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Case No: BL-2018-000492

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF
ENGLAND AND WALES
CHANCERY DIVISION

Royal Courts of Justice
Rolls Building, Fetter Lane, London, EC4A 1NL

Date: 20/01/2020

Before:

MRS JUSTICE FALK

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Between:

RAJAN RUSSELL	**Claimant**
- and -	
(1) EDWARD CARTWRIGHT	
(2) ROBERT SLOSS	
(3) TIMOTHY BARLOW	**Defendants**

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Romie Tager QC & Isabel Petrie (instructed by **Ince Gordon Dadds LLP**) for the **Claimant**
Dan McCourt Fritz & Stephanie Thompson (instructed by **Gowling WLG (UK) LLP**) for the **Defendants**

Hearing dates: 25-29 November, 2, 3, 5 & 6 December 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MRS JUSTICE FALK

Mrs Justice Falk:

Introduction

1. This is a claim by the Claimant, Mr Russell, against three other individuals, Mr Cartwright, Mr Sloss and Mr Barlow. It relates to a property development business known as "Hub" that all four individuals were involved in as a joint venture between 2011 and July 2014, and which the three Defendants have subsequently continued to operate. I will refer to the four individuals as the "principals".

2. The claim relates to Mr Russell's departure from the business, which was documented principally by a Settlement Deed dated 1 July 2014. The claim has been formulated as involving breaches of express or implied contractual terms or fiduciary duty, breaches of a duty to disclose or a duty to correct a misunderstanding by Mr Russell, or alternatively as an allegation of unlawful means conspiracy. However, it is common ground that, owing to the terms of the release contained in the Settlement Deed, none of those claims can succeed in the absence of fraud or dishonesty being established.

3. The essence of Mr Russell's complaint is that the Defendants did not tell him about, or give him an opportunity to participate in, a development project relating to a site in Wembley which Hub successfully executed shortly after Mr Russell's departure from the business. Mr Russell says that he was wrongfully excluded and the Defendants' actions in doing so were dishonest.

4. Mr Russell says that, if it had not been for the alleged breaches, he would not have entered into the Settlement Deed and would have continued to participate in the joint venture. Alternatively, if he had found out about the true position after executing the Settlement Deed and before completion of the sale of his interest provided for under that document, he would have rescinded it on grounds of fraudulent misrepresentation. However, rescission is not sought by this claim, which is made in damages.

5. The Defendants deny the claims, and also counterclaim on the basis that the present proceedings are brought in breach of the terms of the Settlement Deed, and accordingly that Mr Russell is obliged to pay their costs on the indemnity basis.

6. This decision follows the first stage of a split trial, that first stage being confined to questions of liability under the claim and counterclaim and the basis on which any damages should be calculated.

Background and chronology

7. Mr Cartwright and Mr Russell both have a background in investment banking. They have known each other for a number of years, and when the Hub joint venture was established they were good friends. At that time neither had a professional expertise in property, although Mr Russell had made a number of property investments and had a greater knowledge of the sector than Mr Cartwright.

8. Mr Sloss and Mr Barlow have both worked in the real estate sector throughout their careers. They have known each other for many years, having met at university, and have worked closely with each other since they set up a property development company called Squarestone together in 2001.

9. Mr Sloss also knew Mr Cartwright socially. They discussed the possibility of starting a property development business focusing on mid-market residential development in Greater London, taking advantage of a drop in property prices in the aftermath of the financial crisis. In early 2011 Mr Cartwright and Mr Russell discussed the possibility of Mr Russell also being involved. Mr Russell knew Mr Sloss to an extent as well, and it turned out that he had also known Mr Barlow many years previously when they were both young children. The thinking was that Mr Cartwright and Mr Russell would largely be responsible for raising funds, and Mr Sloss and Mr Barlow would provide real estate expertise, supported by the existing infrastructure of the Squarestone business. All four would have equal shares in the business.

10. The basic idea was that Hub would identify development sites and potential investors. Hub would manage the acquisition and development of the site, and its sale, in exchange for fee income. In addition, the principals contemplated investing some of their own funds alongside the third party investors, and receiving a share of profits in the form of "carried interest".

11. On 8 July 2011 a new company, Hub Residential Limited ("HRL"), was incorporated for the purpose of the proposed business. The principals each held 25% of the shares of HRL and were appointed as directors. Addleshaw Goddard LLP provided draft heads of terms in August 2011 (which were never signed), and in December 2011 they circulated a draft of what became the Framework Joint Venture Agreement referred to below.

12. The principals commenced business during 2011 without signing formal documentation (beyond the incorporation of HRL). Mr Russell made a significant early contribution by securing funding from an investor, Kew Capital LLP ("Kew"), having been able to develop a close relationship with the managing partner, Nathan Burkey. In November 2011 Kew informally committed to invest £25 million of equity.

13. Two sites became available, in North Acton and Newham respectively (referred to below as the "Kew" or "Rockbridge" projects). Mr Barlow focused on the former and Mr Sloss on the latter.

14. Formal documentation in relation to the Kew projects was entered into on 14 and 15 June 2012. The structure involved the creation of a limited partnership, Rockbridge LP, which ultimately acquired the North Acton and Newham sites. The members of Rockbridge LP comprised a specially incorporated entity formed to act as general partner, a Kew investment vehicle, a company called Hub Residential (Carried Interest) Ltd ("HRCIL") and a limited liability partnership called Hub Residential 1 LLP ("HR1 LLP"). HRCIL was formed on 29 February 2012 to receive the carried interest that the principals would become entitled to if the projects were successful. HR1 LLP was the vehicle through which the principals, together with some other high net worth investors, invested alongside Kew. HRL was appointed by Rockbridge LP to provide project management, administration and asset management services in exchange for fees.

15. On 19 June 2012, probably prompted by the execution of the Kew documentation, the principals signed Shareholders' Agreements in respect of HRL and HRCIL and, it appears, signed a document called the Framework Joint Venture Agreement ("FJVA"). There is some doubt about whether a version of the FJVA was also signed at some earlier point in 2012 (a signed, but undated, copy also having been identified, and

indeed being the only copy produced in evidence), and the confusion is reflected in the Settlement Deed. However, nothing turns on this and, apart from the date, there is no suggestion of any discrepancy between the texts of the two versions.

16. The FJVA recited that the principals were proposing to enter into a joint venture arrangement to establish one or more "Hub Entities" to provide "Hub Entity Services" to investors seeking to acquire and develop new sites or convert existing buildings within the M25 area into residential and ancillary mixed use accommodation (described as the "Hub Activity"). Hub Entity Services was defined as the raising of equity and debt finance for and providing asset development and asset management services to investors proposing to undertake the Hub Activities. Another recital referred to the parties being in discussions with Kew Capital to carry out the first Hub Activity.

17. The FJVA contemplated a five year term (unless the parties agreed to extend it) and equal sharing of profits and losses from, and voting rights in, Hub Entities. Under clause 9, each principal was required to "devote a sufficient amount of their business time" to the venture. Under clause 14.1 each principal agreed for the duration of the joint venture not to engage in any "Restricted Activity" without the consent of the others. The concept of "Restricted Activity" is considered further below, but essentially it was similar business activity with a value of at least £2 million.

18. Completion of the North Acton acquisition occurred in March 2013 and the Newham acquisition (also referred to as "TBR") completed the following month.

19. Hub continued to investigate other potential opportunities. In particular, it identified a site at Harrow which it proposed that Kew should finance. However, the transaction fell through when it became apparent that Kew would not provide funds.

20. In September 2013 Hub identified a site in Hayes as being of interest. In November 2013 Mr Cartwright re-instigated contact with another potential investor, Bridges Ventures LLP ("Bridges"), with whom he had first had contact the previous year. During December 2013 Bridges and Hub reached agreement in principle on a structure and profit split for the Hayes project, which was reflected in heads of terms entered into in January 2014.

21. The Defendants' case is that during 2013 and in the early part of 2014 they became increasingly concerned about what they saw as Mr Russell's lack of contribution to the business, including an apparent unwillingness to involve himself in detail and diminished attendance at the office. There were also concerns about Mr Russell's behaviour both externally and in relation to Hub staff. It was however recognised that during 2013 Mr Russell had been dealing with some difficult personal issues, and early in January 2014 the Defendants offered Mr Russell a three month sabbatical, which he declined.

22. Matters came to a head on 31 March 2014 when Mr Cartwright emailed Mr Russell, essentially to say that things could not go on as they were. Mr Russell responded by indicating that he was "happy to resign" and it was "time for me to leave". Immediately thereafter, Mr Russell went on holiday. His first day back in the office was 16 April 2014. This also proved to be his last day in the office before leaving the business, because he chose not to return thereafter, saying by email on the same date that he did not see any future for him in the current structure.

23. Between 16 April and the date of the Settlement Deed, correspondence was by email or phone, apart from the meeting on 29 April referred to below. Mr Russell had never wished to use a Hub laptop and so did not have direct access to business information on its servers. The practice he had adopted was to ask for specific information or documents from members of staff if he wanted it, generally by email. This practice did not change. He had also developed a practice of asking other principals for updates in person when he attended the office. This ceased after he stopped coming to the office, and he did not ask for any replacement update mechanism.

24. Meanwhile, on 8 April 2014 Bridges' investment committee approved the Hayes deal, subject to due diligence. On 15 April Mr Barlow met the property agent CBRE and was informed about a possible opportunity to purchase a property called Chesterfield House in Wembley ("Wembley"), which was being sold by receivers. Details of this site had first been provided to a Hub employee in March 2013, but had not been pursued at the time. The site had therefore been on the market for over a year. The property had been under offer to another purchaser, but the mortgagee, Investec, was frustrated about the lack of progress. CBRE suggested that it would be worthwhile Hub putting in an expression of interest. An internal feasibility analysis was undertaken and an expression of interest at a figure of £10m was provided by Hub on 23 April 2014, and (in response to suggestions by CBRE) provided in a revised form on the same day. Hub also asked external planning consultants to provide a preliminary assessment, on a contingent fee basis.

25. Between 16 and 26 April 2014 the principals conducted settlement discussions over email. Among other things, by an email dated 17 April Mr Russell confirmed that he was happy not to be part of the Hayes project and for the others to set up a separate company with him excluded, but stated that an agreement was required to cover his whole involvement. The email also stated that he needed to be kept fully abreast of everything that was happening with the two Kew projects.

26. On 23 April Mr Sloss arranged for Mr Russell to be removed from the Hub email distribution group.

27. On 29 April Mr Cartwright met with Mr Russell at a London club. As discussed further below, one outcome of this meeting was that Robert Paul of Nyman Lisbon Paul ("NLP") was instructed to provide independent valuation advice. More significantly for present purposes, the Defendants' case is that at this meeting, and by his behaviour at the time and subsequently, Mr Russell made clear that he wished to receive, and only wished to receive, information about the two Kew projects, in which he continued to be involved given his close relationship with Mr Burkey. This is the so-called "Hub 2 agreement" discussed further below, and which formed an important part of the Defendants' case. Mr Russell disputes the existence of any such agreement, and claims that as a fellow director of HRL and (in effect) partner the Defendants were under continuing obligations to keep him updated more generally and to provide him with the opportunity to be involved in decision-making. However, it is not disputed that he at no stage asked whether there were any other Hub opportunities or projects that were being considered that he did not already know about.

28. In early May the Wembley project appeared to be going nowhere, and on 9 May Hub's contact at CBRE indicated that he suspected that detailed discussions were going on with another buyer. However, the opportunity revived following direct discussions with

Investec (with whom Mr Sloss and Mr Barlow had had a longstanding relationship in respect of another property), and on 23 May HRL made an offer to purchase Wembley for £10.75 million, subject to contract and due diligence. It was immediately requested to provide a proof of funds letter, which Mr Sloss requested from Bridges. The approach that Mr Sloss made on 23 May to ask for this letter was the first occasion on which the Wembley site was raised with Bridges. Bridges provided a proof of funds letter to Investec confirming its support for the project on 27 May 2014 (following an intervening bank holiday weekend), and in response to a further request provided a second version on 30 May. The second letter not only confirmed Bridges' support but stated that it had "allocated sufficient capital". HRL also provided a slightly revised version of its offer on the same date.

29. On 3 June 2014 Mr Cartwright sent the NLP valuation to Mr Russell. This valuation had been sent to Mr Cartwright on 19 May. It valued Mr Russell's 25% shareholding in HRL as at 16 May 2014 at around £166,000.

30. On 4 June 2014 HRL's offer for Wembley was accepted at a slightly increased figure of £10.8m, and Farrer & Co were instructed to act in connection with the purchase. Heads of terms were signed on 5 June 2014.

31. Also on 5 June 2014, following email correspondence between 3 and 5 June, Mr Sloss and Mr Russell agreed key settlement terms by telephone. The one outstanding commercial matter after that date related to Hayes.

32. Having initially considered the project on 18 June, Bridges' investment committee approved the Wembley investment on 30 June 2014, subject to due diligence and on the basis that the commercial terms between Bridges and Hub would be broadly the same as for Hayes.

33. On 1 July 2014 the principals and HRL entered into the Settlement Deed, which was drafted by Lawrence Graham. Under this document, Mr Russell agreed to sell his shareholding in HRL back to HRL for £250,000, with completion to occur once the necessary formalities for an own share purchase had been completed by the company. He also agreed to resign as a director at completion. The Settlement Deed provided that, with effect from completion, Mr Russell would cease to have rights or obligations under the FJVA (subject to limited exceptions), and that Mr Russell would release any claims against HRL and the other principals, the Settlement Deed being in full and final settlement of any such claims. These release provisions are discussed in more detail below.

34. Completion occurred on 16 July 2014, at which point the share buyback completed and the Consultancy Agreement which the Settlement Deed also provided for, and which Mr Russell had signed on 1 July, came into effect. Mr Russell retained his interest in HRCIL, and so continued to benefit through that vehicle from any carried interest in the Kew projects, as well as his interest in HR1 LLP. The Consultancy Agreement provided for Mr Russell to receive fees in respect of the Rockbridge projects and (if it proceeded) the Hayes project, in each case contingent on receipt of fees by HRL. There was no specific obligation to work in return for these fees. The Agreement also contemplated that Mr Russell might introduce new projects to HRL, subject to majority approval by the Board.

35. On 11 July 2014 exchange of contracts was achieved on the Hayes transaction (that transaction subsequently completing on 29 August). On 14 July 2014 Chesterfield House Partners LLP was incorporated with a view to acquiring Wembley. Exchange of contracts on Wembley took place a few days later on 22 July, and purchase of the Wembley site was completed the following month, on 19 August 2014.

36. On 22 August 2014 Mr Russell visited the Hub office for the first time since he had left, and Mr Cartwright raised the subject of Wembley with him. Mr Russell says that Mr Cartwright wrongly described it as a commercial investment. Mr Cartwright also sent an email to Mr Russell on 1 September 2014 attaching a press release issued by Bridges in relation to Hayes and Wembley (although Mr Russell did not accept that this email was received by him).

37. During 2015, Mr Russell formed the view that he had a claim in respect of his departure from the Hub business. Following pre-action correspondence that commenced in November 2015, the claim in the present proceedings was issued in February 2018.

The claims

38. Mr Russell's claims can be summarised as follows:

    i) The Defendants were in breach of express or implied duties to Mr Russell. Express duties were engaged under the FJVA. Implied duties arose either because the relationship was fiduciary in nature or because the contract was a relational one into which duties should be implied, in particular duties of good faith and fair dealing, including a duty to disclose documents or information relevant to the FJVA.

    Mr Russell says that these breaches were fraudulent in nature. The failure to disclose the Wembley project was intentional and dishonest, and the Defendants dishonestly and deliberately used the connection with Bridges, goodwill generated from the Rockbridge projects and Hub resources for their personal gain in relation to Wembley, to Mr Russell's exclusion. They took active steps to prevent him finding out about the project.

    ii) Mr Russell also claims fraudulent non-disclosure (referring to *HIH Casualty v Chase Manhattan Bank* [2003] 1 All ER 349 at [19] to [22]), on the grounds that a duty to disclose existed, there was a deliberate withholding of information, and the Defendants acted dishonestly or recklessly because they knew they should have disclosed the Wembley project. Furthermore, the Defendants were obliged to correct Mr Russell's misunderstanding about the financial viability of Hub, which was what had prompted his resignation. The failure to do so in the light of the Wembley project and, for example, the information provided for the purposes of the NLP valuation report (which made no reference to Wembley), amounted to fraudulent misrepresentation.

    iii) Alternatively, Mr Russell claims that the Defendants were parties to an unlawful means conspiracy. There was a collective, dishonest decision to withhold information and exclude Mr Russell from the Wembley project with the intention of causing damage by unlawful means. The unlawful means comprised the intentional and dishonest breach of the express or implied duties owed, or

alternatively fraudulent misrepresentation, or fraudulent breach of a duty to disclose and/or a duty to correct. The unlawful acts resulted in loss. The conspiracy was either entered into in April 2014, when the Wembley opportunity came in, or if Mr Cartwright was not aware of that opportunity at that stage then the conspiracy was formed on or about 23 May 2014 when the offer to purchase was made.

39. In Closing, Mr Tager (for Mr Russell) submitted that Mr Russell needed to demonstrate the following in order to succeed: a) the existence of duties of good faith and disclosure prior to 31 March 2014; b) that the duties continued between 31 March and 1 July 2014; c) that the Defendants knew that they were subject to such duties; d) the failure to disclose the Wembley transaction during this period in breach of those duties was dishonest; and e) had Mr Russell been informed about the Wembley transaction he would not have entered into (or at least that it would have had a material effect on his decision to enter into) the Settlement Deed.

40. The Defendants deny that there was any breach of duty and denied fraud or dishonesty. Mr McCourt Fritz (for the Defendants) also submitted that the claims for breach of duty were pleaded as intentional rather than fraudulent in nature. Furthermore, he submitted that the better view was that any fraudulent non-disclosure could not give rise to a claim in damages: *HIH Casualty v Chase Manhattan Bank* [2003] 1 All ER 349 at [75], per Lord Hoffmann (not cited in *Conlon v Simms* [2006] 2 All ER 1024 (Ch) at [202], [2008] 1 WLR 484 (CA) at [130], which suggests that a damages claim would be available), and that no fraudulent misrepresentation claim (as distinct from fraudulent non-disclosure) was pleaded, or could have been pleaded. Mr McCourt Fritz submitted that, in order to succeed, Mr Russell therefore needed to demonstrate both fraud and the existence of an unlawful means conspiracy, which he could not.

Evidence

41. The court heard oral evidence from all four principals. Witness statements were also supplied for two additional witnesses for the Claimant, John Ferguson and Marta Skowronska. There were five additional witnesses for the defence who all also gave oral evidence, comprising Simon Ringer, the Head of Property Funds at Bridges, three Hub employees (Anish Kanjiyani, Marcio Sugui and Hugo Denee) and Mr Paul (the NLP valuer).

Mr Russell

42. I have to record that Mr Russell proved to be an unsatisfactory witness. During the course of a lengthy cross-examination, he avoided straight answers to a high proportion of the questions asked, and also gave inconsistent responses. Answers were frequently evasive or did not respond to the question asked, instead seeking to take the opportunity to provide his own additional evidence in chief. I have also concluded that important aspects of his evidence in chief were unreliable.

43. Whilst it is understandable that, after a gap of more than five years, Mr Russell would have difficulty in recalling details of meetings or telephone calls, his difficulties in recollection in oral evidence appeared to be selective, in a way that undermined the reliability of his evidence. Explanations that he sought to give of contemporaneous documents, in particular email correspondence, at times stretched credulity, and in

important respects relied on short passages in documents not properly read in context. Some of his evidence was also inherently improbable.

44. The impression I have obtained both from Mr Russell's evidence and from the significant amount of email correspondence that I have read is of someone who has a tendency to be rather dismissive or denigrating of others' work, in particular work on detail, and who is prone to elevating the significance of his own contribution. He sees himself as a strategist, not willing to get involved in detailed execution work. His focus appeared to be solely on financial reward. Whilst his role in the business was clearly significant at the initial stage in procuring Kew as an investor, it is much less apparent that he made a significant contribution after that, and indeed there was evidence that some of his actions were (albeit unintentionally) harmful. His lack of property expertise would to an extent have restricted what he could do, but there would still have been significant areas where he could have made a more extensive contribution.

45. I do not agree with Mr Tager's portrayal of his client in closing as having an over trusting nature and being naïve. Mr Russell saw himself as an experienced businessman who was quite able to look after his own interests and who would make his own decisions, including about such matters as whether it was appropriate for him to obtain separate legal advice.

46. Whilst Mr Russell's evidence was that he did a significant amount of work in respect of potential sites, including after the date on which he indicated he intended to resign, I do not accept that the contribution was as material as Mr Russell indicates. Furthermore, in respect of proposals made after that date I have concluded that he was putting them forward in his own financial interest, as projects he might wish to invest in on terms that suited him but where Hub could provide execution services (which he lacked), rather than on the basis of them being Hub projects in which all the principals would participate on equal terms.

47. Some aspects of Mr Russell's evidence, notably in relation to the Hub 2 agreement, are addressed below. However, it is convenient to address two specific points here, relating to whether Bridges' interest in Hayes was a "one off", and Mr Russell's professed concerns about Hub's financial viability.

48. Part of Mr Russell's pleaded case was that he had assumed that Bridges' investment in Hayes was a one off, rather than it being the case that Bridges were also interested in investing in other future Hub projects, and that the Defendants had deliberately failed to inform him about Wembley because that demonstrated that there was the prospect of future projects involving Bridges, which would have had a dramatic effect on his decision to leave or on his negotiating position. Although Mr Tager sought to argue otherwise in closing submissions, this was an important aspect of the pleaded case. However, it did not survive cross-examination of Mr Russell and consideration of the relevant documentary evidence. Mr Russell had clearly been kept fully informed about discussions with Bridges in late 2013 and the first quarter of 2014. He had even attended the first key meeting with Bridges in November 2013. It was clear while Mr Russell was still actively involved in the business that Bridges was interested in doing multiple deals and had agreed heads of terms on Hayes with Hub that expressly contemplated this, albeit that Bridges' policy was to approve individual deals on a project by project basis rather than to commit to any formal "platform". Mr Russell was ultimately forced to accept that he had been aware of Bridges' interest in multiple deals at the time.

49. At one stage Mr Russell sought to rely on it being unclear at the relevant time whether Bridges had raised the funds required from its own investors. He suggested that he became concerned in early March 2014 that funds might not be available. However this was based on one email dated 5 March which Mr Russell sought to rely on out of context, and without reference to other evidence including an email dated 24 March 2014 to which he had responded, which made it clear that Mr Ringer thought that closing of the Bridges fund was "on target". In response to this challenge Mr Russell attempted to move on to a concern about whether Hub had appropriate sites available for Bridges. However, this conflicted with contemporaneous email evidence indicating that Mr Russell had no concern about the availability of sites at the time.

50. My conclusion from the evidence is that Mr Russell had no reason to believe that Bridges had not raised the requisite funds, and indeed had every reason to consider that they had (and certainly the ability to check the point very quickly if he was in doubt), and that he had no particular concerns about a lack of possible sites. I therefore do not accept his evidence about Hayes being a "one off", which I do not consider was truthfully given.

51. Another aspect of Mr Russell's evidence was that his decision to resign was affected by a concern he had about Hub's financial viability, and in particular a concern that on the projections he had seen, and absent new deals, the business would run out of money by the second half of 2016, with two years of a lease on their Mayfair office left to run (a lease which he said he had not been happy for Hub to commit to when it did in January 2014). He says that had he known about Wembley that would have made all the difference because it would have removed the cash flow risk, and he would have understood why the Defendants appeared not to share his concerns about the level of overheads.

52. This evidence is closely linked to Mr Russell's evidence about whether Hayes was a one off as far as Bridges was concerned, because if it was not then additional income streams would be expected. Again, this evidence did not survive cross-examination. Whilst there was some concern about cash flow in the longer term, the position would be significantly ameliorated by Hayes, a project of which Mr Russell was well aware, as well as other deals that Bridges (or indeed other backers) might fund. Mr Russell's portrayal of himself as the only principal concerned about the finances, including the level of overheads, and trying to restrain the other principals from incurring additional costs because he did not anticipate further deals, is inconsistent with the other evidence, in particular the contemporaneous emails.

Mr Ferguson

53. Mr Ferguson is a solicitor who has now retired from full-time practice but at the relevant time was a proprietor of Ferguson Solicitors (subsequently Spring Ferguson), and had in that capacity from time to time advised Mr Russell. His evidence, that he was not retained to give advice on the draft Settlement Deed and Consultancy Agreement or instructed to advise Mr Russell relating to his departure from Hub, was accepted unchallenged, and he was not called for cross-examination.

54. It is convenient to make the point at this stage that, although Mr Russell did not obtain separate advice about the terms of his departure, he did have some input into the drafting of the Settlement Deed and corresponded direct with Lawrence Graham, whom Mr

Cartwright considered had been instructed on behalf of all four principals. It was clear from Mr Russell's evidence that as far as he was concerned he wanted to have Mr Ferguson "on standby" should the need arise, but I infer that in the event he concluded that Mr Ferguson's advice was not required.

Ms Skowronska: the alleged instruction

55. A brief witness statement was also provided by Ms Skowronska, who had worked as an assistant accountant at HRL between 2011 and 2015. In the event this witness did not appear, and the Claimant's case was closed without her evidence.

56. The absence of Ms Skowronska's evidence undermined Mr Russell's case in a material respect. Mr Russell's pleaded claim relied among other things on an allegation that between April and July 2014 HRL employees had been given instructions which led to him experiencing increasing difficulties in obtaining information relating to the business, and in particular that the Defendants had instructed HRL employees not to discuss the Hayes or Wembley projects, or other potential projects, with Mr Russell. Ms Skowronska's witness statement provided the only direct evidence of a basis for this claim, because it stated that all staff, and in addition the accounts team, had been specifically instructed not to provide information to Mr Russell. In the absence of this evidence the Claimant's case on this point ended up being limited to comments in Mr Russell's evidence about experiencing difficulties in obtaining information on 16 April, in particular from a senior member of staff called Steve Sanham. I was asked to draw an inference from that evidence that an instruction had been given.

57. I record now that, having reviewed the documentary evidence and heard from the witnesses who did give evidence, I decline to draw any such inference, and I find that no such instruction was given.

58. Emails from Mr Sanham to Mr Russell on and after 16 April indicate no unwillingness to provide information. The evidence that Ms Skowronska might have given if she had appeared was directly contradicted by evidence given by other Hub employees, and in particular the clear and unchallenged evidence of Mr Kanjiyani, a fellow member of the accounts team, that he was at no time instructed to withhold information from Mr Russell (or for that matter to restrict the information he provided to Mr Paul for the purposes of the valuation). Consistent evidence was also given by Mr Sugui and Mr Denee. The clear evidence of Mr Sugui, the Hub group finance director, was that although he was aware of the email group mailing list discussed further below, he had not been instructed by the Defendants not to provide information about Hayes, Wembley or other potential projects to Mr Russell. Furthermore, the approach he had adopted well before Mr Russell's departure (without feeling the need to check with anyone) was to send material to Mr Russell only if Mr Russell asked or if he knew that Mr Russell was involved in the subject matter, because his impression was that Mr Russell was less involved in the business as compared to the other principals. However, if asked he would have provided any information requested. Mr Denee similarly recalled no instruction being given and confirmed that (subject to the mailing list point) he did not consider that there was any culture in the office about keeping Mr Russell in the dark. I accept the evidence of these three staff members.

Mr Barlow

59. Mr Barlow was the first witness called for the defence and was cross-examined in the most detail. I found him to be an entirely straightforward and honest witness. There was no concerning hesitation in his answers, which responded directly to the questions asked, even when the answer might be regarded as unhelpful to the Defendants' case.

60. One specific point worth mentioning at this stage in relation to Mr Barlow's evidence relates to the speed and certainty of execution of the Wembley transaction. In contrast to Hayes, which had been expected to exchange for a long period but which was held up because of a planning related complication (referred to at [125] below), the Wembley transaction progressed much faster but in circumstances where there was less confidence that it would proceed to exchange of contracts. During July 2014 there remained three material outstanding issues in respect of Wembley, including one in respect of a telecommunications lease relating to a mast on the existing building. I accept Mr Barlow's evidence that if these issues were not resolved then the deal could not proceed. In respect of the mast this is supported by an email from Mr Ringer dated 20 July expressing concerns about the issue.

Mr Sloss

61. Mr Sloss was called immediately after Mr Barlow. Again, I found him to be a straightforward and honest witness. His responses were clear and precise. In some respects he appeared a little more careful or guarded in his responses than Mr Barlow.

62. As discussed below, Mr Sloss gave evidence in relation to his understanding of the agreement reached on 29 April 2014 (referred to at [27] above) which went beyond the pleaded case, and beyond the evidence of his co-defendants. I did not find any inconsistency to be rehearsed. Rather, Mr Sloss's evidence reflected his belief.

63. Mr Sloss's evidence was of particular assistance in relation to his oral agreement with Mr Russell of commercial terms for the latter's departure on 5 June 2014, including that it was only at that stage that agreement was reached over use of the Hub name, and in relation to his understanding about a statement made by Mr Russell in an email earlier on that date, on which Mr Tager heavily relied and which is discussed below.

Mr Cartwright

64. Similarly, I found Mr Cartwright to be a straightforward and honest witness. He clearly does not have the property expertise that shines through in Mr Barlow's and Mr Sloss' evidence, his focus being on the funding side. Generally, his recollection was less good and less specific than that of his co-defendants, but he was clearly well aware of his limitations in that respect, and he made it very clear that he was relying to a large extent on having re-read emails before giving evidence. He did however give relatively specific evidence about the important meeting he had with Mr Russell on 29 April 2014. I have considered this evidence carefully and, as discussed further below, I accept it as representing Mr Cartwright's genuine recollection, having been reminded of what had occurred by re-reading the email correspondence.

65. It was apparent that Mr Cartwright's consciousness of his lack of expertise is not limited to property matters, but extends to any matters with legal implications. The investment banking and funds environment in which he had previously worked gave him ready

access to in-house lawyers, and he felt exposed in negotiating Mr Russell's exit without assistance from lawyers, to whom he therefore turned as a matter of course.

66. It was also clear from Mr Cartwright's evidence that he had tried to find a way of keeping Mr Russell in the business, but had decided that the right course for Mr Cartwright personally was to seek to stay in business with Mr Sloss and Mr Barlow.

Mr Ringer

67. Mr Ringer gave straightforward evidence, which I accept. It was supportive of the Defendants' case. In particular, he gave evidence about the proof of funds letters supplied in relation to the Wembley project. As discussed below, Mr Tager had sought to rely on text included in that letter, which had in part been provided to Mr Ringer by Hub, as indicating that the Defendants were prepared to be dishonest, and had made allegations along those lines in cross-examining both Mr Barlow and Mr Sloss. However, he put no such allegation to Mr Ringer, and it was clear that Mr Ringer was content that the letters were accurate.

Mr Kanjiyani, Mr Sugui and Mr Denee

68. The evidence given by these witnesses was not seriously challenged, and I accept it. One aspect of Mr Denee's evidence, relating to email distribution lists, was relied on by Mr Tager in closing and is addressed further below.

Mr Paul

69. Again, Mr Paul's evidence was not seriously challenged. It was clear that he was instructed to provide an independent valuation, that he received the financial information he required from the accounts team at Hub and a brief "SWOT" analysis (Strengths, Weaknesses, Opportunities, and Threats) from Mr Cartwright, which he incorporated in his report. He was instructed by Mr Cartwright but understood that he was accepting responsibility to all four principals. He was aware of the Hayes project and that this was not reflected in the financial information provided to him, but his evidence was that this was what he expected because he had understood that it would be undertaken in a separate entity. (I would add that given that the transaction had not yet exchanged the omission in any event appears somewhat unsurprising.) However, Mr Paul did consider the existence of the Hayes project to be a positive indicator of the Hub brand's future potential.

70. Mr Paul was asked specifically about some follow-up correspondence he had had with Mr Cartwright where Mr Paul talked about using the valuation figure he had put forward as a starting point for negotiation, bearing in mind that valuation is an imprecise science. In my view this evidence does not undermine the independence of his report, and Mr Tager rightly did not make any criticism of Mr Paul.

The duties owed

Fiduciary duties?

71. Mr Russell's case was that the relationship between the principals was one that they treated as a partnership, reposing complete trust and confidence in one another. They referred to each other as partners and used that label on business cards and on the Hub

website. They ran Hub for a considerable period during 2011 and the first part of 2012 without considering formal documentation to be required, and when it was entered into they continued to treat each other as partners, with expectations of good faith, fair dealing and disclosure.

72. Mr Tager submitted that the relationship was fiduciary from the outset, referring to *Sheikh Tahnoon bin Saeed bin Shakhboot Al Nehayan v Kent* [2018] EWHC 333 (Comm), [2018] 1 C.L.C. 216 ("*Al Nehayan*") at [153] to [166], where Leggatt LJ (sitting at first instance) considered the circumstances in which parties to a joint venture may owe fiduciary duties to each other. As a result, Mr Tager said, the Defendants were required to act openly and honestly, and to disclose relevant information.

73. I disagree that the relationship was fiduciary in nature. As Leggatt LJ explained in *Al Nehayan* at [157], it is exceptional for fiduciary duties to arise other than in certain settled categories of relationship. One of those categories is the relationship of partnership, but the parties to this case were not partners in HRL. They were shareholders[1]. Although Mr Tager relied on the fact that the principals did at times make use of the term "partner" to refer to each other, I am satisfied that when they did so they meant business partner rather than partner in a legal sense. In any event, their use of the term would of course not have determined whether a relationship of partnership existed, or whether fiduciary duties had otherwise arisen.

74. Returning to *Al Nehayan*, having referred to the judgment of Millett LJ in *Bristol and West Building Society v Mothew* [1998] Ch 1 at 18A, where he described a fiduciary as "someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence" , Leggatt LJ went on to say the following at [159]:

> "159. Thus, fiduciary duties typically arise where one person undertakes and is entrusted with authority to manage the property or affairs of another and to make discretionary decisions on behalf of that person. (Such duties may also arise where the responsibility undertaken does not directly involve making decisions but involves the giving of advice in a context, for example that of solicitor and client, where the adviser has a substantial degree of power over the other party's decision-making: see Lionel Smith, 'Fiduciary relationships: ensuring the loyal exercise of judgement on behalf of another' (2014) 130 LQR 608.) The essential idea is that a person in such a position is not permitted to use their position for their own private advantage but is required to act unselfishly in what they perceive to be the best interests of their principal. This is the core of the obligation of loyalty which Millett LJ in the *Mothew* case [1998] Ch 1 at 18, described as the 'distinguishing obligation of a fiduciary'. Loyalty in this context means being guided solely by the interests of the principal and not by any consideration of the

[1] Clause 17 of the FJVA expressly provided: "Nothing in this Agreement shall be deemed to constitute a partnership or agency relationship between the parties." It is the case that the Rockbridge structure involved both a limited partnership and a LLP, but those were holding vehicles for the investments, and not the vehicles through which HRL conducted its business.

> fiduciary's own interests. To promote such decision-making, fiduciaries are required to act openly and honestly and must not (without the informed consent of their principal) place themselves in a position where their own interests or their duty to another party may conflict with their duty to pursue the interests of their principal. They are also liable to account for any profit obtained for themselves as a result of their position."

75. Leggatt LJ went on to find that there was no fiduciary relationship in that case, distinguishing two other cases, *Murad v Al-Saraj* [2004] EWHC 1235 (Ch), [2005] EWCA Civ 959 and *Ross River Ltd v Waveley Commercial Ltd* [2012] EWHC 81 (Ch), [2013] EWCA Civ 910, where the person found to be owing fiduciary duties in a joint venture context had been entrusted with extensive discretion to act on behalf of the other party or parties and in their interests.

76. Leggatt LJ also commented at [163] that the existence of trust and confidence was not sufficient, and furthermore that the test is not whether one party subjectively placed trust in the other. The test is an objective one, asking "whether the nature of the relationship is such that one party is entitled to repose trust and confidence in the other". At [165] he summarised the position by stating that the kind of trust and confidence characteristic of a fiduciary relationship differs from that involved in many commercial relationships, being "founded on the acceptance by one party of a role which requires exercising judgment and making discretionary decisions on behalf of another and constitutes trust and confidence in the loyalty of the decision maker to put aside his or her own interests and act solely in the interests of the principal".

77. In *Glenn v Watson* [2018] EWHC 2016 (Ch) Nugee J said at [131(7)]:

> "Without in any way attempting to define the circumstances in which fiduciary duties arise (something the courts have avoided doing), it seems to me that what all these citations have in common is the idea that A will be held to owe fiduciary duties to B if B is reliant or dependent on A to exercise rights or powers, or otherwise act, for the benefit of B in circumstances where B can reasonably expect A to put B's interests first. That may be because (as in the case of solicitor and client, or principal and agent) B has himself put his affairs in the hands of A; or it may be because (as in the case of trustee and beneficiary, or receivers, administrators and the like) A has agreed, and/or been appointed, to act for B's benefit. In each case however the nature of the relationship is such that B can expect A in colloquial language to be on his side. That is why the distinguishing obligation of a fiduciary is the obligation of loyalty, the principal being entitled to "the single-minded loyalty of his fiduciary" (*Mothew* at 18A): someone who has agreed to act in the interests of another has to put the interests of that other first. That means he must not make use of his position to benefit himself, or anyone else, without B's informed consent."

78. Nugee J went on in the following paragraph to comment that this was why fiduciary duties do not usually arise in commercial settings, because each party is usually entitled

to prefer his own interests. He emphasised at [134] that a relationship of "trust and confidence" does not mean that the relationship is a fiduciary one. Contracting parties usually do trust each other. Instead what the concept refers to in this context is a situation where one party is in a position where he "trust and confides that the other party will act exclusively in the first party's interests".

79. When asked in cross-examination, Mr Barlow agreed that the relationship between the principals involved trust and confidence, and Mr Cartwright accepted that there was a high level of trust and co-operation between the parties when they started business. Mr Russell also gave evidence that he had trusted the other principals. However, this does not establish a fiduciary relationship. It is unsurprising, given the nature of the venture, that it was only likely to work in practice if trust and confidence existed. But that is no different to many types of commercial relationship. Furthermore, the test is not a subjective one, so asking about the principals' own views does not determine the matter. The key question is whether the nature of the relationship was such that Mr Russell could trust in the loyalty of the Defendants to put Mr Russell's interests first, and act in what they perceived to be his best interests rather than their own. In my view none of the evidence came close to establishing this. Each principal was looking after his own interests throughout the life of the joint venture. This did not change once Mr Russell indicated an intention to resign and decided to absent himself from the office. In particular, nothing happened after that point to indicate that Mr Russell was now relying on the Defendants to manage the business for his benefit and in his interest, when he had not done so before. I reject Mr Russell's suggestion in his evidence to the contrary.

The FJVA: extent of obligations of good faith

80. Mr Tager also submitted that the express terms of the FJVA imposed relevant duties of good faith, or alternatively that the FJVA was a "relational" contract into which such duties should be implied, relying on *Alan Bates and Others v Post Office Limited* [2019] EWHC 606 (QB) at [706] to [736].

81. Mr Tager relied particularly on clauses 3.3, 14 and 16.1 of the FJVA, which so far as relevant provided as follows:

> "3.3 Each Principal undertakes with each of the other Principals to exercise all voting rights available to such Principal as a shareholder, partner or member in and director of any Hub Entity so as to procure the proper conduct of the business of that Hub Entity in accordance with the terms of this Agreement and the relevant Hub Entity Constitutional Documents and at all times to act in good faith as regards the procurement of the business of each Hub Entity.
>
> …
>
> 14.1 For so long as the joint venture contemplated by this Agreement remains in existence and has not been terminated … none of the Principals nor any of their Affiliates will:
>
> (a) engage in any Restricted Activity without the prior written consent of the remaining Principals…

…

14.3 No Principal shall, and each Principal shall procure that no Affiliate of him shall, (whether on his own account or on behalf of any other person and whether alone or jointly with any other person), after the date of this Agreement and while it remains in force, acquire (or enter into any agreement to acquire) any direct or indirect legal or beneficial interest of whatsoever nature in, over or in respect of any real estate, the purpose of which is either to frustrate or compete with the joint venture contemplated by this Agreement. The Principals shall act in good faith with respect to each other and the joint venture contemplated by this Agreement with respect to the provisions of this clause.

…

16.1 Except to the extent necessary to comply with any applicable law or any requirements of any relevant stock exchange or governmental or regulatory body and any other regulatory requirements in force from time to time affecting the Principals, the joint venture, or any Hub Entity, and save as permitted pursuant to this Agreement, none of the Principals shall divulge or communicate to any person or use or exploit for any purpose whatsoever (including for personal gain) any of the confidential knowledge of information relating to the joint venture, any Hub Entity, the Business, or relating to the other Principals or to this Agreement, which the relevant Principal may receive or obtain as result of entering into this Agreement…"

82. Mr Tager also relied on clause 6.1, which contemplated that each of the principals would be "entitled" to be the sole owners or managers of any Hub Entity "on the basis that they shall collectively participate in the decision making on an equal basis" and share equally in profits and losses.

83. I do not accept that any of these terms imposed obligations on the Defendants to Mr Russell which they breached in respect of the Wembley project. The closing words of clause 3.3 contain an express good faith obligation, but specifically as regards the procurement of business for Hub. Wembley was a Hub project. It was undertaken by HRL. Clause 3.3 could have been relevant if, for example, the business had been diverted elsewhere, or potentially if the project had not been pursued in the interests of Hub (for example, by being turned away or stalled for no good reason), but that was not what happened. The Wembley project was successfully procured for Hub.

84. Similarly, clause 14 is not engaged. The clause is headed "Exclusivity and non-compete". Clause 14.1(a) clearly relates to undertaking business "similar" to that of Hub, not business done in Hub. This is apparent from the definition of "Restricted Activity". "Restricted Activity" is defined as "any other joint venture, fund, pooled investment vehicle, company or scheme with investment objectives and geographical focus substantially similar to the Hub Activity" and with a value of £2 million or more. The references to "other" vehicles with investment objectives and geographical focus

"substantially similar" to Hub Activity makes it clear that the concept is not referring to Hub vehicles or Hub Activity itself. In the same way the good faith obligation in clause 14.3 is directed at acquiring interests in property with the aim of frustrating or competing with the Hub joint venture. That is not an accurate description of Wembley: it was acquired for the benefit of the joint venture, albeit that by the time it was acquired one of the principals had left the business, such that the joint venture continued between three rather than four people.

85. A literal reading of clause 16.1 might suggest that confidential information relating to the joint venture might not be used for any purpose at all. Clearly that was not intended: such information was to be used for Hub related purposes, but not to be used or exploited for other purposes. Again, this was not breached in connection with Wembley. Wembley comprised "Hub Activity" and additional vehicles established in respect of that project would have been "Hub Entities" as referred to in clause 16.1 (see [16] above for these definitions).

86. As regards clause 6.1, Mr Russell's actions after 31 March 2014, discussed further below, are relevant. Although that clause did contemplate collective participation in decision making, that was in terms of an entitlement: Mr Russell could choose to participate. If he chose not to, as I conclude later in this judgment that he did, it does not follow that there was an obligation on the other principals to try to require him to do so.

87. The existence of specific, and limited, good faith obligations in clause 3.3 and 14.3 (and nowhere else in the FJVA) is also highly relevant to the question of whether any more general duty of good faith or fair dealing should be implied, as Mr Tager submitted that it should. I agree with Fancourt J in *UTB LLC v Sheffield United Ltd* [2019] EWHC 2322 (Ch) at [196] to [205] that, rather than trying to identify first whether a contract is a "relational contract" and for that reason includes an obligation of good faith, the better starting point for the reasons he gives is the application of the conventional tests for the implication of contractual terms, as authoritatively restated by Lord Neuberger in *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd and another* [2016] AC 742 ("*Marks and Spencer*") at [16] to [31], that is whether a reasonable reader would consider that an obligation of good faith was obviously meant, or the obligation was essential to the proper working of the contract since it would otherwise lack commercial or practical coherence (the business efficacy test). This was the approach adopted by Leggatt LJ in *Al Nehayan* when he went on to find in that case, where the parties had not tried to specify the details of their collaboration in a written contract and that collaboration "involved much greater mutual trust than is inherent in an ordinary contractual bargain between shareholders", that the implication of a duty of good faith was essential to give effect to the parties' reasonable expectations, and satisfied the business necessity test (see in particular at [173] and [174]). Leggatt J had also adopted that approach in the earlier case of *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB).

88. Determining whether a term should be implied is an objective exercise, rather than one based on the parties' subjective intentions: see for example *Impact Funding Solutions Ltd v Barrington Support Services Ltd* [2017] AC 73 at [31], *Marks and Spencer* at [67] and *Marussia Communications Ireland Ltd v Manor Grand Prix Racing Ltd* [2016] EWHC 809 (Ch) at [64].

89. The FJVA is a relatively detailed document. It contains limited express obligations of good faith which I have concluded were not breached in respect of Wembley. In my view it was neither obvious, nor essential to the proper working of the contract, to imply some broader obligation of good faith. The existence of express good faith obligations indicates that when the parties intended to impose an obligation of good faith they did so, strongly suggesting that implying a more general good faith obligation would be inconsistent with the express terms.

90. Furthermore, the precise extent of the alleged good faith obligation was never satisfactorily explained to me and was expressed in various different ways at different times. Any implied term must be capable of being clearly expressed (*B.P. Refinery (Westernport) Proprietary Limited v Shire of Hastings* 180 CLR 266, 283).

91. The particulars of claim referred to an obligation to make full disclosure of all information and documents "relevant" to the FJVA, potentially a very broad concept. In closing submissions Mr Tager focused on what he said were important "milestones" of the Wembley project, such as putting in an expression of interest, obtaining support from Bridges, making an offer and obtaining approval from Bridges' investment committee. A step such as making an offer, which would at least have reputational consequences for Hub if it was subsequently unable to pursue it, was the type of decision that he submitted should have been taken by the directors of HRL, including Mr Russell, and because he had not been informed about the project he had been wrongly excluded from any opportunity to participate.

92. However, there was no history of a practice of board or partners' meetings convened to take significant decisions. At all relevant times, including when the FJVA was entered into (the relevant date for determining whether a term should be implied: *M&S* at [23]), the business was run on a much more informal basis. Although the Defendants accepted in cross-examination that (at least before 31 March, and probably before 29 April, 2014) they would expect to update all the principals on material developments, that is no more than would be expected for any working business relationship of the kind in question, rather than being obvious or essential in a legal sense. The scope of any such duty is certainly unclear and whether it was regarded as engaged in relation to a particular matter would inevitably depend to an extent on the subjective views of the relevant principal, as well as on practical matters such as whether the relevant individual was available when a particular decision had to be made. The context also included the fact that under clause 9 of the FJVA each principal was required to devote a "sufficient" amount of time to the business, indicating that each of them was expected actively to involve himself on a continuing basis. These are strong indicators against implying a term requiring disclosure of "relevant" matters or unspecified "milestones" of the kind referred to by Mr Tager, either on the basis that it was obvious or required for business efficacy.

93. It is also relevant to this point that none of the decisions taken in relation to Wembley before 1 July 2014 involved any material legal commitment (leaving to one side limited amounts in respect of legal fees). Although Hub did commit to pay an agent's fee to CBRE, that was contingent on the deal proceeding. It is far from clear that steps falling short of a material legal commitment were of a kind which would require the approval of the Board generally (if that were the test, as Mr Tager suggested), rather than being matters within the authority of individual directors.

94. Mr Tager also suggested that, because one or two comments were made during the course of the settlement negotiations about negotiating in good faith, the Defendants must have recognised they were obliged to inform Mr Russell about Wembley. The question of knowledge and intent is dealt with below, but I will comment here on the suggestion that underlies this that there was a good faith obligation under the contractual terms which was engaged – or was perhaps created (although that was not pleaded) – once Mr Russell had resigned and was in discussions about his departure, requiring the Defendants to take active steps to inform Mr Russell about developments in the business.

95. As the evidence of Mr Sugui and Mr Barlow in particular made clear (see [58] above in the case of Mr Sugui), in practice Mr Russell's participation in the business well before April 2014 was already significantly less than that of the other principals. He tended to be involved only in matters he had asked about or took a specific interest in, not taking part in the majority of day to day communications, such that staff members tended not to copy him in unless he had expressed an interest. Mr Cartwright also explained that, given that it was a relatively small team based in a small office, meetings tended to be held at short notice with no particular structure, and the habit had developed of not sending meeting invitations to Mr Russell if he was not in the office.

96. If Mr Russell had continued to participate in (non Kew related) business of Hub between April and June 2014, he would naturally have been involved in some of the steps taken in relation to Wembley, at least if he had chosen to take an interest in that project and the step in question was relevant to the role he chose to adopt. Similarly, Mr Cartwright was involved in certain aspects, particularly those relevant to funding. However, as discussed in more detail below, Mr Russell at no stage indicated any desire to be informed about anything other than the Kew projects. In those circumstances I find it impossible to see how any obligation of good faith that might be found to exist would actually be engaged to require the Defendants to take steps to inform him about other projects, exactly contrary to Mr Russell's indications (discussed further below) that he was not interested in hearing about them, and in a manner that would be inconsistent with the working practice that had developed while he was still active in the business prior to April 2014.

97. In *Al Nehayan* Leggat LJ summarised at [175] and [176] what a duty of good faith typically involves, commenting that the obligation is not a demanding one and "does no more than require a party to refrain from conduct which in the relevant context would be regarded as commercially unacceptable by reasonable and honest people". He noted that, in contrast to a case where fiduciary obligations exist, it does not involve an obligation of loyalty, and parties are generally free to pursue their own interests rather than subordinate them to those of the counterparty.

98. These comments are relevant to the circumstances surrounding Mr Russell's departure. Even if some form of good faith obligation might be implied into the FJVA, or I was wrong in my view about the scope of the express provisions on which Mr Tager relied, any good faith obligation would be limited in nature. The Defendants' failure to tell Mr Russell about Wembley, in circumstances where I have concluded (see further below) that he had indicated that he was not interested in being told about anything other than the Kew projects, he never asked about other projects or opportunities and the Defendants had not taken any steps to prevent him from finding out, is not in my view

conduct which would be regarded as commercially unacceptable by reasonable and honest people. The Defendants were entitled to pursue their own interests.

The Settlement Deed

99. As already mentioned, the Settlement Deed was entered into between the four principals and HRL. It dealt with the purchase of Mr Russell's HRL shares, but more relevant for present purposes are the release provisions summarised below.

100. The drafting of these provisions reflects the confusion referred to at [15] above about whether two versions of the FJVA exist, using a concept of "Framework Joint Venture Agreement" to refer to a signed but undated agreement, and "Subsequent Framework Joint Venture Agreement" to refer to a "subsequent" FJVA dated 19 June 2012.

101. Clause 3.1 provided that "with effect from the Completion Date" Mr Russell "shall cease to have any rights and/or obligations under the Framework Joint Venture Agreement and/or the Subsequent Framework Joint Venture Agreement", subject to certain continuing provisions referred to in clause 3.2, which included clause 16 of the FJVA (confidentiality).

102. Clause 4.1 provided as follows ("RR" being Mr Russell, and "the Company" being HRL):

> "This Deed is in full and final settlement of, and RR hereby releases and forever discharges with effect from Completion, all and/or any actions, claims, rights, demands and set-offs, whether in this jurisdiction or any other, whether or not presently known to RR or to the law, and whether in law or equity, that he ever had, may have or hereafter can, shall or may have against the Company and/or any of the other Parties arising out of or connected with the Framework Joint Venture Agreement and/or the Subsequent Framework Joint Venture Agreement or any matter or matters contained therein or any other matter arising out of or connected with the relationship between RR and any of the other Parties, and including, but not limited to, any rights which RR may have in relation to the "Hub" name…"

103. Clause 4.2 provided for a corresponding release by Mr Barlow, Mr Sloss and Mr Cartwright in favour of Mr Russell, and clause 5 contained an agreement not to sue in respect of any of the released claims.

104. Clause 13 provided for mutual indemnities by each party against all costs and damages (including "the entire legal expenses") incurred in all future actions in respect of any of the released claims. Clause 16.1 contained an "entire agreement" clause, specifying that it superseded "all previous agreements, promises, assurances, warranties, representations and understandings" relating to the subject matter. Clause 16.2 provided that each party agreed that they would have no remedy in respect of any "statement, representation, assurance or warranty (whether made innocently or negligently) that is not set out in this Deed", and that they would have "no claim for innocent or negligent misrepresentation based on any statement in this Deed".

105. Mr Tager accepted that the effect of the drafting of these provisions was that a variety of possible claims were released, but maintained that all Mr Russell's claims were "based in fraud". The exclusion of such claims would have required very clear and specific words.

106. The Defendants accepted that the Settlement Deed did not release dishonesty based claims. This was an appropriate concession to make. Subject to this, however, it is clear that the Settlement Deed contained a comprehensive release, replacing Mr Russell's existing rights with the terms of the Settlement Deed. Although Mr Tager relied on the fact that claims etc were only released with effect from Completion (on 16 July 2014), this makes no material difference. As Mr McCourt Fritz pointed out, once the Settlement Deed was entered into Mr Russell was obliged to proceed to completion. If he had been induced to enter into it by fraudulent misrepresentation or non-disclosure he could seek rescission, but no subsequent misrepresentation or non-disclosure would be relevant.

The Hub 2 agreement

107. As already indicated, the Defendants rely on the existence of an agreement, the Hub 2 agreement, entered into between Mr Cartwright and Mr Russell on 29 April 2014. They do not assert that the agreement had contractual force. They rely on its existence (or more accurately the Defendants' belief in its existence) to provide what they say is, when combined with the absence of requests for information from Mr Russell, a complete defence to the allegation that they acted dishonestly in failing to provide information in respect of Wembley.

108. Mr Cartwright's recollection of the meeting he had with Mr Russell on 29 April 2014 was based on his own direct recollection of the meeting, which he described as "rather fuzzy", together with a review of contemporaneous email correspondence and having thought long and hard about it before giving evidence. Based on this, he recalled that the following four things were covered at the meeting.

109. First, Mr Russell talked a lot about the value of his interest in Hub, using numbers of the order of around £9 to £10 million. This led to a suggestion by Mr Cartwright that the interest be valued either including or excluding the Hayes project (in fact it was only valued on the latter basis, for reasons that Mr Cartwright cannot now explain but which Mr Russell explained as being at Mr Sloss's suggestion because Hayes had not been signed, a suggestion to which Mr Russell agreed because he thought he could add his own figures for Hayes once the valuation had been done). It was agreed that the valuation should be obtained from NLP.

110. Secondly, Mr Russell made it clear that he was upset that (presumably following Mr Sloss's action on 23 April – see [26] above) he was not receiving information that Mr Burkey was getting in relation to the Rockbridge projects, using words to the effect that "I need to see what Nathan sees", and (so Mr Cartwright says) saying that he (Mr Russell) did not want to see anything else. This led to the idea being developed of dividing emails into two groups, those relating to Rockbridge and those relating to other matters (the second group being referred to as "Hub 2"). There had previously only been a single undifferentiated email distribution group for all Hub staff.

111. Thirdly, because Mr Cartwright had had no prior experience of this type of negotiation, he suggested using a lawyer or corporate financier as an intermediary in the negotiations. Mr Russell declined this suggestion and thought that the matter should be sorted out between the four principals. Finally, Mr Russell made it clear that he wanted the matter sorted "yesterday", in other words as soon as possible.

112. The emails sent by Mr Cartwright on 29 April following the meeting include instructions by Mr Cartwright to the relevant staff member to set up a Hub 2 email distribution group and add Mr Russell back to the original group. He also sent an email to Mr Russell in the afternoon of 29 April confirming that he had requested that the new group, hub2@hubgroup.co.uk, be set up and stating:

> "Once that is done, the existing hub@hubgroup.co.uk will be used for correspondence with respect to Acton and TBR and the new one will be used for all other email distributions. There is no interest from this end not to let you be party to any dialogue with respect to the two projects."

113. Mr Cartwright also sent a further email to Mr Russell and all Hub staff on the morning of 30 April confirming that the original list should be used for the Rockbridge projects and the Hub 2 group should be used for "all other correspondence". In the afternoon of 30 April he sent a further email to Mr Sloss and Mr Barlow which recorded the following in relation to Mr Russell:

> "When I saw him yesterday, he agreed that he shouldn't see emails on new business going forward but, equally, I agreed that he shouldn't be excluded from TBR and Acton info flow. The idea of two email groups was reached mutually and he approved it."

114. He also sent them another email specifically recording that he had assured Mr Russell that all dialogue in relation to the Rockbridge projects would take place via the original mailing list.

115. Mr Russell's evidence in cross examination was that he could not recall the content of the 29 April meeting, although that was not how he presented it in his witness statement. He did seek to maintain, however, that he did not agree to the idea of two email distribution groups, and that he telephoned Mr Cartwright, probably on the morning of 30 April, to discuss Mr Cartwright's email of 29 April on that subject and to make clear that he objected to the arrangement, and that there was no question of future business being pursued by the Defendants without Mr Russell's participation until terms were agreed for his departure. Hub 2 could not exist until "Hub 1" was settled. His evidence was that after they spoke he "assumed" that the proposed new email group had not been implemented, and he continued to work on projects he was already involved in, including not only the Rockbridge projects but also certain other sites, including a site at Rotherhithe and one in Southgate.

116. I accept Mr Cartwright's evidence that there was no such telephone call. Mr Russell's evidence on this issue is inconsistent with the contemporaneous emails, whereas Mr Cartwright's evidence is entirely consistent with them. Not only was there no documentary evidence indicating Mr Russell's disagreement with or objection to what

Mr Cartwright had set out, on the morning of 30 April Mr Russell replied to the email that Mr Cartwright had sent to all to staff about mailing lists to ask about something else, with no indication of an objection. Furthermore, on the same date Mr Russell suggested the creation of "Hub 3" to cover any projects which Mr Russell sourced and which the Hub business chose to become involved in. This is evidenced by Mr Cartwright's communication of this suggestion to Mr Barlow and Mr Sloss in an email on 30 April, in which he also referred to Mr Russell's acceptance that "Hub 2 is the business that he will not be involved in".

117. Mr Russell's evidence was that his understanding of Hub 2 and Hub 3 did not relate to email groups. The former was discussed as a concept that covered future business that the Defendants might undertake without his involvement once his departure was agreed, and Hub 3 related to developments he introduced following his departure.

118. The Defendants' pleaded case was that the "Hub 2 agreement" was an agreement about email distribution groups, rather than a more fundamental agreement that Mr Russell had agreed that he would have no involvement or interest in further projects. Mr Cartwright's evidence was entirely consistent with this. Mr Sloss believed that it was a more "profound" agreement relating to non-involvement in all projects other than the Rockbridge projects (albeit subject to the sale of Mr Russell's interest proceeding). Mr Barlow's evidence was largely consistent with Mr Cartwright's although there were some indications that he, like Mr Sloss, thought that Mr Russell had agreed to be excluded from future transactions.

119. My conclusion from the evidence is that there was a "Hub 2 agreement" between Mr Russell and Mr Cartwright on the terms described by Mr Cartwright. The agreement related to the distribution of information and reflected Mr Russell's desire to see information about the Rockbridge projects and nothing else. It was consistent with what all the principals were aware of, namely that Hub's business was ongoing and, given the nature of its business and its staff costs and other overheads, Hub would not "down tools" on work to identify and progress new opportunities while terms for Mr Russell's departure were negotiated and agreed. Mr Russell could not seriously suggest otherwise, and indeed the evidence included an email from Mr Sloss to Mr Russell in June 2014 in relation to a site the latter had mentioned in Enfield, where Mr Sloss comments that Hub was looking at a site close by, a comment that engendered no response.

120. It is highly significant that Mr Russell cannot point to a single example of any enquiry or request for information by him between 31 March and 1 July 2014 about potential opportunities or projects that the Defendants were working on. Furthermore, I have found (see [57] above) that at no stage were staff instructed not to provide Mr Russell with any information. He could have asked but he chose not to do so. I do not accept that, in circumstances where he chose not to ask about other projects and had made it clear that he was not interested, the Defendants were nonetheless obliged to contact him about opportunities or projects of which he was not aware.

121. I also accept the Defendants' evidence that if, Mr Russell had asked any of them, they would have provided the information requested. He continued to be a director and shareholder and could have obtained information if he wanted it. His failure to ask, in circumstances where he was aware that Hub continued as a going concern and he was

not in fact receiving information about other projects, is entirely consistent with the Hub 2 agreement, which was itself based on Mr Russell's professed lack of interest.

122. Mr Cartwright's assessment of Mr Russell's approach at the time was that he had "moved on" from the business both mentally and physically. I accept this as the most likely explanation. It is consistent with the approach Mr Russell took of only asking for Kew related information (given the continuing relationship he had with Kew, and which the evidence suggests he was trying to develop further, outside Hub), with the fact that he wanted terms agreed very quickly, and with his focus shifting to projects that he could source on his own terms, which he might introduce to Hub where it could provide the execution skills that he evidently lacked. His specific interest in the Kew projects is also consistent with the 17 April email referred to at [25] above.

123. The reality was that, at the time, Mr Russell was not interested in receiving information other than in relation to the Rockbridge projects. He was potentially interested in working on other sites that he might introduce to Hub on his own terms, but was not interested in other Hub activity in which he was not involved.

124. Mr Sloss's removal of Mr Russell from the Hub email distribution list on 23 April does not, at first sight, sit entirely easily with the Hub 2 agreement. However, I accept Mr Sloss's evidence that this was done in the context of Mr Russell making clear that he was not intending to participate in Hayes, and Mr Sloss's more general expectation that, having decided to leave, Mr Russell would cease to be involved in future business. However, he accepted that Mr Russell could ask for information at any stage until the settlement completed.

125. In respect of Hayes, I accept the Defendants' case that Mr Russell had made it clear on or shortly before 31 March 2014 that he was not interested in an equity participation. This is confirmed by an email sent by Mr Barlow to Addleshaw Goddard on that date. It is also consistent with the email Mr Russell sent on 17 April referred to at [25] above. The Hub 2 agreement meant that he did not receive further information circulated about it. The deal was however very well advanced (the last sticking point being a difficulty the vendor experienced in carving the site out from a larger site in the context of a section 106 planning obligation affecting the larger site), and Mr Russell was content to deal with it separately, in the event by way of the Consultancy Agreement. There was nothing to prevent him asking for or obtaining information about Hayes, which he would have been perfectly able to do to the extent that he thought he needed or wanted it.

126. What was however clear to all parties after 29 April was that the valuation of Mr Russell's shareholding interest remained to be agreed. This included any value reflecting the fact that HRL owned the Hub name. Any value associated with the brand and Hub's trading record would therefore need to be reflected in the valuation. The terms agreed on 5 June with Mr Sloss addressed this, and this is discussed further below.

127. Mr Tager submitted that any understanding represented by the Hub 2 Agreement was one that covered only the sort of routine emails that went to all staff. The original hub@hubgroup.co.uk list covered all staff and the new one covered all staff except Mr Russell. He submitted that it would not be used for more sensitive matters that might be discussed between principals or with senior staff, or project related emails sent only to certain staff members. Mr Tager relied on a response given by Mr Denee in cross-

examination, to the effect that he did not understand Mr Cartwright's instruction about email groups to refer to more sensitive emails.

128. I do not accept this submission. It was clear that Mr Cartwright did not understand the concept in this way. This was not simply a question of managing the size of Mr Russell's inbox because he did not want to receive generic emails sent to all staff. As the contemporaneous emails show, a clear distinction was being drawn between the Rockbridge projects and other projects. Mr Russell wanted to see everything that Mr Burkey saw, and that would have been the case whether the email or document in question was being sent to the entire distribution list or only to certain principals or members of staff. If the subject matter was sensitive and related to Rockbridge he would have had a greater, rather than lesser, interest in seeing it. Furthermore, Mr Russell did not want to see anything else. It cannot realistically be suggested that one approach was being intended for Rockbridge matters, and a different one for other matters. Rather, no thought was given to any nuanced distinction between emails to entire distribution lists and emails to some, but not all, members of that list. The same principle clearly applied. Mr Russell wished to see Rockbridge related emails and nothing else.

129. If further support is needed for this (though I do not think it is) then it is worth noting that use of the full distribution list was not in fact limited to generic emails of a kind designed to provide staff with news. The office was a relatively small one with no more than around a dozen employees, and a number of examples were identified of emails being sent to the full distribution list even though they were not in the form of update emails, and where at least some of those on the list would have no particular interest in the subject matter.

130. Mr Tager also submitted that it was highly significant that there is no mention of the Hub 2 agreement in pre-action correspondence. Its existence is referred to for the first time in the defence.

131. I have considered the relevant pre-action correspondence. I do not consider that the failure to refer to the Hub 2 agreement at that stage materially undermines the Defendants' case. Mr Russell's case changed quite significantly over the course of the pre-action correspondence, and when fraudulent misrepresentation was alleged and Mr Cartwright's email of 29 April referred to at [112] above was referred to by Mr Russell's solicitors, the Defendants' solicitors responded by stating that the allegation of fraudulent misrepresentation should not have been made, referring to professional conduct rules rather than providing a substantive response. Following that there was no substantive correspondence before the claim was issued. It is therefore quite possible that the Defendants' solicitors concluded that reference to the arrangement was not necessary to respond to the points raised by Mr Russell's advisers. Another possibility is that, once the claim was issued, the work needed to draft the defence reminded the Defendants of the significance of what had been agreed.

132. The existence of a Hub 2 agreement is also consistent with Mr Russell's lack of reaction to being told about the Wembley project. I do not accept his evidence that Mr Cartwright described it as a commercial investment (evidence that was strongly contradicted by Mr Cartwright, whose evidence I prefer). Among other things, there would have been little point misrepresenting the position in that manner given that the acquisition was being publicised, and indeed Mr Russell was sent the press release shortly thereafter which made it clear that what was contemplated was primarily a

residential development. Hub's business was also residential redevelopment. It is inherently improbable that Mr Russell would have understood Hub to have purchased a commercial property without redevelopment plans.

133. I should also briefly deal with the point that Hub was of course considering the Wembley project before 29 April, so the question arises as to whether the Defendants should have provided information about it to Mr Russell before that date, since no Hub 2 agreement was in place. I have already concluded that there was no express or implied duty to make such a disclosure. Even if this was incorrect, then it is clear that – like a number of other opportunities that Hub reviewed –Wembley was a highly speculative proposition at that time, and I do not consider that it would have engaged any obligation of disclosure that might realistically be implied.

134. Finally on the question of the Hub 2 agreement, it is worth noting that the concept of "Hub 2" was also used in discussion in a broader sense, consistent with Mr Russell's "Hub 3" proposal. For example, in the 26 April email referred to at [140] below Mr Cartwright put forward suggested terms to Mr Russell under which the existing entities would remain as they were to complete the Rockbridge projects, and the Defendants would incorporate "HUB Res 2" through which they would take the business forward with the Hayes project "and other future projects". This also reflected earlier discussions while Mr Russell was still active in the business, which distinguished the Hub structure used for the Rockbridge projects and "HR2", the separate structure they considered they needed for later projects not involving Kew. This wider concept of Hub 2 is not inconsistent with the Hub 2 agreement and in my view it does not undermine the Defendants' case.

5 June email

135. Mr Russell placed significant reliance on an email he had sent to Mr Cartwright, copied to Mr Barlow and Mr Sloss, at 12:01 pm on 5 June 2014. Mr Tager submitted that, however any Hub 2 agreement might have been construed as at 29 April, by the time of that email it was plain to the Defendants that they had wrongly withheld the Wembley deal.

136. The email is entitled "Separation". It refers to the NLP valuation, which Mr Russell had read the previous night, and made a number of comments on it as well as generally. The comments include that Mr Russell did not want to sell but was prepared to do so because the others wanted him to, and in relation to the valuation that, on the basis of what NLP was saying, "even with no growth in Hub, which seems unlikely… the price is going to rise each year". Mr Russell relied particularly on the following paragraph, which appeared as a second numbered paragraph 4 (referred to below for convenience as "paragraph 4"):

> "There hasn't been any mention of the Hayes transaction, or for that matter Gibraltar which was agreed the profit on which would fall 40% less costs into Hub at the March board meeting. Origination of the deal at Hayes, as well as all future deals in mid market London resi relies on the Hub track record. If you used the Hub track record to originate a deal, that deal is a Hub deal and I own 25% of it, both now as well as going forwards in the event I do not sell my shares."

137. The email goes on to make a number of other points, including that Mr Russell would "help all and any transactions that we either may be involved in already, or in future to their conclusion in so far as I am able and you wish", and that he was prepared to sell all his interest in Hub, and "any interest that I may have in Hub will cease at the date that the transaction is executed". The email also states that Mr Russell was prepared to discuss any other matters "in good faith". It proposed financial terms, either for both the HRL shares and an amount in the lieu of carried interest, or just for the HRL shares.

138. I disagree that this email makes a material difference to Mr Russell's case. First, I have concluded that the Hub 2 agreement related to the volunteering of information, not an understanding that Mr Russell was irrevocably giving up any interest in future projects. A statement that he currently had a 25% interest in Hub and would continue to do so if he did not sell is uncontroversial in that context.

139. Secondly, the email has to be viewed in the context of the other evidence, including other contemporaneous email correspondence as well as witness evidence.

140. It is clear from the emails as well as witness evidence that the 5 June email relied on was part of a negotiation process. Mr Cartwright had sent the NLP valuation to Mr Russell by email on 3 June. In that email he referred to discussions between Mr Russell and Mr Sloss about the merits of the valuation versus the "cash offer" which was made by an email dated 26 April. That offer was the one referred to at [134] above, under which Mr Russell would remain in the existing structure throughout the life of the two Rockbridge projects and a new vehicle would be set up which would take over the Hub name. That offer was repeated on 3 June, together with a suggestion that Mr Russell would also share in the benefit of future projects introduced by him to the new vehicle. Alternatively, Mr Russell was offered the Hub name for a nominal sum. Mr Russell's responses to this focused principally on the valuation, making a counter offer to sell his interest in HRL and his carried interest and clarifying that on the basis of that he did not expect a contribution from Hayes and there would be no future liability. The following day he made a proposal in relation to sites he sourced in the future, involving a 25% profit split. Mr Cartwright emailed again in the morning of 5 June offering to purchase Mr Russell's HRL shares at the NLP valuation. When Mr Sloss and Mr Cartwright saw the 12.01 pm email on which Mr Russell relies they each commented that Mr Russell had changed tack in respect of Hayes and Gibraltar, the latter being regarded as a historic deal that was nothing to do with Mr Russell (it was not done in Hub).

141. Later on 5 June Mr Sloss spoke to Mr Russell by telephone and reached the oral agreement referred to at [31] above. Under the agreed terms, Mr Russell would sell his HRL shares, carried interest from the Rockbridge projects would be paid out as when received, Mr Russell would receive amounts in respect of Hayes if it happened, and the Defendants would retain the Hub name.

142. The existence of the alternative "cash offer" is informative. It is entirely consistent with the Defendants' understanding that Mr Russell's focus was on the two Rockbridge projects, together with other projects Mr Russell might introduce. The discussion about the name is also relevant. The paragraph Mr Russell relies on in his 5 June email (paragraph 4) is at least in part about the perceived value of the name (the "Hub track record"). Although the Defendants clearly wished to keep the name, they were prepared to offer it to Mr Russell for a nominal sum.

143. Overall, in my view the 5 June email was part of a negotiation process. Mr Russell was "setting out his stall", and indeed doing so in a way which appeared to the Defendants to be partially inconsistent with the approach he had taken previously. Paragraph 4 is essentially making statements about the value of his shareholding interest in HRL, which among other things owned the name and any goodwill associated with it, and saying he wanted an amount in respect of Hayes (and potentially Gibraltar). It is also clear from the witness evidence that none of the Defendants, and in particular neither Mr Sloss nor Mr Cartwright who were the principals directly involved in the negotiations with Mr Russell at the time, read paragraph 4 as amounting to a statement that Mr Russell was to have an interest in all projects without qualification, or that (contrary to the Hub 2 agreement) he now wanted to be told about other projects. Rather, they read it as him saying that he would have an interest in deals originated using the Hub track record if he did not sell his shares. Mr Sloss also stated that as far as he was concerned he did not agree with paragraph 4 in the light of the Hub 2 agreement, and that the position he agreed with Mr Russell after negotiation later that day reflected that. I accept that the Defendants saw nothing in paragraph 4 which made them recognise that Mr Russell was suffering from a misunderstanding, or one that they should have corrected.

Other allegations of dishonesty

144. Mr Tager sought to support the allegations of dishonesty by reference to other evidence which he claimed demonstrated a propensity to mislead on the part of the Defendants.

145. First, Mr Tager submitted that an email that Mr Cartwright had sent to Mr Russell on 26 April 2014 was "clearly misleading" in that it intentionally gave the impression that Addleshaw Goddard had only advised on the contents of the contractual documents for the benefit of all four principals, whereas in fact it was apparent that they had been involved in the drafting of the email itself, including as to matters that should or should not be included, and had also been engaged by Mr Barlow since early April 2014 to advise in relation to the Hub name. Drafts of the email had also been seen by Mr Barlow and Mr Sloss, so this allegation potentially extended to them as well.

146. The part of the text of the email relied on was a sentence in which Mr Cartwright stated that the "reason" he had consulted the relevant partner at Addleshaw Goddard was "simply to gain clarity over things for everyone's benefit". This text was in Mr Cartwright's original draft, which was then added to by an associate solicitor at Addleshaw Goddard (who at the time was on secondment to HRL), without that text being commented on or removed. The partner in question also reviewed the email, and whilst he suggested that the statement be removed that was specifically on the basis that including it was likely to appear more confrontational, and that the email should be kept informal. He did not suggest removing it on the basis that it was misleading.

147. In circumstances where the two solicitors must both have been aware of exactly what their firm had and had not been asked to advise about, it was in my view very difficult for Mr Tager to seek to rely on the email to impugn Mr Cartwright's honesty in the manner that he did without also making allegations against at least the associate solicitor, if not the partner as well. To be clear, whilst the email refers to Mr Cartwright's reason, that is motivation, for instructing Addleshaw Goddard, the basis on which Mr Tager made his allegation was that the firm had actually also been

instructed on other matters. The fact of those instructions (rather than Mr Cartwright's motivation) was clearly within the knowledge of the solicitors.

148. When the issue first arose during oral evidence Mr Tager declined to confirm that he was not seeking to criticise the solicitors. By the end of the trial Mr Tager had rightly confirmed that he did not regard either solicitor as having acted in anything other than a proper and professional manner. In my view there should have been no necessity to delay confirmation that the solicitors had acted properly, as they clearly did. The difficulty arose with making an allegation against Mr Cartwright on a basis which inevitably raised at least a question about the role of the solicitors, and doing so without immediately making clear that he was not seeking to criticise them. Although he suggested that the solicitors' position only became clear during the oral evidence, I disagree. The documentary evidence showed that there were no reasonable grounds for criticising the solicitors and the oral evidence did not add materially to the documentary evidence on this point.

149. Turning to the allegation against Mr Cartwright, he explained that the point he was focusing on in the email was whether the four principals should negotiate the commercial terms of Mr Russell's departure directly, or alternatively whether they should use a lawyer or corporate finance adviser as an intermediary. What he intended to convey was that he was not using Addleshaw Goddard's services to negotiate terms, but rather to obtain clarity about the existing legal documents. He had made it clear to Mr Russell previously that he was consulting Addleshaw Goddard, and the emails showed that Mr Russell was aware of this. He did not intend to convey that Addleshaw Goddard had not been instructed about anything else.

150. In essence I accept this. In particular, in my view there can be no criticism of the fact that the Defendants sought advice in respect of the Hub name and did not volunteer this fact to Mr Russell. The immediate context was the Hayes project, which the Defendants were trying to execute in circumstances where Mr Russell had said that he was not participating but had not yet agreed the terms of his departure, including in respect of the Hub name. In the circumstances it was entirely appropriate to obtain advice to determine whether the Hub name could be used for Hayes. That was advice that was separate to agreeing the terms of Mr Russell's departure. Furthermore, and as already indicated, Mr Cartwright's email to Mr Russell refers to his reason for instructing Addleshaw Goddard, rather than saying that HRL was not using the firm for anything else. Indeed, Mr Russell was aware that the Addleshaw Goddard associate solicitor was on secondment at HRL, no doubt working on a range of matters. I also do not think it was wrong for Mr Cartwright not to volunteer that he had asked Addleshaw Goddard to help with the wording of the email, and that was also clearly the view of the two solicitors. I therefore reject this allegation.

151. Secondly, Mr Tager relied on a statement by Mr Cartwright, in the email dated 3 June which enclosed the valuation, that he was continuing to attempt to broker a settlement, and to the possibility of being able to tweak what was on the table "to everyone's benefit". In my view there is no basis to suggest that this demonstrated a propensity to mislead. It was part of a genuine attempt to reach commercial agreement.

152. Thirdly, in respect of Mr Barlow and Mr Sloss, Mr Tager submitted that they had intentionally misled the receivers on the Wembley transaction in relation to the Hub funding position, both in the two expressions of interest as well as the two offers, when

read together with the two accompanying proof of funds letters. Mr Tager submitted that these documents incorrectly portrayed HRL as "fully funded" and also misled about the timeframe within which the transaction could be progressed. He also made allegations to Mr Barlow and Mr Sloss that the proof of funds letters contained lies. He suggested that they incorrectly indicated that Bridges had allocated capital and that it had already "partnered" with Hub, when in fact Hayes had not signed.

153. I reject all these allegations. I do not accept that the documents in question demonstrate a lack of integrity. I accept the evidence of Mr Barlow and Mr Sloss that the statements included in the expressions of interest and offers were in accordance with normal practice in the property industry, and that they certainly did not consider them to be misleading. They were written by experts in the property industry and would be read by experts in the same field, who would understand them for what they were and, in particular, would understand that the actual provision of funds was subject to contract and would depend (among other things) on due diligence. The accuracy of the proof of funds letters was, unsurprisingly, confirmed by Mr Ringer in his evidence, including the point that he had the ability to make the allocations of capital referred to. By the dates the offers were put in there had also been a direct discussion between Mr Barlow and Investec, who were therefore aware of the details of HRL's position in relation to funding. Mr Sloss and Mr Barlow genuinely believed that they could obtain funding from Bridges, as indeed they did.

154. As mentioned above, Mr Tager sought to rely on text included in the proof of funds letters signed by Mr Ringer as indicating that Mr Barlow and Mr Sloss were prepared to be dishonest, but did not put that allegation to Mr Ringer, although he did suggest that the letters were misleading. Mr Tager said that, because Mr Ringer gave evidence after the Defendants, he had to decide whether to put the allegations to Mr Barlow and Mr Sloss before Mr Ringer gave evidence, at which point he concluded that no similar allegation should be put to Mr Ringer.

155. In my view the allegations about the proof of funds letters should not have been made. Whether or not anyone at Hub had suggested text for inclusion in the proof of funds letters, the letters as signed were Mr Ringer's, on behalf of Bridges. He was undoubtedly responsible for the letters and adopted their contents. In any event Mr Ringer is and was a senior executive at a third party organisation, and given his responsibility for the content it is highly improbable that he would not have read what were short letters and challenged any inaccuracy before signing them. Furthermore, and importantly, the matters suggested as being inaccurate related to Bridges itself, and would therefore have been matters within Mr Ringer's direct knowledge. In my view the allegation, if made, inherently involved an allegation of dishonesty against Mr Ringer, which Mr Tager had no reasonable grounds to make since there was no reasonably credible basis on which to assert that the statements in the proof of funds letters were inaccurate.

156. Although by the stage of closing submissions Mr Tager had sought to narrow the point by relying on the proof of funds letters only in combination with the offer letters and expressions of interest written by Hub itself (with a view to diverting criticism from Mr Ringer), that will not do. As regards matters relating to Bridges, there is no evidence to suggest that anything the Defendants drafted for Mr Ringer was known by them to be untrue. On the contrary, since Mr Ringer was content to adopt their drafting that provided confirmation that it was true. The proof of funds letters were either inaccurate

and dishonest or they were not. They were not, and there were no reasonable grounds to assert that they were.

Conclusions on fraud/dishonesty allegations

157. In reaching my conclusions on Mr Russell's allegations of dishonesty against the Defendants I have had regard to the "presumption of innocence" in fraud cases, under which a court faced with rival explanations of a particular incident, one innocent and the other not, should start from the strong presumption that the innocent explanation is more likely to be correct (*Jafari-Fini v Skillglass Ltd* [2007] EWCA Civ 261 at [40], per Carnwath LJ). Fraud is inherently less probable than other explanations. However, I should also record that I would have reached the same conclusions on the evidence in this case without applying any presumption of innocence.

158. I am satisfied that Mr Russell has not succeeded in proving that the Defendants were dishonest. Moreover, I find that they were honest in their dealings with Mr Russell in relation to his departure from Hub, and specifically in relation to Wembley. I have found that they did not owe any positive duty to Mr Russell to inform him about projects of which he was unaware. They also at no stage conveyed the impression that Hub was not working on new projects. Even if I was wrong about the absence of a duty to inform, the Defendants did not believe that they were under any duty to tell Mr Russell about Wembley, or indeed any other potential project. They understood that if they did not agree terms with Mr Russell for the sale of his shares then Mr Russell would remain a shareholder, and on that basis he might participate in Wembley as well as Hayes if those projects proceeded to execution (subject to the action they would then likely take to try to buy him out on the basis that he was in breach of the FJVA obligation to devote sufficient time to Hub). They also accepted that, if Mr Russell had asked about projects, they would have provided the information requested. No instruction was given to staff to withhold information. There was no conspiracy to avoid providing Mr Russell with information or to exclude him from the opportunity to participate in Wembley.

159. As confirmed in *Ivey v Genting Casinos* (UK) Ltd [2018] AC 391 at [74], in order to establish dishonesty the first stage is to determine the actual state of the individual's knowledge or belief as to the facts. The second stage is to determine whether the individual's conduct was honest or dishonest by reference to the (objective) standards of ordinary decent people. In this case, the dishonesty claim fails at the first stage since there was no awareness of any duty to disclose. For the same reason, and for the reasons given at [98] above, it also fails at the second stage.

160. In reaching this conclusion I have taken into account that Wembley was a significant project which proceeded very quickly after 23 May, and which by the date the Settlement Deed was entered into the Defendants had high hopes of executing. Apart from Hayes, of which Mr Russell was aware, there was no other project that was anywhere close to execution. At first sight, the circumstances do raise questions. However, having heard all the evidence I am confident that the Defendants acted honestly, in accordance with their understanding that they were not obliged to volunteer information about Wembley.

161. I have also taken into account that, given Mr Russell's clear focus on maximising financial returns, it might be said to be inherently unlikely that he would not be interested in other opportunities or projects that Hub was considering, because (as with

Hayes) he might be able to derive some value from them. However, I am persuaded that he did not ask, and at the time he was not interested. The explanation put forward by Mr Cartwright that at that stage Mr Russell had "moved on" and was exploring other opportunities, is a credible one and I have accepted it as the most likely one.

162. Overall, I also consider that the Defendants' case is strengthened rather than harmed by a comparison of Wembley with Hayes. Hayes was a transaction which had been worked on for many months, during a large part of which Mr Russell remained active in the business. Costs had been incurred which would have been reflected in the financial information used by NLP in its valuation. The outstanding section 106 issue delayed the transaction considerably. Valuing HRL on a basis that excluded any expected income from Hayes, but giving Mr Russell a modest share in that income through a separate consultancy arrangement if, and only if, the Hayes transaction occurred, tends to reinforce the approach of agreeing a price for Mr Russell's HRL shares which reflected its existing business and assets (including goodwill, or Hub's "track record") rather than separately attributing value to transactions that it might undertake in the future.

163. For the sake of clarity, I should also confirm my conclusion that the Defendants were not at any relevant stage under a duty to correct a misunderstanding on the part of Mr Russell about the absence of other projects. If he had developed such a misunderstanding, that was not because of anything that the Defendants had done.

Conclusions on claim and counterclaim

164. In the circumstances it is not necessary to consider the details of the individual causes of action asserted by Mr Russell. However, in summary I find that there was no breach of contractual or other duties, no conspiracy to injure by unlawful means, and no fraudulent non-disclosure or failure to correct a misunderstanding.

165. Mr Russell's claim therefore fails and he is not entitled to any relief. Furthermore, it follows that the Defendants' counterclaim must succeed. Mr Russell has breached clause 5 of the Settlement Deed by bringing and continuing to prosecute the present proceedings, and the Defendants are entitled to damages on an indemnity basis pursuant to clause 13 of the Settlement Deed. Mr Tager did not dispute that this meant that the Defendants are entitled to an order requiring Mr Russell to pay all their costs unless they are unreasonable in amount or have been unreasonably incurred (that is, a costs award on the indemnity basis), see *Deutsche Bank (Suisse) SA v Gulzar Ahmed Khan & Others* [2013] EWHC 1020 (Comm) at [19] to [24] and CPR 44.5.

166. As already mentioned, this decision follows the first stage of a split trial, confined to liability and the basis on which any damages should be calculated. In view of my decision no second stage should be required, and the parties should be able to agree the appropriate form of the order, including in relation to the determination of quantum on the counterclaim. In respect of that, Mr McCourt Fritz suggested that I follow the course referred to by Morgan J in *Renewable Power & Light Ltd v McCarthy Tetrault* [2014] EWHC 3848 (Ch) at [40] of declaring an entitlement to an indemnity in respect of costs, making an order for costs which reflects that entitlement, and directing a detailed assessment on the indemnity basis. In principle, that appears to be a sensible and pragmatic way of proceeding, subject to providing for the possibility of the parties

being able to agree quantum without further recourse to the courts, which of course they are encouraged to seek to do.