

## **Imposing fiduciary obligations into property ventures**

**1. Intervention of equity** - no longer can parties to a property venture look only to the terms of the written contract when assessing their respective obligations. The intervention of equity now has to be taken into account. The increasing trend to impose fiduciary obligations in commercial relationships has encroached into property ventures. This is not limited just to joint ventures but extends to other types of ventures such as planning promotion agreements and even some overage arrangements.

**2. Ross River v Waveley Commercial Limited** [2012] EWHC 81 (Ch) – in this case Morgan J. has confirmed that independent and free-standing fiduciary obligations can be imposed in circumstances which do not give rise to a parallel claim in contract or tort. In that case the Claimants entered a joint venture with the First Defendant (“WCL”) to acquire a site and obtain planning permission for use of the site as a combination of supermarket, shops and flats. The sole operator of the venture was WCL and during the course of the joint venture it made payments to connected parties. The evidence on this was unclear. It was alleged that as many as 215 payments had been made and that recoupment in many cases was unlikely. As a result WCL would face a deficit preventing it from paying the profit due to the Claimants. WCL was owned and controlled by the Second Defendant. There was no value to be gained from suing WCL in contract as the Claimants’ case was that it no longer had the funds. In consequence the claim was based on breach of fiduciary owed by both WCL and the Second Defendant. Morgan J. held that both had breached the fiduciary obligation of good faith and both were liable to make good any deficit which had to be determined by a subsequent enquiry. It was not a general obligation but one tailored to the particular circumstances. Both defendants were held to owe a duty “not to do anything in relation to the handling of the joint venture revenues which favoured itself to the disadvantage of” the other party.

**3. Berkeley Community Villages Limited v Pullen** [2007] EWHC 1330 (Ch) – the decision in Waveley is a step on from earlier decisions such as Morgan J’s decision in this case and Briggs J. in *Ross River v Cambridge City FC* [2007] EWHC 2115 (Ch). The Berkeley case concerned a planning promotion agreement which contained an express obligation to show good faith but no express restriction on the land owners’ ability to sell. Shortly before the expected grant of planning permission for residential development of the farm land the owners attempted to sell but were stopped by Berkeley applying for an interim injunction. At the full trial it was held that a sale defeating the objective of the agreement was a breach of the obligation of good faith. It follows from the Waveley decision that even if there had been no such express obligation the owners would still have been subject to a fiduciary obligation preventing them from selling whilst the agreement was in force.

**4. Ross River v Cambridge City FC** – having sold the ground for residential development the Club subsequently needed to sell the overage entitlement that it retained. The grant of planning permission was the trigger for the overage. During the negotiations over the release the Club’s advisers attempted to obtain information so as to estimate the value of the overage entitlement. The purchaser had relevant information relating to matters such as expected residential density and access. When a request was made for information regarding the planning application the purchaser’s adviser responded but did not disclose the relevant information which was not in the public domain such as counsel’s advice on the access way. Briggs J. held that this was a breach of the duty of good faith notwithstanding that there were express provisions dealing with disclosure which were not operated in the circumstances. The duty was not a general duty to make full disclosure of all material information as that would run counter to the express disclosure provisions. Instead the wrong was the “single-minded regard” to the interest of the purchaser when the adviser should have either declined to respond or been frank if responding. This was also held to be a tortious wrong.

## **5. Lessons from these cases**

**5.1 Avoidance of distortion of bargain** – the Courts will not impose a full set of absolute fiduciary obligations as would be the case with one of the traditional fiduciary relationships. The particular fiduciary obligation imposed has to be nuanced by the circumstances and in particular the terms of any contract. The Courts will take care to ensure that the fiduciary obligation imposed is formulated so that it does not distort the bargain between the parties and in most cases that bargain will be set out in a written agreement.

**5.2 Not limited to joint ventures** – the likelihood is that most joint ventures will give rise to a relationship which justifies the imposition of a nuanced fiduciary obligation. There will be a sufficient element of mutuality in the relationship with one or other party acting jointly for all the parties. In Waveley WCL acted for all the parties in operating the joint venture. But it is not just joint ventures which will give rise to possible fiduciary obligations. In the Berkeley case the builder acted for both parties in seeking to obtain planning permission whilst in the Cambridge FC case the obtaining of planning permission by the purchaser was for the benefit of the Club as well due to the overage. Property transactions in whatever form which involve one or more parties acting jointly for all of them will be susceptible to the imposition of fiduciary obligations in addition to the contractual obligations.

**5.3 Persons owing fiduciary duty** – as is illustrated by Waveley it will not only be parties to the venture who may be subject to such obligations. In that case the controller of a party was held to be. Directors will need to be warned that they may be. Members of the governing committee of a limited liability partnership used as the medium for a joint venture may be as in F & C Investments (Holdings) Limited v Barthemely [2011] EWHC 1731 (Ch).

**5.4 Subordination of interests** – with a traditional fiduciary there must be no conflict between the interest and the duty of the fiduciary. The fiduciary's personal interest must be subordinated to the interests of the person to whom the fiduciary obligation is owed. There will not be such a requirement in the context of property ventures. Each party will be able to take into account self-interest. The issue will be where the balance between the parties' interests is to be struck as each will be "obliged to strive to maintain a fair balance between the distinct interests" (Sales J. in the F & C case).

**5.5 Restriction of traditional fiduciary duties** - due to the removal of the need to subordinate personal interests it is unlikely that three of the traditional fiduciary obligations will be material. These are the duties to avoid conflict between personal interest and duty; not to make a profit from position; and to act in the best interest of the person in whose favour the duty is owed. The obligation which is most likely to be relevant is the duty to show good faith.

**5.6 Good faith** – what is meant by "good faith" is still being explored by the English courts. In the Berkeley Village case Morgan J described it as an "obligation to observe reasonable commercial standards of fair dealing in accordance with their actions that related to the agreement and also requiring faithfulness to the agreed common purpose and consistency with the justified expectation of the" other party to the agreement. This has been followed in later cases and is consistent with the Australian authorities.

**5.7 Operation of good faith** - as stated above the Courts will not impose an absolute obligation of good faith but instead will tailor it to the particular circumstances. It has been applied to

5.7.1 prevent one party being involved with a competing venture as in the Australian case of Macquarie International Health Clinic Property Ltd. V Sydney South West Health Service [2010] NSWCA 268.

5.7.2 compel a frank response rather than concealment as in the Cambridge FC case;

5.7.2 prevent the subject matter of the venture being disposed of as in the Berkeley Village case;

5.7.3 ensure that the venture is not operated to the detriment of one of the parties in a manner which was not contemplated by the parties as in the Waveley case.

It may be that equity intervenes to preserve in tact the venture whilst the internal workings of the venture are left to be governed by the contract.

**5.8 Warnings** - it means that consideration should be given when negotiating a property venture as to the need to give warnings that

5.8.1 the written contract may not be all embracing and that fiduciary obligations may be imposed by the Court;

5.8.2 such a possibility is not limited to joint ventures;

5.8.3 such obligations may be imposed on persons who are not parties to the venture;

5.8.4 this is not a means by which the bargain can be rewritten.

**5.9 Contractual provisions** – consideration should also be given at the negotiation stage as to whether additional provisions need to be added to the contract with a view to limiting the scope for fiduciary obligations to be imposed and thus reduce the

uncertainty. In particular consideration should be given to the inclusion of provisions relating to

5.9.1 disclosure – what is to be disclosed and when;

5.9.2 restriction on dealings with venture property;

5.9.3 application of venture funds;

5.9.4 limitation, if any, on ability to compete;

5.9.5 governance of venture.

**5.10 Exclusion** – to seek to avoid the uncertainty that will inevitably be caused by arguments over fiduciary obligations a comprehensive written contract could seek to exclude such obligations. Trustee exemption clauses seek to restrict the extent of fiduciary obligations. If the parties have attempted to construct a comprehensive agreement could there be good sense in excluding the intervention of equity and relying exclusively on the contractual terms. If it is the informed decision of parties who each have independent legal advice then why should they not be able to decide at the start that they do not want the risk of a long trial over the application of fiduciary obligations? This is a commercial transaction and such an exclusion could make good commercial sense. An alternative would be to deal only with specific aspects of the joint venture.

**6. Conclusion** – Waveley is very clear confirmation that in many cases property ventures will not just be matters of contract. Equity may confer an independent right probably based on good faith which may protect a party by ensuring the continuance of the venture.