission is legally unimpeachable under the company law regime in Singapore. The plaintiff's assertions in this respect have no merit. In any case, as the defendant owed her fiduciary duties by reason of his position as her partner, trying to establish the existence of such duties on the basis of his position in the companies was not only unnecessary but also an overkill. It would have been more understandable had the plaintiff asserted that in the event the defendant was not a partner, he would owe her fiduciary duties because of their respective positions in the JV companies. The plaintiff, however, did not pitch this claim in the alternative. Instead she asserted that the defendant owed her separate fiduciary duties as a partner and as director of the JV companies.

The defendant's conduct and its consequences (issues (c) and (d))

The plaintiff's allegations in relation to bank accounts for the venture

77 In para 5 of the statement of claim, the plaintiff alleged, *inter alia*, that the defendant had failed to diligently discharge his duties to her as a joint venture partner in that he had failed to disclose to her that: (a) there was no bank account for the venture and he had used his personal accounts instead; (b) he had used the bank account that he shared with his wife to receive the plaintiff's contribution to the venture; (c) he had kept the moneys drawn down from the loan facilities granted by Lloyds in a personal account that he maintained with his wife; and (d) he had used funds belonging to the venture for his personal expenses.

78 In her closing submissions, the plaintiff contended that the defendant had a duty to open a separate bank account for the venture into which her contribution and the loan moneys should have been paid. She complained that when she sent her capital contribution of £100,000 to the defendant in late August 1996, he had deposited the moneys into his joint account with his wife in Jersey, Channel Islands. She said that following her capital injection he had expressly told her that that money would subsequently be rerouted to a London bank account but had failed to take this step. The plaintiff also said that simply by failing to keep venture funds separate from his personal funds, the defendant had breached his fiduciary duties as a partner. The failure to open a separate JV account was, on similar grounds, a similar breach.

79 The defendant's answer to the allegations relating to the venture account was that the parties had expressly agreed that they would use their personal bank accounts to hold venture moneys and each party would account to the other for the moneys that he or she held. The defendant was not in breach of any duty because the parties had contemplated mixing funds. Further, the plaintiff was estopped by convention from asserting such a breach because she also mixed her own moneys with JV funds.

80 As partners, both parties had to account to each other for the joint venture funds that came into their respective hands whether the same emanated from the parties themselves, from loans or from the business the partnership carried on. Whilst as a matter of practice, it is certainly preferable and safer that venture moneys be kept separate from the personal moneys of each partner, such a procedure is a matter of prudence rather than a legal obligation that one party owes to another unless they have specifically agreed that this should be the case. Therefore, whether a joint venture account was supposed to be opened to receive the moneys of the venture, is a question of fact.

81 During cross-examination, the plaintiff admitted that the defendant had told her to send her

capital contribution to his personal bank account in Jersey. She agreed that that account was held jointly with his wife and that she had known that this was a joint account because he had told her so. She was questioned as to why she had not mentioned in her correspondence with the defendant on the remittance that there had been an express agreement to open a joint venture account. Her reply was that she had not thought it was so important at the time. Subsequently it was put to her that not once had she ever asked where or which were the joint venture accounts that the defendant had promised to set up. Her response was that she had not raised any question on this at all during the period of the venture because she had not known that there was anything wrong. When it was put to her that she had never raised this issue because it had not been contemplated by the parties that a separate joint venture bank account would be established, she disagreed. It is notable, however, that at one stage in court she said that she did not know whether there was an express agreement on the opening of a joint venture bank account. What had been discussed was that, for tax purposes, the money was to be sent to Jersey and thereafter the defendant would send it on to his account in the UK.

82 Having regard to the above testimony and the other evidence, it appears to me that there was no agreement between the parties that there should be distinct and separate bank accounts for the venture. Each party used his or her own accounts to deposit moneys belonging to the venture and there was no hint during the existence of the venture that this was not supposed to be the case. The defendant used his personal accounts for servicing the various loans and issuing cheques for various matters. According to him, this was because the accounts held at Lloyds by the companies were not current accounts. The plaintiff received tenancy rentals in accounts held in her own name or that of Pertama. She also admitted to mixing rental income from her own properties with the JV moneys held in Pertama's bank accounts. The plaintiff drew on Pertama's accounts for various reasons and most probably some of her withdrawals did not relate to the venture. She admitted to this in cross-examination when she said that she had used the Pertama account "for my things" and then explained that she could make remittances from the Pertama account from outside of the UK if she wanted to use moneys earned by her own companies. I cannot establish what moneys in the account were from her own companies and match these with her withdrawals as the plaintiff did not give discovery of the full statements of Pertama's bank account. She redacted numerous entries in the statements of account on the basis that they were irrelevant to the action in that the entries did not relate to the venture. I can only conclude that the redacted entries would indicate that although the bank account contained both moneys belonging to the venture and the plaintiff's own moneys some of the venture moneys may have been used for purposes unrelated to the venture.

83 In the circumstances, I find that not only was there no agreement for a separate account to be established to hold venture moneys but also that the parties had a practice of mixing venture funds with their own funds and were both content for this practice to continue during the period that the venture continued. It was only after the venture broke down that the plaintiff complained about the failure to segregate venture moneys from personal moneys. In my view, that complaint was made far too late to found the ground of an allegation of breach of duty against the defendant. The plaintiff's claim that the defendant was in breach of a duty to (a) open a separate joint account, (b) keep the joint venture moneys separate from his own personal moneys, and (c) remove venture funds from the account held jointly with his wife, must therefore fail.

84 There was a fourth complaint in connection with the venture moneys and this one was substantiated in that the defendant did admit in evidence that he had used moneys held in trust for the venture for his personal needs. He did not tell the plaintiff of this or ask her permission to do so. His actions were therefore in breach of his obligation as a partner not to profit from the partnership, to the exclusion of the plaintiff, and of the express term of the oral agreement that the parties would account to each other. The defendant submitted that the plaintiff was estopped from making this

complaint because she had done the same thing as indicated by the numerous redactions in the Pertama bank statements and her admission that the Pertama account contained both her personal moneys and the venture's moneys. It does seem inequitable to allow the plaintiff to complain of conduct that she also practiced. Further, the plaintiff did not show how she had suffered loss as a result of this breach. Her counsel did not lead evidence on this nor submit on the point. As the venture made a profit and there is sufficient money in the fund presently held on behalf of the venture to ensure each party receives his or her full entitlement to that profit, a finding of breach on the part of the defendant has no material consequences.

The plaintiff's allegations in relation to the keeping and maintenance of proper records of the JV properties, their purchase, mortgage and sale

85 The plaintiff's allegations on the defendant's failure to keep and maintain proper records of the properties purchased and sold by the JV companies and of all documents relating to their mortgage are contained in sub-paras (e) and (f) of para 25 of the statement of claim. In her closing submissions, the plaintiff did not expand very much on these allegations. All she said was that the defendant had failed to keep proper records of all the dealings in respect of the partnership, that he had failed to provide mortgage statements to her and that he did not provide her with the completion statements in relation to the JV Properties. She did not make any submissions as to how the alleged failures in this regard had caused her loss or damage.

86 The defendant submitted that this claim of breach of duty was belated, and thus vexatious, since the allegation that the defendant had failed to keep records was only made when the statement of claim was amended in October 2005. He also asserted that he did not have any fiduciary duty to keep records and pointed to the plaintiff's admission during cross-examination that at the outset of the venture, the parties had not discussed any obligation on the part of the defendant to keep records. She had also agreed that in the correspondence between her and the defendant there was nothing that suggested that she required the defendant to keep documentation relating to the purchase and sale of the JV properties. When asked to explain why she said that the defendant had an obligation, the plaintiff replied that she was the one who was supposed to be doing the running around and buying the houses and he was the one who had to do all the legal things, keep the documents and get the mortgages. If the person who was arranging for the mortgage loans did not keep the mortgage documents, who was supposed to do it, she asked. It was not her job to get the mortgage documents and keep the records.

87 From an objective point of view, each of the partners must have had an obligation to keep full records of whatever he or she was doing on behalf of the venture to the extent that such documents were available to him or her. It also appears from the masses of documents that were put in evidence that, by and large, both parties fulfilled this obligation. In her closing submissions, the plaintiff did not itemise the documents that she said were missing or had not been provided to her. The only itemisation was set out in appendix 1 of the further and better particulars of the re-re-amended statement of claim filed on 9 May 2006. Some of the items in this list were frivolous, for example, item 1 of the list was "mid June 1996 Agreement in the Defendant's House" which was a non-existent document as the plaintiff herself asserted that the agreement was an oral one. Further, items 7 and 14 related to correspondence to Philippsohn Crawfords Berwald and their replies and these being correspondence between Lloyds and its own solicitors, the defendant had no access to those documents. Then, item 17 was a copy of a letter the defendant sent the plaintiff. It cannot have been his duty to keep a copy of that letter in order to give it to her subsequently if she had lost it.

88 In addition, the list itemised several documents that must have been generated by Mapletoft or have been in Mapletoft's possession in relation to the purchase and sale and mortgage of the six JV

properties that that firm handled. Mapletoft was instructed by the plaintiff to handle these transactions. Mr O'Sullivan accepted these instructions from her and reported to her on the transactions as they progressed. Mr O'Sullivan testified that he had a close solicitor-client relationship with the plaintiff spanning some ten years and the plaintiff herself admitted that she had used Mapletoft for a number of years prior to the venture. The evidence showed that the plaintiff corresponded with Mapletoft on the mortgages as well as on the purchases. Mr O'Sullivan testified that he dealt with the plaintiff on the six properties and had minimal contact with the defendant. The correspondence bears out that evidence. In addition, the plaintiff held powers of attorney from the JV companies giving her authority to act for them in all matters relating to their respective JV properties. These powers of attorney were executed in late 1996 and were subsequently received by the plaintiff though the actual date of receipt is not clear. In any case, the powers authorised the plaintiff to *inter alia* manage the JV properties; buy, sell or create interests in the JV properties; make contracts or sign on behalf of the respective JV companies; and do all acts that may be delegated to an attorney. As far as the documents therefore that were in Mapletoft's possession or were created by Mapletoft, the plaintiff had full access to them and was perfectly able to create and keep her own records in respect of them. In fact, the plaintiff received several files from Mapletoft and did not disclose this in this action until after Mr O'Sullivan had filed an affidavit on 18 July 2006 and testified that he had given his files to her. In one of the earlier tranches of the trial, when the plaintiff was questioned as to whether she had asked Mr O'Sullivan for documents she replied that she did not get any documents. As far as the plaintiff's complaints in relation to this class of documents are concerned, they are without foundation and should not have been brought. The plaintiff had full access to the documents and exercised such access.

89 There were, however, additionally, a number of items on the list of documents that the defendant should have had and should have kept for the purposes of maintaining proper records for the venture. These items related to the loan facilities and the dealings between the defendant and the JV companies and Lloyds. It would have been easier for the plaintiff had these documents been all neatly filed and organised and given to her. It is not, however, at all clear what damage the plaintiff suffered by reason of not receiving these documents in such condition from the defendant. Further, the JV companies had given full authority to the plaintiff to obtain any information she wanted from Lloyds. Additionally, on 18 October 2000 and on 28 August 2001, the defendant wrote to Lloyds to authorise the plaintiff to inspect, view and get disclosure of all documentation related to the JV properties. According to the testimony of Mr Wallace Wong from Lloyds, these letters were accepted as authorising the plaintiff to obtain information and documents from the bank. In fact, the plaintiff and the defendant had a meeting with the representatives of Lloyds so that the plaintiff could make enquiries about the loans. The plaintiff also corresponded with Lloyds in August 2001. Subsequently, she obtained an order for production of banker's books against Lloyds and conducted three rounds of inspection at the bank's premises.

90 The plaintiff has not established any loss or potential loss to her by reason of any failure on the defendant's part to give her documents during the course of, or subsequent to the end of, the venture. She stated repeatedly in court that she was afraid that she continued to have liability to Lloyds because the defendant may have taken additional loans against the guarantees and the JV properties. Lloyds, however, confirmed repeatedly that there were no outstanding liabilities other than those disclosed to the plaintiff in 2001. The plaintiff admitted under cross-examination that she was aware that the last three facilities given by Lloyds had been fully repaid. Mr Wallace Wong testified that no further advances of £55,000 each had been made to the defendant, as the plaintiff had feared. Mr Tam, the court expert, also testified that having gone through all the documents and accounts, he had not seen any evidence to suggest that any advances had been made other than those disclosed in the documents. The advances disclosed in the documents were those that were made to finance the purchase of the properties. In this respect, Lloyds confirmed in court that the

loan facilities had been fully repaid and that the plaintiff had no further liability to them under the guarantees that she had signed.

91 The plaintiff also alleged that there was a change in terms of the credit facilities. Mr Wong denied this. He explained that the change of facility account numbers was due to the implementation of a new computer system. He testified that there could not have been a change in the facility terms because such a change would have required risk management approval within Lloyds and no such approval had been given. This testimony was not challenged.

92 Whilst there may have been a technical breach in that the defendant's record keeping was not as good as it should have been, I cannot find any financial or other loss or damage caused to the plaintiff by reason thereof. This complaint by the plaintiff is therefore unfounded.

The sale of Peckham Rye

93 The pleaded allegation in this regard was that the defendant had failed to secure the best possible price for the sale of Peckham Rye. This property was mortgaged to Lloyds to secure a credit facility in the sum of £84,000 which was fully drawn down. Peckham Rye was sold by Lloyds in a mortgagee's sale. Prior to the sale, Lloyds appointed a firm called Grant Stanley as the receiver of the property and the receiver appointed the firm of Andrews Robertson to auction the property. The auction took place on 18 September 2002 and Peckham Rye was sold for £260,000.

94 In her closing submissions the plaintiff dealt only briefly with Peckham Rye. She first stated that the defendant failed in his duty to ensure that the mortgage interest in respect of Peckham Rye was serviced in accordance with the terms of the loan and this failure had resulted in the forced sale. This was not a pleaded allegation. She repeated this assertion later in the submissions when she said that the forced sale of the property was brought about by the defendant in retaliation for the plaintiff's refusal to perform her part of the settlement. This was another unpleaded allegation. The plaintiff had no basis on which to make such assertions in her closing and I cannot and will not deal with them. The plaintiff did not make any submission that directly supported the pleaded allegation that the defendant had a duty to obtain the best possible price for this property and had breached that duty. That must have been because she had realised, finally, that the defendant had no control over the sale of Peckham Rye and that there was no basis for saying that the sale was conducted in an improper manner. Additionally, she had not adduced any evidence that Peckham Rye could have been sold for a better price than it actually fetched. Mr David Scharfer of Grant Stanley gave evidence to the court that he had valued the property as being worth £225,000 to £250,000 and this valuation had been agreed with by Andrews Robertson. He also stated that the property was sold at a very satisfactory market price that was well above the reserved price. This evidence by Mr Scharfer was not challenged by the plaintiff. In all the circumstances, I find that the allegation was unsustainable.

Disbursement of the proceeds of sale of St Aidans and Mundania

95 The pleaded allegation was that the defendant acted in breach of his fiduciary duty because he failed to disburse the proceeds of sale of St Aidans and Mundania to the plaintiff. These properties were sold in 1999 and the proceeds of sale were sent to and kept by the defendant. The plaintiff said in evidence that the defendant told her that he would retain the proceeds "for safekeeping" and that whilst she was not happy about this she dared not question him. The sale proceeds were sent to him as he demanded and the plaintiff hoped that he would send her her share in due course. Subsequently, when nothing was received, she tried to speak to him about it but he was difficult to contact.

96 The defendant did not deny that he had kept the proceeds of sale. His submission was that he was not required to split the proceeds because he was supposed, under the terms of the oral agreement, to hold moneys towards repaying the loans. Further, the plaintiff had never asked for the proceeds to be split. He asserted that instead it was agreed between him and the plaintiff that the proceeds would be kept with an account with Lloyds in Labuan towards future repayment of the loans. The plaintiff and her husband had given the solicitors instructions to remit the sale proceeds to Lloyds rather than to distribute it. In court, the plaintiff had admitted that she did not disagree with, as she put it, the defendant's instruction that the money be sent to Lloyds. She also admitted in court that she had not written to the defendant to ask for the sale proceeds from either St Aidans or Mundania to be split.

97 The defendant submitted that in the light of the evidence, there was no fiduciary duty to split the proceeds of sale since it was always agreed that the defendant would retain moneys to pay the bank and the agreement between the parties was that they would simply account to the other for the moneys that they held on behalf of the venture. The plaintiff's own behaviour bore out this agreement. She collected rent in respect of the JV properties every month but she did not split the net proceeds from month to month or at any time. At no time during the course of the venture did the plaintiff pay any part of the rental income to the defendant. In any event, the plaintiff had suffered no loss as the movements of the net proceeds of sale had been traced in Mr Tam's report.

98 During the course of the trial, it appeared to me that the plaintiff might have had cause for complaint regarding the non-distribution of the sale proceeds. On further consideration of the evidence, however, I have come to a different conclusion. Whilst the plaintiff did plead that one of the terms of the oral agreement was that the rental proceeds and the profits from the resale of the JV companies would be shared equally between the parties, she did not plead any term relating to when such division of profits was to take place. It appears to me that the issue of date or dates of distribution was one of the issues that the parties thought they did not need to define distinctly at the outset. There was no subsequent discussion on the point but the parties' conduct appears to indicate that there was no hard and fast rule on distribution. The defendant certainly never asked the plaintiff for any share of the rental proceeds during the course of the venture and the plaintiff herself did not make any offers in that respect. It may be worth mentioning that the plaintiff collected a substantial amount as rent; at one time she said she had collected some £308,000 whilst Mr Tam concluded that she had actually received £416,719 (a figure the plaintiff disputed).

99 Further, the plaintiff's conduct in agreeing to the remittance of the sale proceeds of St Aidans and Mundania to Lloyds in Labuan without any contemporaneous request for the proceeds to be split between the two of them once the funds arrived in Labuan was a clear signal that she was not at that time concerned about the funds being split. She admitted that she did not make any written request thereafter for her share in the funds. She attempted, rather weakly in my view, to assert that she had tried to ask the defendant for the funds but had not been able to do so because he had refused to answer the telephone. This was not a good explanation for her failure to request a split. The plaintiff wrote copiously to the defendant during the course of the venture and sent these letters out by facsimile transmission so that they reached him quickly. I am sure that if she had really wanted her share of the sale proceeds immediately or if she had considered that she was entitled under the oral agreement to an immediate distribution thereof, she would have informed him of this in writing in no uncertain terms. Additionally, her failure to complain about the non-distribution until the proceedings were far advanced indicates that this was not a serious complaint. I therefore hold that there was no breach of duty on the defendant's part in relation to this matter.

The settlement agreement (issue e)

100 A significant defence put forward by the defendant to this action for the taking of an account against him was that it should never have been brought because the settlement agreement constituted a compromise and final settlement of the parties' rights. In his closing submission, the defendant maintained this stand but said he was doing so only for the purpose of making the submission that the costs of the action had to be borne by the plaintiff.

101 The plaintiff challenged this stand on the basis that the settlement agreement was not valid or not enforceable. She put forward the following grounds:

> (a) that the defendant had failed to advise the plaintiff to seek independent legal advice prior to signing the settlement agreement as he should have done being sole director of the JV companies;
>
> (b) the defendant had coerced the plaintiff to sign the settlement agreement;
>
> (c) if the court found that a solicitor-client relationship between the plaintiff and the defendant had existed, the settlement agreement, being manifestly disadvantageous to the plaintiff, should be set aside on the basis that her signature had been procured by the exercise of undue influence on the part of the defendant; and
>
> (d) cl 13 of the settlement agreement contained a condition precedent that had to be performed by the defendant prior to the plaintiff being obliged to carried out the settlement agreement and as the condition precedent was not met, the plaintiff had been released from her obligations under the settlement agreement.

102 The first three grounds cannot stand. In relation to the first ground, I have already found that the defendant did not owe the plaintiff any fiduciary duty in his capacity as a director of the JV companies. As far as the second ground is concerned, it is not available to the plaintiff because she did not plead duress and it is established law that under O 18 r 8 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) a defence of duress has to be specifically pleaded with proper particulars. See for example *Goh Chok Tong v Chee Soon Juan* [2003] 3 SLR 32 and *Tudor Grange Holdings Ltd v Citibank NA* [1991] 4 All ER 1. The third ground was also not pleaded and, in any event, I have found that there was no solicitor-client relationship between the plaintiff and the defendant.

103 The only ground of substance is the last one. This ground depends on the true interpretation of cl 13 of the settlement agreement which reads:

> [The plaintiff] has agreed to immediately retire STG121,000.00 being the outstanding Lloyds Bank loan which will be a bank loan expense she incurs under item 7 above on condition [the defendant] shall procure Lloyds Bank to release all charges, liens they have on the unsold Properties, deliver up the Certificate of title/Title Deeds discharge to the unsold Properties directly to Victor Adam Ibrahim (who shall hold the same for [the plaintiff and the defendant] as stakeholder) and release [the plaintiff] from all liability under all the personal and continuing guarantees she has given to Lloyds Bank for the loans for the Companies/Properties and any other liabilities to Lloyds Bank [the plaintiff] has and for this purpose she hereby confirms that other than in respect of the Companies/Properties, she has no relationship with Lloyds Bank involving liability for her.

104 The plaintiff submitted that under cl 13, the defendant was obliged to procure the release by Lloyds of their remaining mortgages over the JV properties and delivery by Lloyds of the title deeds in respect of the properties to VAI and also her release from her liability under the guarantees that she

had given to Lloyds ("her guarantees") *prior* to her being obliged to pay Lloyds the sum of £121,000 in settlement of the outstanding amounts due to Lloyds. Thus, she said, the defendant's obligation under cl 13 was a condition precedent to her obligation under the same clause arising, and since these matters had not been procured by the defendant, she not only did not have to make the payment but could treat the settlement agreement as terminated by breach.

105 The plaintiff's version of events was that the breakdown of the relationship with the defendant came about because in September 2000, she made certain discoveries from the documents that she had obtained from the accountant (one Daniel Ariokasamy) who was then handling the venture's accounts. The plaintiff began to question the defendant about the moneys in his various personal accounts and thereafter she demanded that he close the venture accounts and redeem the guarantees. On 10 September 2000, the defendant gave notice of redemption to Lloyds. Thereafter there was an exchange of correspondence and negotiations brokered by VAI culminating in the settlement agreement in August 2001. The plaintiff asserted that the settlement agreement was drafted and settled by the defendant. At the time, she was concerned about her guarantees and wanted to be released from her obligations under them and also retrieve the original guarantees. Thus, when the defendant sent her a draft of the settlement agreement with a proposed cl 13 which stated that the plaintiff "will retire STG121,000 … *and* [the defendant] shall procure Lloyds Bank to release all charges …" (emphasis mine), the plaintiff amended the draft by deleting the word "and" and replacing it by the phrase "on condition". Her intention she said was to make the discharge of the liabilities a condition precedent to her obligation to pay Lloyds.

106 The plaintiff also alleged that the defendant did not tell her at the time that the payment of £121,000 to Lloyds had to be made prior to the release of the charges. Whilst in his submissions the defendant had asserted that the normal course of events in the discharge of loans is for payment to be made first and documents released later, if that was true it must have been something that he knew at the time the settlement agreement was signed and yet he had not informed the plaintiff of this procedure. Further, although the defendant was also aware at the time of the plaintiff's concerns relating to the full discharge of her liability to Lloyds, all he did was to say that he had complied with the settlement agreement and that he was not willing to make further payments to the bank.

107 The defendant submitted that it would be absurd to construe cl 13 as a condition precedent requiring him to obtain a release of the plaintiff's liability and the return of her guarantees before she had paid the outstanding sum of £121,000 due to Lloyds. He urged me to apply the principle of construction set out in *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235 which is that where a contractual provision lends itself to different interpretations, the court should reject the interpretation which leads to an unreasonable result. At p 251 of the report, Lord Reid observed:

> The fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they shall make that intention abundantly clear.

In the present circumstances, the true interpretation of cl 13 had to be that the defendant was only obliged to procure the release of the charges and the delivery of the documents upon the plaintiff's payment of the sum of £121,000 to Lloyds which would be the normal course of events in the discharge of a loan.

108 The defendant also submitted that he had performed his obligations under the settlement agreement. He had taken steps towards redemption of the outstanding mortgages and sought confirmation that the plaintiff and the defendant would be released from their guarantees upon

redemption. Lloyds had responded in mid August 2001 to state that upon receipt of the full redemption moneys, the title deeds would be sent to the parties' solicitors in order that the discharge formalities could be arranged. On 14 August 2001, Lloyds informed the parties that the amounts outstanding were £1,901.97 for Glengarry, £62,082.29 for Peckham Rye and £63,096.55 for Hansler. That made a total of £127,080.81. On 15 August 2001, the defendant remitted the sum of £6,080.81 to Lloyds to settle the difference between the amount due and £121,000.

109 On 16 August 2001, Lloyds wrote separately to the plaintiff and the defendant to confirm that they had been discharged from all liabilities as guarantors for the facilities granted to Untong Properties Ltd, Mutiara Properties Ltd, Greenholm Assets Ltd, Anak Properties Ltd and Senang Properties Ltd. By another letter dated the same date, Lloyds confirmed that upon full redemption of the loans given to Tanah Merah Properties Ltd (Peckham Rye), Elsenham Consultants Ltd (Glengarry) and Bintang Properties Ltd (Hansler), there would be no outstanding liabilities due to Lloyds from any of the eight companies or from the plaintiff or the defendant. In view of this, the defendant said, there was no basis for the plaintiff to refuse to perform her obligations under cl 13.

110 What are the possible ways in which cl 13 can be interpreted? The first is that put forward by the plaintiff which gives great emphasis to the phrase "on condition" and asserts that because of the position of that phrase before the setting out of the defendant's obligation, the true meaning of the clause is that the defendant had to fulfil his part before the plaintiff did hers. Is that a reasonable result? The practical result of giving effect to this interpretation would be that, given the well-known reluctance of lenders to release security they hold for a debt until such debt has been fully settled, the clause would have obliged the defendant to either pay Lloyds himself or provide it with sufficient and satisfactory alternative security to persuade it to release the guarantees and the charges over the JV properties. The first course would have involved him coming up with funds and the second course would have involved, at the least, expense and delay as lawyers would have been needed to effect the change in the security. If the defendant had taken the first course, the plaintiff's commitment to pay £121,000 would have become unnecessary (and in any case her commitment was to "retire STG121,000 being the outstanding Lloyds … loan" and not to reimburse the defendant for money paid by him to Lloyds) and if the defendant had taken the second course, then the plaintiff's payment of £121,000 would have been made soon after the creation of the new security and would have resulted in the costs of creating that security being wasted. Apart from these practical points, the plaintiff's interpretation means that no effect is given to the word "immediately" in the phrase "[The plaintiff] has agreed to immediately retire …". That word implied that the plaintiff had agreed to make the payment within a short time of the conclusion of the settlement agreement. Further, parties must be taken when entering into an agreement to be acting in good faith with the intention that the agreement shall be given effect to. The plaintiff, an experienced businesswoman and investor, must have been aware of the stand generally taken by lenders with regard to release of security and, therefore, if she really intended, in August 2001, that cl 13 should oblige the defendant to ensure that all the charges were discharged and all the guarantees were released before she had to pay a single pound, she would have used much clearer language and would have deleted any reference to an obligation on her part to make immediate payment. I conclude therefore that the plaintiff's presently proffered interpretation is not the correct interpretation.

111 The second way of interpreting cl 13 is the defendant's, that is, that the defendant was only obliged to procure the release of the charges and the delivery of the documents after the plaintiff's payment of the sum of £121,000. Whilst this interpretation gives effect to the normal sequence of events in the discharge of secured loans and also gives a purpose to the word "immediately", it places no weight at all on the use of the words "on condition" and thus renders those words otiose. An interpretation that has such an effect is not attractive although the defendant's interpretation is more reasonable, and thus more likely to be the true construction than that given by the plaintiff.

112 There is, however, I think, a third way of interpreting the clause. That is to say that the condition on which the plaintiff's performance was premised was that the defendant would procure a confirmation from Lloyds that it would upon payment release all charges, deliver up the title documents and release her from liability under her guarantees. This interpretation involves reading a few extra words into the clause. It would, however, have the advantage of giving full effect to both "on condition" and "immediately" because it would mean that an immediate payment would be required from the plaintiff after the defendant had fulfilled the condition. Bearing in mind the circumstances that existed at the time, *i.e.*, the plaintiff's great anxiety about her liability to Lloyds and the distrust that she had of the defendant so that she would not accept his word that her payment would settle all the liabilities, such an interpretation seems to me to be the true interpretation of the clause. If this interpretation is the correct one, then the defendant had met the condition by 16 August 2001 when Lloyds gave the confirmations I have referred to in [109] above or, if not then, by the end of the month when Lloyds gave a further letter confirming that in respect of the three outstanding loans, it would release its security on payment. If this interpretation is incorrect, then the correct interpretation must be that given by the defendant as the plaintiff's interpretation has to be rejected for the reasons I have given. On the defendant's interpretation too, he had fulfilled his obligations under the clause in that it was clear from the correspondence that upon payment all the security would be released.

113 On this issue therefore, I find for the defendant. The plaintiff's assertion that she was released from her obligations under the settlement agreement by reason of the defendant's breach must be rejected.

The status of Glengarry (issue f)

114 The plaintiff's position was that Glengarry was not and was never intended to be one of the JV properties. She did not claim this property for herself but asserted that DF was its beneficial owner. The plaintiff cited several matters in support of her assertion. First, Glengarry was a leasehold property whereas the JV properties were freehold. Secondly, Glengarry is a small one bed-roomed flat whilst the JV properties were houses which each had four or more bedrooms. Then, the JV properties were let on assured shorthold tenancy agreements while there was no tenancy agreement for Glengarry. It was occupied by DF rent-free. Finally, the renovation works done to Glengarry were paid for by the plaintiff and not invoiced to the venture unlike the cost of renovation works to the JV properties.

115 The plaintiff said also that when she informed the defendant that DF was anxious to move into Glengarry, the defendant made no point as to the rental income or any point in respect of DF moving in as he would have done had the property belonged to the venture. When the plaintiff subsequently forwarded accounts of the venture to the defendant, Glengarry was not included in these accounts. Further, there was no correspondence that supported the defendant's assertion that Glengarry was a JV property. In the plaintiff's correspondence with the defendant too, she had referred to Glengarry as "David's flat" and at one stage she had accused the defendant of refusing to send her the money drawn down to enable her to purchase the flat for DF. The plaintiff had used her own money to finance the venture and that letter was a request that she be repaid so that she would have funds to buy Glengarry for DF. The defendant did not respond to the plaintiff's accusation or challenge her statement that she had wanted her money returned to her so she could buy a flat for her son.

116 The defendant on the other hand argued that all the objective evidence showed that Glengarry was a JV property as it was sourced, bought, financed and treated like any other JV property during the currency of the venture. He said that the purchase of Glengarry was handled in the same way as the purchases of all the other JV properties. In fact, there was a specific agreement between the

plaintiff and the defendant for its purchase. In this respect, the defendant pointed to testimony from the plaintiff that when she identified Glengarry as being suitable for purchase, she informed the defendant and obtained his agreement in the same way as she had for the other seven JV properties. Glengarry was purchased by an offshore company, Elsenham, in which the defendant was the sole director and the plaintiff and the defendant held equal shares. Elsenham obtained financing from Lloyds and this was secured by a mortgage on Glengarry and a joint guarantee from the plaintiff and the defendant. In a letter from the plaintiff to the defendant dated 11 March 1998, the plaintiff agreed to using money from "the pool" to purchase Glengarry if a bank loan could not be secured in time. The defendant said that "the pool" referred to the venture funds held by him in his personal bank accounts.

117 Further, the plaintiff had admitted that her correspondence with the defendant dealing with Glengarry showed that Glengarry was treated in the same manner as the other JV properties. Even the correspondence between the plaintiff and the defendant at the time of the breakdown of their relationship showed that the plaintiff regarded Glengarry as a JV property. Examples of these were given. In a letter to the defendant dated 18 September 2000, the plaintiff stated:

> As to the eight properties, you may keep Goodrich and Upland. You have kept the sale proceeds of Mundania and St Aidan, these you may retain;
>
> As to Hansler, Peckham Rye, Silvester and *Glengarry* these are to be transferred to me with the respective mortgages to be redeemed by you …" [emphasis added]

When the plaintiff's husband sent the defendant certain accounts for the JV properties in October 2000, the accounts included Glengarry. In an e-mail to the defendant on 20 January 2001, the plaintiff said "The accounts are simple mathematics. There are only eight houses purchased and two sold". Then she complained "After the purchase of Goodrich and Glengarry you refused to buy more properties".

118 In my judgment, the evidence taken as a whole supports the defendant's position rather than the plaintiff's. Whilst the plaintiff may have wished to purchase Glengarry to, at least initially, provide a home for DF and his father, the fact remains that she used the venture in order to make this purchase. She asked the defendant whether he would agree to the purchase (something she need not have done had she intended to buy the property as a gift for her son) and when he did, the property was bought in the name of an offshore company and was mortgaged to Lloyds in the same way as all the other JV properties. The plaintiff's stand was that she was forced to do this because she had no money to buy Glengarry personally since she had put up a lot of the funds required for the purchase of the JV properties before the credit facilities and loans were in place. She also asserted that the defendant had refused to return her stake from the loan funds drawn down. In the course of cross-examination, however, the plaintiff admitted that at the time of the purchase of Glengarry, the total credit balance in her bank accounts well exceeded its purchase price of £46,000. The plaintiff also admitted that she did not ask the defendant if she could use the rental moneys she was holding in Pertama's bank account to reimburse herself in order to purchase Glengarry although she could have made such a request. Before the relationship broke down and not too long after Glengarry was purchased, the plaintiff wrote to the defendant's wife asking for the mortgage and interest statements for all eight JV companies, *i.e.*, including Elsenham, so that she could pass this information to the venture's accountant. At that stage certainly she did not treat Glengarry any differently from the way in which she treated the other JV properties. It was only in October 2000 that she started asserting that Glengarry belonged to DF and even then she was not consistent about this assertion. It should be noted that DF did not remain in occupation of Glengarry throughout and after he vacated the premises, the plaintiff let them out. I therefore find that Glengarry is a JV property.

Remuneration for the plaintiff (issue g)

119 The plaintiff pleaded that it was an express term of the oral agreement that she would be entitled to reasonable compensation for the time, effort and expenses incurred and expended by her in performing obligations for the venture. As an alternative, she averred that it was an implied term of the venture that she would be entitled to such compensation. As a further alternative, she claimed for payment on a *quantum meruit* basis.

120 The defendant strenuously resisted this claim. He submitted that it was clear from the evidence given by both parties that there was no discussion at all, let alone an agreement for the payment of compensation to the plaintiff. The plaintiff had not said in her affidavit of evidence-in-chief that such an express term existed but simply stated:

> I understood from these discussions that I would be entitled to reasonable compensation for the time, effort and expenses incurred and expended by me in performing my side.

In court, she admitted that she had never requested fees during the currency of the venture for letting and managing the JV properties. Instead, in her fax to the defendant of 25 February 1997, the plaintiff said that there would be no commissions deducted if she as opposed to a third party, rented out a JV property:

> Mundania was let by Roy Brooks estate agents early Dec. As you know, St Aidan's we will rent out by ourselves for you. So there will be no commission deducted and you may have the whole rent. Naturally we will be happy to arrange the sale of these properties if you so require at no charge.

The plaintiff had only made a claim for compensation for her time and effort on 6 October 2000 after her relationship with the defendant had broken down and even then she made no reference to an express term. She simply asserted that the defendant had told her "you and Pierre can have your living from that". The defendant submitted that this alleged statement (which he denied making), only meant, at the most, that the plaintiff was to make a living out of the profits of the venture. Even on re-examination the plaintiff admitted that the defendant never "actually spelt out the exact terms".

121 The plaintiff, in closing, did not pursue the allegation of an express oral term. Instead, she chose to argue that there was an implied term in the oral agreement that she would be reasonably compensated for her efforts. In this respect, the plaintiff's case can be summarised as follows. She and her husband were persuaded by the defendant to give up the opportunity of other employment (or the opportunity of making investments for their own account only) and devote all their time and effort to the venture. She expended a great deal of money looking for houses in London. She was involved in sprucing these properties up, marketing them for sale, maintaining them for tenancy and collecting the rentals. Although she initially insisted that the defendant had promised her a fee in exchange for her work in the venture, during cross-examination she qualified her initial position. She said that the defendant did not use the word "fee". Instead, he said "you and Pierre can have your living from that because you will be doing your job and I will be a lawyer here".

122 I must therefore consider this as a claim based on *quantum meruit* arising from a contract. In *Serck Controls Ltd v Drake & Scull Engineering Ltd* [2000] 73 Con. LR 100, Serck carried out design and installation works on a site owned by Drake. Such works were envisaged to be a sub-contracted part of overall works at the site. The existence of this sub-contract between Serck and Drake was contested, as was the basis on which Serck should be paid for work done on the site. In relation to *quantum meruit*, Hicks J had this to say (at 34-5):

> A quantum meruit claim may, however, arise in a wide variety of circumstances, across a spectrum which ranges at one end from an express contract to do work at an unquantified price, which expressly or by implication must then be a reasonable one, to work (at the other extreme) done by an uninvited intruder which nevertheless confers on the recipient a benefit which for some reason, such as estoppel or acquiescence, it is unjust for him to retain without making restitution to the provider … Robert Goff J describes the basic measure of recovery in restitution as being "the reasonable value of the plaintiff's performance -- in a case of services, a quantum meruit or reasonable remuneration" (B P Exploration (Libya) Ltd v Hunt [1979] 1 WLR 783, at pg 805D – my emphasis)
>
> At the first end of the spectrum described in the first sentence of the last paragraph the measure should clearly be the reasonable remuneration of the claimant; at the other it should be the value to the defendant. In between there is a borderline, the position of which may be debatable. It is, however, unnecessary and inappropriate to conduct that debate in the abstract here if, as I believe to be the case, it is clear on which side of the line the present facts lie.

123 It would be noted from the above that two types of *quantum meruit* exist *viz* contractual *quantum meruit* and secondly, restitutionary *quantum meruit*. Where there is an express or implied contract which is silent on the quantum of remuneration or where there is a contract which states that there should be remuneration but does not fix the quantum, the claim in *quantum meruit* will be contractual in nature. Where, however, the basis of the claim is to correct the otherwise unjust enrichment of the defendant, it is restitutionary in nature. It is also relevant that there cannot be a claim in *quantum meruit* if there exists a contract for an agreed sum and there cannot be a claim in restitution parallel to an inconsistent contractual promise between the parties. As Scrutton LJ said in *Steven v Bromley & Son* [1919] 2 KB 722 at 727:

> It is a commonplace of the law that there can be no implied contract as to matters covered by an express contract until the express contract is displaced. A well-known example of this is where an agent works on the terms that he shall receive a commission if successful. That excludes a claim on a quantum meruit for work which does not result in success. But where work is done outside the contract, and the benefit of the work is taken, a contract may be implied to pay for the work so done at the current rate of remuneration, and the terms of the express contract may remain binding insofar as they are not inconsistent with the implied contract.

124 Restitutionary quantum meruit is succinctly summarised in *Lee Siong Kee v Beng Tiong Trading, Import and Export (1988) Pte Ltd* ("Lee Siong Kee") [2000] 4 SLR 559 at [35] to [37]:

> 35. Next, Lee rested his claim for a *quantum meruit* on a restitutionary basis. He relied on the principle which was stated in Goff and Jones *The Law of Restitution* (5th ed, 1998) at p 531:
>
> > *[I]f the innocent party has rendered services or has supplied goods under a contract, which has not been substantially performed and which has been determined by him because of the other party's breach*, he may recover the value of the services rendered or the goods supplied, on a quantum meruit or a quantum valebat respectively, rather than sue for damages for loss arising from the breach. The party in breach cannot deny that he has received a benefit. It is said that because the contract is at an end, he cannot keep the innocent party to the contract price. (Emphasis added.)
>
> 36. The leading authority for this proposition is *Planche v Colburn* (1831) 8 Bing 14. The facts are well known. The defendant engaged the plaintiff to write a volume for publication in a proposed series. The plaintiff wrote part of the book and was ready to complete and deliver the whole.

However, the defendant abandoned the series and refused to pay the plaintiff. Tindal CJ stated that the plaintiff 'ought not to lose the fruit of his labour' and awarded him a sum for the work done even though he had not substantially performed the contract or delivered any part of the product to the defendant. A more recent authority for this proposition is the following part of the speech of Lord Wright in *Luxor (Eastborne) Ltd and Ors v Cooper* [1941] AC 108 at p 141:

> [I]t all comes back to the same issue, namely, that there must be some breach of contract for which damages can be claimed. It has been said in some cases that the claim may be based on quantum meruit on the principles expounded in the notes to *Cutter v Powell* (1795) 6 Term. Rep. 320, according to which the special contract is treated as rescinded and the agent thereupon becomes entitled to claim a partial recompense for what he has done. Such a claim is in the nature of a quasi-contractual claim. It is properly made in cases of contracts for work and labour and the like, where the employer, who has got the benefit of part performance but *before full completion has repudiated the contract*, *may be sued* either for damages for breach *or for restitution in respect of the value of the part performance which he has received*.

37. The crux of such a claim against a party for a *quantum meruit* on a restitutionary basis is the premise that the contract was terminated prematurely as a result of a breach of that party. That principle has no application here. The agency agreement was not terminated prematurely by reason of the breaches on the part of Beng Tiong. The agreement, pursuant to cl 3.8 thereof, came to an end on the expiry of the extended deadline by which Lee was to secure (which he did not) the execution by the personal representatives or trustees of the estate of the sale and purchase agreement for the sale of the properties to Beng Tiong.

[per LP Thean JA]

125 The defendant submitted that there was no necessity in this case for the implication of a term for the payment of compensation. The oral agreement had expressly provided that both parties would benefit from the equal sharing of rental proceeds and profits on resale. In these circumstances, on the authority of *Lee Siong Kee* and *Chitty on Contracts* Vol 2 (H G Beale gen ed) (Sweet & Maxwell 28th Ed, 1999) at para 32-143, there was no room for the implication of a term for further remuneration to be paid to the plaintiff. In my view, that is not entirely correct as both the case and the academic view are authorities for a situation where "the parties' obligations had been explicitly set out in the agency agreement, and there was no room for implying a term as contended". In the *Lee Siong Kee* case, the agency agreement explicitly set out the circumstances in which the plaintiff was to receive certain sums from the defendant and also the circumstances where not only no such sum was payable but all moneys advanced to the plaintiff were refundable to the defendant. That is not the case here. The oral agreement was rather general and vague. Besides agreeing on the profit split, the remuneration for the work done was not specifically discussed. The manner in which the defendant characterised the claim *viz* the distribution of the profits was unduly narrow as the two are not mutually exclusive. They are inversely related. One decides the expenses prior to calculating the profit.

126 From the beginning of the venture, the defendant was riding on the plaintiff's expertise in choosing suitable properties for investment, purchasing and sprucing them up and sometimes engaging in their maintenance and management. The venture was attractive to him because of this expertise of the plaintiff and because he knew that she would be on the ground in London to do all this work and it would not be left to a stranger. It should also be remembered that the parties were contemplating acquiring a number of properties not just one or two. The plaintiff asserted 50 whilst the defendant maintained they were only thinking of 20. Even that latter number is a big one, however, and

sourcing, renovating and managing 20 properties even if not all 20 needed to be worked on at the same time could reasonably be envisaged to require a substantial amount of time and energy. When the parties divided the responsibilities under the venture, they expressly agreed that these duties would be carried out by the plaintiff. It is not inconsistent with that term to imply a term that the plaintiff should be remunerated for such work on a reasonable sum basis. If the parties had both carried out this portion of the venture or some of it through a stranger, they would definitely have had to pay fees and those fees would have been chargeable as part of the expenses of the venture before the profit calculations took place. I therefore find that there is a contractual basis in this case for a claim in *quantum meruit*.

127 As far as the claim for *quantum meruit* on a restitutionary basis is concerned, I do not really need to deal with it in view of the finding above. However, I note that the defendant's argument was that this was not applicable since, as pointed out in the *Lee Siong Kee* case, the crux of such a claim would be the premise that the contract was terminated prematurely as a result of the breach of the party against whom the claim is made. This was not a case in which the plaintiff's performance of her obligation was aborted thereby depriving her of any benefit from the venture. Since the termination was mutual and not as a result of a breach, the defendant submitted that no question of restitution arose. This is a strong point but it seems to me that there may be circumstances where even a mutual termination results in one party unfairly suffering loss which could found a restitutionary claim. However, there is no need for me to go into it on this occasion and I leave the issue open.

128 Having made the finding that there is a valid basis for *quantum meruit*, I must next consider what the plaintiff should be paid. The plaintiff asked to be paid ten percent of rentals earned as a letting fee and five percent of such rentals as a management fee. These fees were not discussed by the parties and the defendant submitted that the plaintiff had not proved that they were reasonable fees. The defendant submitted that the rates put forward by the plaintiff were arbitrary and that as she had not offered any evidence of reasonable rates, her claim had to fail. He also reminded the court that on 6 October 2000 when the claim for remuneration was first made, the plaintiff had not put forward these rates. Instead, she had asserted a "notional figure" of £8,000 per annum and therefore £32,000 for the four years during which the venture had been in operation. This formula was derived she said from the actual expenses incurred in running Pertama. The defendant submitted that the plaintiff had abandoned this formula because Pertama's expenses could not be attributed to the venture since it was used to manage her personal properties as well and the plaintiff had simply gone from one arbitrary assertion to another.

129 The plaintiff did have some evidence in support of her ultimate claim. On 20 September 1996, well before any dispute had arisen, she had written to the defendant pointing out the necessity of setting up a management company and had set out in that letter that the alternative would be to appoint outside property management. She stated that if this alternative was taken, the fees charged by the manager would be between ten and 15 percent. The defendant subsequently agreed to the establishment of Pertama. Additional evidence of the rates charged for such management came from Grant Stanley's stint as receiver of Peckham Rye. There was documentation indicating that it had charged ten percent as management fees for this job. There was no evidence at all, however, of what letting fees would be charged by an independent manager. Bearing in mind that the plaintiff's proposal that she should set up her own management company was made with the purpose of saving the venture money, I do not think it would be reasonable for the plaintiff to charge the venture what an independent manager would. Thus, her remuneration as manager cannot be pegged at the same level as Grant Stanley's. The plaintiff has only claimed five percent of rentals as her management fee and this appears to be a reasonable figure in the light of other evidence. I find that she is entitled to be paid at this rate for her management services. I cannot, however, make a finding in respect of her claim for a letting fee in view of the lack of independent evidence indicating that her intended charge

is a reasonable one.

The cross claims for accounts (issues h and i)

130 To some extent, the cross claims for accounts have been rendered otiose by the appointment of the court expert. Mr Tam and his team carried out a comprehensive and complete review of all documents and records given to him by both parties and produced both an original report and an addendum report. He gave evidence on both reports at the trial. The exercise took a substantial period of time and was a very costly one. For this reason and others set out below in [147] and [148], there is no point making any further order for the taking of accounts of the venture. The only reason to consider whether prior to the trial either party had failed to provide a proper account of the moneys they had handled would be to found an order for costs.

131 I will deal first with the allegations of the plaintiff *vis-à-vis* the defendant. The closing submissions of the plaintiff on this point were rather brief and somewhat disjointed. The plaintiff said that she had requested a full and proper account after the breakdown of the parties' relationship. After many such requests were made, the defendant had provided a purported account (in 16 volumes) allegedly prepared by GSP. That firm's letterhead identified them as consultants, not as accountants. The plaintiff was concerned that the defendant was being elusive and figures were being produced without supporting documents. The plaintiff stated also that she had not been able to understand GSP's account and had had it reviewed by Ernst & Young. Ernst & Young had told her that there were several information gaps in the account which prevented them from accurately assessing it. Whilst the 16 volumes had been produced in court, she submitted that on cross-examination, it was shown that several if not most of the payment vouchers were not verified. More importantly, a number of the documents produced by the defendant were duplicated from the plaintiff's bundle.

132 The plaintiff said that her fears in respect of the defendant's inadequate accounting were confirmed when she was informed by Duncan Merrin's letter of 24 September 2003 that they could not trace the sum of £67,200 which was the amount drawn down from the loan facility granted to Tanah Merah Properties. She then requested the defendant to account for the draw down. The defendant failed to provide documentary evidence in support of the draw down. In court, the defendant claimed that the completion statements were simply pro forma documents. There was not, however, one document that supported that statement and therefore it followed that the plaintiff's concern as to the failure to account was more than justified. The plaintiff also submitted that when, during cross-examination, the defendant was asked to explain the billings for the JV companies made through his former practice and then transferred to his new practice, he was most evasive.

133 The defendant responded to these allegations by submitting that the facts showed that he had completely fulfilled his duty to account by providing the plaintiff with accounts throughout the duration of the venture and after the venture ended, of his own accord as well as when requested by the plaintiff. Various matters were put forward to support this submission.

134 First, there was the defendant's testimony that in December 1997, he had given the plaintiff an Excel spreadsheet that contained details of moneys received and paid by him on behalf of the venture and showed the destination and source of the moneys put up by each party, including the Jersey accounts where the disbursement of £300,000 drawn down from the loan facilities was deposited. The Excel spreadsheet was updated from time to time by overwriting the soft copy in the defendant's computer. The defendant did not keep printouts of each version of the spreadsheet but an early version of the document for the first year of the operation of the venture up to August 1998 was adduced in evidence. I note here that the plaintiff in response denied having received the spreadsheet in December 1997 and contended that the August 1998 version was actually a copy of a

spreadsheet that she had given to the defendant. Looking at the document, it appears to me that even if the plaintiff was correct in saying that it was a copy of something she had prepared, much of the information contained therein could only have come from the defendant as it disclosed various transactions with Lloyds which were handled by the defendant and with which the plaintiff had nothing to do and could only have known about from the defendant. She must therefore have been given information by the defendant which she was able to use to produce the spreadsheet.

135 Next, when the plaintiff asked him to render an account of the loans and fixed deposits held in Lloyds, the defendant said he had responded by providing her with a summary sheet on 11 September 2000 stating, *inter alia*, the amounts of loans and fixed deposits in Lloyds and the moneys that he was holding for the venture in his personal bank accounts. He also gave her an estimate of the rental he thought she was holding. On 18 September 2000, the defendant sent the plaintiff more spreadsheet accounts. A few days later, he wrote to her on the summary sheet he had prepared dated 17 September 2000. The plaintiff appeared to accept the figures contained in the defendant's accounts and also provided an account of her dealings in the form of a spreadsheet. Sometime later that year, the plaintiff went to the defendant's house and inspected all the documents that he had pertaining to the venture. Then in January 2001, the defendant sent the plaintiff another set of accounts which was updated from the September 2000 spreadsheet. The plaintiff did not dispute the foregoing assertions.

136 Other undisputed facts are that the defendant arranged for the plaintiff to meet the officers of Lloyds in September 2000 to clarify her doubts. She was able to make copies of any documents that she required. Lloyds gave the plaintiff a summary of the deposits held as at 20 September 2000 and also provided a written response to her queries. On 18 October 2000, the defendant made his first written request to Lloyds to answer the plaintiff's enquiries pertaining to the accounts for the JV companies and to cooperate fully with the plaintiff. On 28 August 2001, the defendant wrote a second time to Lloyds to reconfirm his request that the bank answer all the plaintiff's queries in relation to the loans made to the JV companies.

137 To implement the terms of the settlement agreement, in August 2001, the defendant appointed Duncan Merrin to take the accounts of the venture. These accounts were subsequently given to the plaintiff. The defendant also had GSP draw up an account of his dealings with Lloyds because of a claim by the plaintiff that there was a mistake in the interest payments made by Lloyds. GSP's report was given to the plaintiff in January 2002 but the plaintiff rejected it as being "rubbish". Thereafter, the defendant sent the GSP report to Duncan Merrin for verification. Duncan Merrin confirmed its accuracy in September 2002 and this confirmation was forwarded to the plaintiff's solicitors. The defendant invited me to note that both the GSP report and Duncan Merrin's report had not been contradicted by any other accountant or by the court expert and that although Mr Elango of GSP and Mr Merrin himself had filed affidavits of evidence-in-chief, the plaintiff had chosen not to cross-examine them.

138 Finally, the defendant relied on the evidence of Mr Tam who was given copies of the accounts of the venture prepared by GSP. In his report, Mr Tam noted that these accounts had been supported by detailed journal vouchers used to substantiate each entry in the accounts on a property by property basis. These were attached to supporting documentation and relevant copy of bank statements, when such were available. Mr Tam said that he also relied on the detailed journal vouchers that were referred to in the defendant's spreadsheet account dated 6 December 2003.

139 From the evidence, it appears to me that until the relationship broke down and the defendant appointed GSP, the accounts that he gave the plaintiff were not professionally drawn up and were probably inadequate given that he did not keep complete records and also was not an accountant

and the accounts given were those kept and drawn up by the defendant himself. With the appointment of GSP, however, the defendant made an effort to ensure that proper accounts of his part of the venture were drawn up and provided to the plaintiff. The accounts were not complete, however, since as Mr Tam noted in court certain supporting documents in respect of the expenses claimed by both parties were not available. As far as the defendant was concerned, these documents related primarily to expenses claimed in relation to the incorporation fees of the JV companies and the annual registration fees purportedly paid by the defendant for these companies. In Mr Tam's first report, he found that out of the sum of £231,652 that the defendant claimed to have incurred on behalf of the venture, the sum of £24,445 was not supported by documentation or was supported by inadequate documentation. His view, obviously, was that the accounts prepared by GSP were generally reliable, though not completely so since certain documents were not available to GSP. On a consideration of all the evidence, however, I find that with the submission of the GSP report to the plaintiff, the defendant had substantially complied with his obligation to provide the plaintiff with accounts.

140 Next I deal with the allegations of the defendant in respect of the accounts provided by the plaintiff. The defendant complained that the plaintiff's accounting to him was manifestly inadequate. In June 2000, he had asked her for an account of the rentals she received pursuant to the venture. When the plaintiff provided this account, she entered a caveat that she could not furnish "amount in current account as we do not keep running total of expenses etc … and rental from other houses are also placed in the same account". Prior to June 2002, the plaintiff had given him accounts which she herself had prepared and which contained many estimates. In October 2000, the plaintiff produced a spreadsheet on her dealings in relation to the venture. The defendant did not accept that spreadsheet as being reliable because in June that year the plaintiff had admitted being unable to state her receipts and expenditure accurately. There was no improvement after the settlement agreement. On 28 January 2002, the plaintiff sent a letter to the defendant asserting that of £308,330.50 rent she had collected on behalf of the venture, nothing was left. This figure was not supported by any document and was subsequently found to be incorrect as Mr Tam found that the plaintiff had received £416,719. Interestingly enough, in the plaintiff's supplementary affidavit of evidence-in-chief filed on 8 July 2005, the plaintiff asserted that up to 9 June 2004, she had actually received only £293,981.60. This amount was also lower than the sum of £394,959.32 that her auditors Ernst & Young stated she had collected as of 31 October 2003. The defendant submitted that the plaintiff had understated her receipts and overstated her expenditure and the accounts which she had given him were unreliable.

141 The plaintiff's closing submissions did not deal directly with the allegation that her own accounts in respect of the venture were inadequate. During the trial she had given evidence that her accounts of receipts and expenditure had been audited by Ernst & Young who had produced an unqualified audit report after reviewing her account in the light of the supporting documents that she had given them. She had also procured an affidavit from Mr Seshadri Rajagopalan of Ernst & Young that set out their report on their audit of the plaintiff's "statement of cash receipts and disbursements for the period 1 September 1996 to 31 October 2003". Mr Tam in his report noted that of the sum of £220,933 claimed by the plaintiff to be the expenses incurred by her, there was no or insufficient supporting documentation for £59,146. Mr Tam disallowed a sum of £31,500 which the plaintiff had paid to her solicitors and noted that Ernst & Young had also omitted these expenses from their audited "statement of cash receipts and disbursements" dated 14 April 2004. Other claims for expenses made by the plaintiff that were not allowed included letting fee of £38,441, management fee of £19,221 and book keeping fees of £13,650 as Mr Tam had not seen any agreement between Pertama and the JV companies to substantiate Pertama's entitlement to charge these fees. The plaintiff had also provided a sum of £96,103 for what was called "the 25% FICO tax" on all rental income of the JV companies. Mr Tam disallowed this claim on the basis that there was no supporting

documentation to substantiate it.

142 It does appear from the evidence that the plaintiff's accounts were inadequate in relation to the documentation of the rental received and the expenses incurred in relation to solicitors' fees, book keeping fees and the FICO tax. I have found the plaintiff entitled to charge a management fee at the rate of five percent of rental income and since the fee of £19,221 was calculated on that basis, it should not have been disallowed. However, the fee claimed in the accounts as a letting fee being equivalent to ten percent of rental income would have to be regarded as excessive as the plaintiff did not prove that the rate of ten percent was reasonable. There is also no reason to quarrel with Mr Tam's assessment that the solicitors' fees, book keeping fees and FICO tax provision must be disallowed. Thus, in total at least £179,694 of the amount claimed by the plaintiff was not justifiable. Her accounts were not in order.

The status of the court expert's reports (issue j)

143 Mr Tam's terms of reference were, as stated in his report:

> (1) to reconstruct the Joint Venture accounts since inception to 31 August 2004;
>
> (2) to identify any unresolved issues and areas whereby no or insufficient documentation has been provided by each party; and
>
> (3) to deliver a final report setting out the accounts and detailing my findings.

144 The parties took very differing positions on the two reports produced by Mr Tam. The defendant's position was that they, taken jointly, provided an accurate account of the venture except for certain items identified in the reports which were properly for the court to decide having regard to the evidence at the trial. The plaintiff, however, submitted that it was unsafe for the court to rely on the reports and, on that basis, to decline to make an order for full discovery and account as prayed for by the plaintiff.

145 The plaintiff had the following criticisms of the reports. She argued that they were merely a reconstruction of the accounts based on information provided by both parties. That information, however, was incomplete as Mr Tam himself admitted. He had stated in evidence that where there was insufficient documentation he had applied his professional judgment. The plaintiff said that that stance was unsatisfactory. Her action had been motivated by the failure of the defendant to account and produce sufficient documents and relying on the expert's views on areas where there was inadequate disclosure or discovery prejudiced the plaintiff's prayer for accounts in discovery. She also complained that whilst she had been interviewed by Mr Tam and his colleagues for the purpose of preparing the report, it was not clear whether the defendant himself was so interviewed.

146 The plaintiff also asserted that Mr Tam had made unwarranted assumptions about capital contributions and had never verified whether the defendant had made such contributions to the venture. In her view, the expert had seemed to treat money emanating from the defendant's bank accounts and sent to persons like the conveyancing lawyers as being the defendant's money and therefore concluded that those sums were the defendant's capital contribution to the venture. The plaintiff submitted that this assumption on Mr Tam's part was clearly wrong as money coming from or into the defendant's personal accounts need not be his money. Such an approach was akin to putting the cart before the horse. Further, Mr Tam had also assumed that the operations of the venture were to be carried out from personal bank accounts rather than from a joint venture bank account. He had also made a further unwarranted assumption that the letting and management fees chargeable by the

plaintiff should not be recognised. These assumptions were issues in dispute which had to be determined by the court. Mr Tam had "jumped the gun" by including calculations based on such assumptions in his report. In conclusion, the plaintiff reasserted that the report was inadequate as it had assumed facts and situations without the prior determination of the court and without addressing the issue of complete disclosure of all the documents.

147 The plaintiff's reasons for rejecting the expert reports do not, in my judgment, stand up to scrutiny. The evidence showed that Mr Tam did not simply audit the accounts of the venture. As an audit is a sampling exercise, it involves the checking of selected entries and documents and not of all entries and documents in any particular set of accounts. What Mr Tam did, in line with his terms of reference, was to do a full reconstruction of the accounts of the venture using two teams consisting of a total of ten people. The reconstruction was a massive and expensive exercise which took between 1,000 to 1,500 man hours during which more than nine cartons of documents were examined. As Mr Tam had documents from both parties before him, he was able to do the most thorough check on the accounts possible. He was not able to verify everything. This was because both parties were unable to give him all the documents and also some times gave him incomplete documents. He was, however, able to interview them and obtain explanations from them regarding matters that were unclear. Mr Tam himself said that to prepare the reconstructed accounts, he and his team had gone through all the supporting documents and talked to the various parties. Whilst obviously there were various items on which they did not have enough information in the beginning, yet with the explanations given and considering the nature of these items, he was able to take a position on them and account for them in the way that he did eventually in the reports.

148 Having read the reports and heard Mr Tam's testimony of the work that went into producing them, and also having heard the evidence of the parties regarding the documents that they were able to produce and the evidence of other parties involved in the transactions, I am convinced that it would not be possible for any other accountant to do a better job than Mr Tam had done. No one would be able to do a complete job in view of the missing records. The plaintiff has complained bitterly about documents that have not been produced. I am satisfied that the defendant has produced everything that he has or is reasonably able to obtain and that those that have not been produced are documents that he probably never had. I am also satisfied that Lloyds has assisted to the best of its ability. The defendant even called Mr O'Sullivan as a witness to try and ascertain what had happened to Mapletoft's files on the transactions and it was at that stage that he discovered that certain files had been given to the plaintiff some years earlier. It seems to me that it would be a waste of both time and money to order further accounts to be taken by either party as no other accountant would be able to come up with more than Mr Tam already has. I note too that Mr Tam himself agreed in court that his reports amounted to a taking of the accounts of the venture.

149 I do not accept the criticism that Mr Tam made unwarranted assumptions in his reports. Whilst the matter of the fees payable to the plaintiff had to be determined by the court, since the plaintiff herself had, in advance of such determination, made a claim for fees and included the claimed amounts as part of her expenses, Mr Tam had to consider that claim and decide whether or not it was valid. His determination was necessary to enable him to reconstruct the accounts and come up with a conclusion but, as all parties recognised, was not binding on me. Nonetheless it was not wrong for him to do it. As far as the alleged assumption relating to the operation of the JV account was concerned, Mr Tam did not assume anything: he simply described what he saw from the accounts. The other assumption that the plaintiff complained about was Mr Tam's acceptance that moneys coming out of the defendant's account belonged to the defendant. I think that was a perfectly reasonable assumption for him to make. Even if the moneys emanated from a third party, as long as that third party was not the plaintiff herself, the moneys would have to be treated as being the defendant's moneys. It was for the plaintiff to prove that moneys coming from the defendant's account were not

his moneys but hers. She did not prove that because all her remittances were taken into account and where appropriate credited as part of her capital contribution to the venture.

150 I now turn to the defendant's submissions in support of the three adjustments that he says ought to be made to the accounts in the reports. These are:

(a) to reflect additional rental income earned in respect of Glengarry;

(b) to remove expenses which were not supported by any documentation or in respect of which the documentation was insufficient; and

(c) to reflect the shortfall in payment from Grant Stanley of £8,573 from the proceeds of sale as an expense that has to be shared between the parties and not attributed solely to the defendant.

151 In relation to Glengarry, the defendant submitted that late in the proceedings, it was discovered that the plaintiff had hidden rental income for Glengarry amounting to £2,200. In the reports, Mr Tam had recognised one tenancy agreement for Glengarry which was in respect of the period from September 2002 to September 2003. This was the only tenancy agreement that the plaintiff had disclosed to him. It was only when the defendant's solicitors saw the draft of a letter that the plaintiff had prepared pursuant to the court's directions on 19 July 2006 that she should deal with the Southwark Council in relation to council tax on Glengarry, that they discovered that the last tenant at Glengarry was one Ms Desai who left the premises on 13 January 2004. When this letter was subsequently shown to the plaintiff in court, she admitted that Glengarry was tenanted until January 2004 and conceded that the rental income for Glengarry in the expert reports needed to be adjusted. The amount earned was £2,200 for the period from September 2003 to January 2004 as the rental was £550 per month.

152 In her closing submissions, the plaintiff did not deal specifically with this issue. Her stand was that Glengarry belonged to her son. If I had held that to be the case, then there would have been no question of including any rental at all earned from Glengarry in the accounts of the venture. Since I have found Glengarry to be a JV property, the rent of £2,200 earned for the period September 2003 to January 2004 must be recognised as income of the venture in the plaintiff's hands.

153 The next matter relates to the expenses of the plaintiff. Mr Tam recognised expenses claimed by the plaintiff totalling £220,933. Of that total, however, he noted that only £161,787 was "supported by third party confirmation". The defendant submitted that the difference between the figures, *ie*, the sum of £59,145.97 should be rejected. He pointed out that the plaintiff's own auditors, Ernst & Young, had only recognised expenses totalling £177,570.37 and that they had come to this amount on the basis of accounts prepared by the plaintiff herself. Thus, the defendant submitted the plaintiff's own statement of her disbursements recorded a smaller figure than Mr Tam's reports had. Whilst the accounts audited by Ernst & Young were for the period ending October 2003 and Mr Tam's accounts were for the period ending August 2004, Mr Tam only recorded expenses of £10,600.10 for the year 2004. Therefore even if the 2004 expenses were added to the plaintiff's statement, her total expenses would only add up to about £188,000 which would still be £30,000 less than the figure that Mr Tam recognised.

154 The defendant alluded to Mr Tam's testimony that he had recognised expenses that had no or insufficient supporting documentation based on his surmise that such expenses might have been incurred in the course of the venture and on the plaintiff's representations . In the defendant's submission, whilst Mr Tam might have been well meaning in attempting to assess the likelihood of

those expenses having been incurred, it was not his province to decide on that issue but for the court to do so having regard to its assessment of the plaintiff's credibility. In this regard, the defendant submitted that the plaintiff had been shown to have both concealed and exaggerated evidence in so many instances in the course of the trial that her evidence in respect of expenses that had no or insufficient supporting documentation ought to be rejected.

155 Further, there were good reasons why the expenses with no or insufficient supporting documentation may not have been expenses of the venture but rather the plaintiff's personal expenses, including expenses on her personal properties. These reasons were that:

(a) many invoices issued by Pertama had no reference to any particular JV property and no reference to the kind of work undertaken;

(b) Pertama was not only managing JV properties but also the plaintiff's own properties; and

(c) the plaintiff had sought to claim expenses that were not related to the venture and which were disallowed by both Ernst & Young and Mr Tam (these were basically legal fees which the plaintiff had incurred when asking for advice on her dispute with the defendant).

156 The defendant sought to persuade me to follow the approach taken in *Nathan v Smilovitch* [2003] EWHC 196. That case concerned a joint venture between the plaintiff (AN) and the defendant (ZS) pursuant to which a number of properties in London were acquired. The parties fell out and there was a dispute, *inter alia*, over certain items of expenditure claimed by ZS that were not supported by appropriate vouchers. In the High Court Ferris J decided (at [28]) that the correct approach was not to reject a claim simply because there the documentation was incomplete but to try and determine on the evidence before the court whether each item was in fact incurred and paid and whether it was a proper item of expenditure. He then went on to consider the disputed items in detail. One of these was a claim for £4,665 which was said to reflect the cost of refurbishment work carried out at one of the properties belonging to the joint venture. The evidence of the payment was contained in seven cheques. While Ferris J accepted that the sum had been paid for refurbishment work, he rejected the item as there was nothing to show that the expenditure had been incurred in respect of the property in question or in respect of some other property that did not belong to the venture. In relation to another item, ZS gave evidence that he had done the work himself and that it cost about £25,000 but there was no documentary evidence in support. This item was also disallowed. The defendant here submitted that if there was no objective evidence to support any particular item of claim by the plaintiff, that claim should not be allowed.

157 I agree with the above submission. There has to be some evidence supporting an expense claim before it can be allowed. This requirement is even more necessary in a situation where the claimant is carrying on her own business apart from that of the venture and thus where it is possible that expenses from one might be, however innocently, mixed up with expenses from the other because the documentary evidence does not clearly indicate the project to which the expenditure related. However, unlike Ferris J who had the benefit of detailed submissions and evidence on the disputed items, I have not been addressed separately on the items making up the total sum of £59,145.97 which the defendant disputes nor have I been referred specifically to the documentation relating to those items. Insofar as there is no documentary support at all for any item, such item should have been disallowed and the accounts should be adjusted to reflect this finding. In relation to the other items, there were some supporting documents though Mr Tam characterised them as "insufficient". He did not, however, identify in what manner they were insufficient and whether they were all insufficient in the same way or insufficient in varying ways. The acceptance of these documents indicates that there was sufficient linkage between them and the venture for Mr Tam to accept the

claims. Thus, the court appointed expert having accepted them the onus was on the defendant who challenged them to prove that his acceptance was wrong. The defendant has not discharged this onus either by way of cross-examination on the specific items or by way of submissions having reference to each particular item. It is not enough to rely on instances where the plaintiff has been shown to have made a wrongful claim (*ie* the claim for legal expenses) and argue that this means that all the disputed claims are likely to be wrongful as well. I would therefore not disallow those items which Mr Tam has accepted even though the documentation was "insufficient".

158 The third matter for adjustment is in respect of the sum of £8,573. There is little dispute about this. It was an amount which Grant Stanley should have paid the venture after the sale of Peckham Rye. In the reports, this amount was debited as an expense of the defendant. In fact, the shortfall was a joint venture expense and should have been apportioned to the parties in equal shares. Therefore, the plaintiff's expenses should be increased by £4,286.50 and the defendant's expenses should be reduced by £4,286.50.

159 There is a final matter on the accounts. Mr Tam left the rate of interest to be applied to the venture moneys held by each of the parties to be decided by the court. The evidence showed various rates: the plaintiff had suggested seven percent in correspondence with the defendant and Lloyds had applied rates ranging from 7.65% in 1998 to 5.5% in 1999 and over 6% in 2000. Mr Tam agreed that 6% appeared to be the average applicable rate during the period of the venture. In view of that evidence, I agree with the defendant's submission that the appropriate rate of interest to be applied to moneys held by each party would be 6%.

Other matters

160 The plaintiff's closing submissions were wide-ranging. She made many allegations that had not been pleaded and asked for reliefs that had also not been pleaded. I cannot and will not deal with these allegations since they were not part of the case before me and the defendant was not given a fair opportunity to rebut them during the trial. I think, however, that I should mention some of them to give a flavour of how the plaintiff took the opportunity in closing to hurl accusations that had not surfaced previously. Some of these allegations were:

(a) to induce the plaintiff to part with her capital injection, the defendant represented to her that he had set up the offshore companies and the mortgages with Hill Samuel were in place and these representations were totally misleading in that the loans had not been obtained and the companies had not been incorporated prior to his obtaining the plaintiff's capital;

(b) the defendant was in breach of the oral agreement in that he, *inter alia*, (1) failed to match the plaintiff's capital contribution of £100,000, (2) failed to put in place mortgages to complete the purchases of Silvester, St Aidan's, Mundania, Hansler, Peckham Rye and Upland;

(c) due to the defendant's failure to put in place mortgages to complete the purchases, the defendant was not entitled to benefit from his negligence and therefore was not entitled to a share in the partnership assets;

(d) the defendant did not put in his share of the capital but used some of the plaintiff's capital for his own benefit and subsequently, manipulated the moneys borrowed on behalf of the partnership and/or borrowed moneys by utilising the facility letters and then claimed those borrowings to be his capital contribution;

(e) the defendant did not act with utmost good faith and therefore was not entitled to the

proceeds of the partnership;

(f) the plaintiff summarised various grounds on which she contended the defendant was not entitled to or had forfeited his interest in the partnership;

(g) the defendant was in breach of the agreement because he did not put the terms of the oral agreement in writing or at the very least make a note of the gist of the agreement;

(h) the defendant abused his position of authority to gain an advantage over the plaintiff;

(i) the defendant used the plaintiff's financial clout to borrow money for his personal gain to the detriment of the venture and the plaintiff;

(j) on the balance of probability, the defendant channelled the funds obtained from the loan facilities elsewhere to the detriment of the venture and the plaintiff;

(k) the purchases of two other properties, described as Heber and Thomson Road, were aborted as the defendant unilaterally cancelled the purchases without consulting the plaintiff causing her to lose credibility with estate agents;

(l) the defendant coerced the plaintiff into signing the settlement agreement which was an action that was to her detriment in that thereunder she agreed to give up her claim to Glengarry, and make loan repayments to Lloyds whilst receiving little benefit in return;

(m) the defendant misled the plaintiff by stating that she was authorised to sign the property transfer documents under the powers of attorney granted by the respective JV companies; and

(n) the defendant failed to comply with company law by appointing a company secretary for the JV companies.

161 There were also various allegations which were very clearly against the weight of the evidence. For example, the plaintiff claimed that the defendant failed to inform her of the amount that had been drawn down from the loan facilities. This was not only unpleaded but the evidence showed otherwise. On 15 May 1997, the defendant wrote to the plaintiff and informed her that he had obtained the release of £300,000 and that it would be sent by telegraphic transfer to Jersey. The plaintiff in her own affidavit of evidence in chief stated that in May 1997, the defendant had written to her that he had finally received £300,000 from Lloyds.

162 The plaintiff also made several allegations in her submissions that funds were missing or could not be traced and that there were hidden loans. For example she claimed that Mapletoft and Mr Tam could not trace the whereabouts of the sum of £150,000 which she had sent to Mapletoft in November 1996. That was not correct as the amount of £150,000 was accounted for and was clearly reflected in Mr Tam's report. Another unsubstantiated (and unpleaded) claim was that her guarantees were unaccounted for and the defendant had channelled the funds elsewhere. Mr Wong stated in court that the guarantees had been fully discharged and that the plaintiff currently owed no liability to Lloyds in respect of her guarantees. He also stated that her guarantees had been in respect only of amounts owed by the JV companies to the Singapore branch of Lloyds and that Lloyds would not hold the plaintiffs liable for any future indebtedness of the JV companies except where monies previously paid to Lloyds in settlement had to be returned as a result of a court order or the operation of applicable laws. There was no evidence at all to support the plaintiff's suggestion that the defendant had spirited away monies which had been lent to him on the security of the plaintiff's

guarantees.

Conclusion

163 I have made various findings in this judgment. I do not think it is necessary to make orders to reflect all those findings since some of them have no practical consequence. I do however, recognise that the parties may consider that the additional orders need to be made and I will therefore give a general liberty to apply so that they can come back to me for this purpose, if necessary. For the time being, the orders that I make are as follows:

(1) There shall be a declaration that the property known as 71A Glengarry Road, London belongs to the venture between the plaintiff and the defendant and must be accounted for accordingly;

(2) 71A Glengarry Road, London shall be sold in the open market as soon as practicable hereafter and the net proceeds of sale shall be added to the funds of the venture and treated accordingly;

(3) A sum of £19,221 being the management fee charged by the plaintiff (at the rate of 5% on rentals collected) shall be added to the expenses of the venture and shall be paid to the plaintiff;

(4) The accounts prepared by Mr Tam shall be adjusted to reflect the sum of £19,221 and to reflect the deduction of all expenses claimed by the plaintiff in respect of which no supporting documentation exists and to apply an interest rate of 6% per annum to moneys held by each party;

(5) The plaintiff's claim for an account and for damages shall be dismissed;

(6) The plaintiff shall bear the defendant's costs of defending this action and prosecuting the counterclaim but these shall be treated as one set of costs;

(7) The parties shall have liberty to apply; and

(8) I will see the parties and hear their submissions on how the costs of the expert should be apportioned between them.

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