EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2017] CSIH 61
CA241/14

Lady Paton
Lady Clark of Calton
Lord Malcolm

OPINION OF LADY PATON

in the reclaiming motion

by

THE UNIVERSITY COURT OF THE UNIVERSITY OF ST ANDREWS; and ANOTHER

Pursuers and reclaimers

against

HEADON HOLDINGS LIMITED; and OTHERS

Defenders and respondents

Pursuers and reclaimers: Sandison QC; Burness Paull LLP (First pursuers) and Gillespie MacAndrew (Second pursuers)
First, third and fourth defenders and respondents: Cormack (sol adv); Pinsent Masons LLP
Second defender and respondent: L Murphy QC; DWF

10 October 2017

Action seeking reduction of a joint venture agreement

[1] In this action, the pursuers (St Andrews University and the trustees of the Strathtyrum Trust) seek reduction of a joint venture agreement on the grounds of non-disclosure and misrepresentation. On 20 August 2015, the action was dismissed as

irrelevant. The pursuers reclaimed, contending that they are entitled to a proof before answer.

[2] As was explained in *Jamieson* v *Jamieson* 1952 SC (HL) 44 at page 50:

> " … an action will not be dismissed as irrelevant unless it must necessarily fail even if all the pursuer's averments are proved. The onus is on the defender who moves to have the action dismissed, and there is no onus on the pursuer to show that if he proves his averments he is bound to succeed …"

The question is, therefore, whether the pursuers "must necessarily fail even if all [their] averments are proved", and not whether the pursuers are "bound to succeed".

The joint venture

[3] The following outline is based upon the pursuers' pleadings and represents what they offer to prove.

[4] Certain areas of land to the west of St Andrews have development potential. Negotiations took place involving Mr Joe Headon and certain parties who owned some of those areas, in particular St Andrews University, the trustees of the Strathtyrum trust, and Mr and Mrs Cuthill, farmers. The discussions focused upon contributing land to a joint project and using the resulting larger area in order to achieve satisfactory zoning, primarily for residential and commercial purposes; also planning consent; and subsequently the sale of the areas of land at a considerably enhanced profit. Mr Headon controlled a group of companies, including Headon Holdings Limited, Headon Properties Limited, and Pollpledge Limited, whose objects included property development. It was envisaged that the latter company might be the developer for the project.

[5] On 1 December 2000, the Cuthills granted a feu disposition of part of their land (specifically excluding two "ransom strips") – "the Cuthill land" – to Headon Holdings

Limited ("HH"), the holding company of the Headon group. The burdens section of the disposition included the following:

> "(Three) my said disponees and their foresaids shall be prohibited from the sale, transfer, lease or any alienation of the said subjects hereby disponed other than to a Limited Company as listed in the first schedule to Minute of Agreement between us and Headon Properties Limited dated Twentieth and Twenty second September Two thousand, or such other Company or Organisation as may qualify as being under the control of Members of the Headon Family or the Family Companies so listed, but that such transfer shall only be with the consent of us as proprietors of the said adjoining subjects, which consent shall not be unreasonably withheld …"

[6] On 2 October 2003, a formal joint venture agreement was concluded. There were five parties to the agreement, namely Pollpledge (designated "the developer"), and four landowners namely the university, the trustees, the Cuthills (having a continuing interest as a result of the two strips of land) and HH. Those four landowners were designated "the joint venturers". The joint venture agreement has been lodged as a production and details are set out in the pleadings. What follows is a brief and selective summary.

[7] In an introductory section, under the heading "Assumptions", it was stated that:

> " … the Joint Venturers have title to the Development Land and that title is a good and valid and marketable title without any conditions which would be materially prejudicial to the Joint Venture …"

Clause 1.3 set out the objects of the joint venture, including obtaining zoning and planning consent, a master plan for development, optimising the sale value of the land, and selling the land. Clause 1.4 provided:

> "1.4 The Joint Venture is limited to the objects set out in clause 1.3, and, except where provided to the contrary in this Agreement, no Joint Venturer may hold out that the Joint Venture extends to any other property or business of the Joint Venturers."

Clause 1.5 was in the following terms:

> "1.5 The Joint Venturers will forthwith apply to the Commissioners of Customs and Excise for registration under section 45 of the Value Added Tax Act 1994 as persons carrying on business in partnership with respect to the Joint Venture, and will

> endeavour to satisfy the Commissioners that they intend to make taxable supplies at such date as is mentioned in paragraph 5 of Schedule 1 to that Act."

Clause 2.2.1 set out certain matters numbered (i) to (x), about which the unanimous consent of the joint venturers was required: for example, the format and content of the planning application; the terms of sale and purchase of land; the terms of appointment of a third party expert (although failing unanimity, a majority would suffice: clause 2.2.2); and what constituted default on the part of the developer. Clause 3 set out the duties of the developer, including the production of the development appraisal; negotiation with the relevant local authority and any other relevant third parties; and lodging and diligently pursuing the planning application until zoning was obtained. Funding for the developer in the exercise of its duties was achieved by "the Developer's Contribution" (£250,000 exclusive of VAT as set out in the definitions section) and clauses 3.3 and 7.6 (the provision of further sufficient funds). Clause 4 was headed "Mutual duties of the Joint Venturers and the Developer" and included duties of co-operation and good faith, full disclosure of relevant information, an undertaking not to enforce rights over another joint venturer's land to the prejudice of the joint venture, and an undertaking to execute all necessary deeds. Clause 5 and part 1 of the schedule regulated the sale of the development land and the distribution of the sale proceeds amongst the joint venturers. Clause 6.1 gave the university the option to keep land for educational purposes, and clause 6.2 provided for additional payment to joint venturers in the event of obtaining planning consent for a more profitable development than had been envisaged.

[8] In about October 2012, zoning for the land was achieved. However disputes arose. Litigation and mediation followed. In their averments, the pursuers offer to prove that in 2014, in the course of a mediation, the university became aware for the first time of the

content of a Minute of Agreement dated 20 and 22 September 2000 ("the back-minute"). A copy of that back-minute has been lodged in process as a production (number 5/2 of process) and parties referred to that production during both the debate and the reclaiming motion.

[9] An examination of the back-minute *prima facie* discloses several matters, including the following: (i) the contracting parties were the Cuthills and Headon Properties Limited, no other party was involved; (ii) the back-minute was not a standard conveyancing missive of sale of heritable property; and (iii) the back-minute was not registered in the Books of Council and Session for preservation and execution, and therefore was not *prima facie* open to public inspection as it would have been if it had been on a public register.

[10] The back-minute contained *inter alia* an agreement for the sale of an option relating to the Cuthill land to Headon Properties Limited. In clauses 1 and 2, the Cuthills agreed that, in exchange for a "deposit" of £249,000, they would grant a feu disposition of that land to Headon Properties Limited. By feu disposition dated 1 December 2000 the Cuthills duly disponed the Cuthill land to HH, not to Headon Properties Limited (copy feu disposition number 5/3 of process).

[11] The back-minute contained other conditions, *prima facie* continuing to bind the parties for a period of eleven years after the grant of the feu disposition. Clause 2(iii) provided that the Cuthill land could only be transferred by the purchaser to a company within the Headon group (listed in the first schedule). Clause 3 provided for a possible re-conveyance to the Cuthills, with appropriate monetary adjustment. Clause 5 provided that the whole profits arising from the further sale of the Cuthill land for development was to be paid over to the Cuthills, as follows:

> "5. If the subjects are sold at any time to a third party in accordance or not in accordance with any agreement that is reached between the Land-owning Parties the entire proceeds will subject to such agreement (if any) be paid to the Seller and the

> Seller will repay to the Purchasers any balance of the deposit still outstanding namely if the sale is within twelve months of payment of the deposit the entire deposit, if within twenty four months 9/10th of the deposit and so on until the expiry of the 11th year. Declaring that for the purposes of this clause and in connection with the sale of the subjects to a third party as in the whole course of this agreement, the Purchaser and their successors under Clause 2(iii) above shall act as Trustees for the Seller and hold the title of the subjects until the date of Registration or infeftment of the Third party and the proceeds of sale thereof until disbursed to the Seller as Trustees for the Seller who alone is beneficially entitled thereto."

[12] The pursuers in their averments offer to prove that, having learned of the content of the minute of agreement for the first time in 2014, it was only then that they appreciated that HH stood to make no profit or gain from the joint venture. With that newly-acquired understanding, the pursuers' position as pled on record is that they found that they had been dealing with one of the joint venturers (namely HH) on a basis which turned out to be false. The pursuers' position as pled on record is that they only then realised that HH did not qualify as a "beneficial owner", a phrase used by the drafter of the pursuers' pleadings in the current action of reduction, defined in Article 2 of Condescendence as meaning an owner who:

> " … enjoyed the beneficial interest in whatever profit or return might be made from its future development …"

[13] The pursuers' reaction to this discovery, and the background to that reaction, are set out in the pleadings *inter alia* as follows:

> "CON 5 In the negotiations leading up to the agreement to enter into the joint venture, each prospective joint venturer owed every such other a duty to disclose all facts of which it had knowledge and of which the other negotiating parties might not be aware, and which it knew or ought to have known would or might be material to those others in their decisions as to whether to enter into the proposed joint venture and, if so, on what terms. In particular, given that the purpose of the joint venture was to secure the mutually-advantageous development of separate parcels of land which each joint venturer was contributing to the joint venture, it was the duty of each prospective joint venturer to disclose fully and frankly to each other the precise nature of the interest which it held in the land it was so contributing, so that that information could be considered by the other prospective joint venturers in making said decisions …

CON 6 At no point in the course of the negotiation of the joint venture, or at any point before 28 April 2014, did the first or second defenders [i.e. HH or the Cuthills] disclose to the pursuers that the interest of the first defender in the land which it appeared to be contributing to the proposed joint venture and which is described in the Minute of Agreement as the Lands of Headon Holdings Limited differed in any way from that enjoyed by the beneficial owner thereof. On the contrary, at a meeting attended by representatives of the pursuers at Headon Park House on 31 May 2000 the late Mr Cuthill told the meeting that Mr Headon had acquired land from him and would wish to be a landowner participant in the proposed development. At a meeting at the Old Course Hotel, St Andrews, on 23 October 2000 Mr Headon made a presentation on behalf of the first defender at which the other parties to this action were present or represented and stated that his 'company had acquired land from Bill Cuthill' and that he (Headon) 'like the other parties here today [had] a great interest in seeing this land obtain development status'. He stated that 'We would all like to get the maximum value for our own land' and that 'At the end of the day each landowner will receive the full value of his land less the appropriate costs'. He described himself as being present at the meeting 'as a fellow landowner'. He stated that 'Headon Developments' incentive for this to work is great as we have purchased some of the land … '

CON 7 Had the pursuers been aware of the true nature of the interest held by the first defender in the Development Land, as condescended upon, they would not have admitted that defender to the proposed joint venture, and would not have entered into the pretended Minute of Agreement. No party was admitted to the society of joint adventurers other than as the beneficial owner of land being contributed for the purposes of the joint venture. The interests of a beneficial owner of Development Land were not the same as, and in various instances conflicted with, the interests of the Developer. In particular, the interests of those parties in relation to the maximisation of the value of the Development Land differed markedly. Provision was made in the Minute of Agreement to ensure that any purchaser of Development Land from a joint venturer while the objects of the joint venture had not been obtained should himself become a joint venturer. The effect of the first defender being admitted to the joint venture was that it received privileges as a joint adventurer which it would not otherwise have been accorded, in particular a right to participate and vote in the councils of the joint adventure, and to block (subject to a cumbersome and expensive third party dispute resolution procedure) agreement on a wide range of important issues in terms of clause 2.2.1 of the Minute of Agreement, such as the nature of the planning consent to be applied for, the terms for the sale of the land, and the existence of circumstances calling for renegotiation of the joint venture agreement. The pursuers would not have been prepared to accord such rights within the joint venture to any party who was not the true beneficial owner of the Development Land. They would, in any event, not have been prepared to accord such rights to a party who was not the true beneficial owner of Development Land, but who was closely connected to the Developer. [But for the non-disclosure and the misrepresentation, the first defender] would not have been able to vote as a joint venturer on matters directly affecting the rights of its sister company, the third

> defender [Pollpledge], as Developer in terms of the Minute of Agreement, such as the extent of Development Costs, the purchase of Developer's Land, whether the Developer fell to be regarded as being in default, and the appointment of a substitute Developer. The third defender is unlikely to have been appointed as Developer in the first place had the first defender not been able, as a prospective joint venturer, to influence the other joint venturers to appoint it as such …"

[14] The university and the trustees raised the present action seeking reduction of the joint venture agreement, declarator that any purported right or interest held by the third and fourth defenders (Pollpledge and its nominee) arising out of the agreement was void, and interdict of the first, third and fourth defenders from taking any further action in terms of the agreement.

Submissions

For the pursuers and reclaimers (the university and the trustees)

[15] Senior counsel submitted that the interlocutor of 20 August 2015 dismissing the action should be recalled, and a proof before answer allowed, all pleas standing.

[16] Disclosure: The pursuers' contention was that, in the context of negotiations for the conclusion of a partnership, there was a duty to disclose matters which a party knew or ought to have known might be material to the decision whether or not to enter into the partnership and on what terms. The parties' agreement, although termed a "joint venture", was (or could be) a partnership: *Mair* v *Wood* 1948 SC 83, Lord President Cooper at page 86. The joint venturers clearly regarded themselves as in partnership (clauses 1.4 and 1.5). The obligations which they undertook pointed to a partnership (clause 4). The *raison d'etre* of the joint venture was to maximise the value of the various landholdings. Even if section 2(1) of the Partnership Act 1890 (concerning common property) was relevant, joint or common property was in itself a neutral factor. The question which the Lord Ordinary should have

addressed was not whether, on the pleadings, the relationship *was* a partnership, but whether, taking matters at their highest for the pursuers, they were bound to fail in their attempt to establish that a partnership had been created.

[17] If the pursuers succeeded in proving the existence of a partnership, that was a contract *uberrimae fidei.* It was then arguable that there was, as a matter of law, a duty during pre-contract negotiations to disclose facts which a party knew or ought to have known might be material to the decision whether or not to enter into the partnership and on what terms (*Helmore* v *Smith* (1887) 35 Ch D 436, Bacon LJ at page 444; *Bell* v *Lever Brothers* [1932] AC 161, Lord Atkin at page 227; *Conlon* v *Simms* [2008] 1 WLR 484, paragraphs 127 and 128; *Gloag, Contract* (2nd ed) page 507). Against that weight of authority the Lord Ordinary appeared to rely on some observations critical of Gloag in *Miller, Partnership* (2nd edition) at pages 158-160. But senior counsel submitted that those observations did not in fact criticise or undermine the other authorities cited above. Questions as to whether a fact was a material one which should have been disclosed during pre-contract negotiations, whether a party knew or should have known that the fact was material, and whether the fact was discoverable, should be explored in a proof before answer (cf the Lord Ordinary's Opinion paragraph [19]). The Lord Ordinary should have allowed a proof before answer to determine whether a partnership existed, whether there was a duty to disclose material facts, and whether that duty was breached.

[18] Misrepresentation: The interest of the developer (Pollpledge) was to obtain the land at as low a price as possible. By contrast, the interest of the landowners was to obtain as high a price as possible. The pursuers had agreed that Pollpledge and HH should be parties to the joint adventure agreement on the understanding that HH was a landowner wishing to maximise the value of its land (even although HH belonged to the same group of companies

as the developer). The verbal representations made at the meetings all as set out in the averments gave that impression. The fact that the representations might literally be true was not determinative (*Peek* v *Gurney* (1873) LR 6 HL 377 Lord Chelmsford at page 447, Lord Cairns at page 402; *Aaron's Reefs Ltd* v *Twiss* [1896] AC 273, Lord Halsbury LC at page 281; *Gluckstein* v *Barnes* [1900] AC 240, Lord Macnaghten at page 250; *Park's of Hamilton (Holdings) Ltd* v *Campbell* [2008] CSOH 177). The correct question (which the Lord Ordinary had not addressed) was "were the representations incapable of conveying a false impression to the hearer?". The joint venture had been entered into, and the various powers (including powers to vote and to veto) given, on the basis of the understanding outlined above. The pursuers offered to prove that the subsequent discovery of the content of the back-minute changed matters significantly, and that the defenders knew that the arrangements in the back-minute were material and would make a difference to the other parties entering into the joint venture. The arrangements in the back-minute showed that the basis upon which the pursuers had agreed to the matrix of rights and interests set up by the joint venture agreement had been false. The pursuers offered to prove that they would not have been prepared to give HH a vote in the councils of the joint venture had they known that it would not benefit from the profit to which it would be entitled from the sale of its land. Voting by joint venturers was required on various important matters, including the type of planning application for zoning (for example, whether residential, commercial, or amenity, all of which could affect value.) The pursuers offered to prove that they would not have agreed to the appointment of Pollpledge as developer had they been made aware that HH would not retain any profit made from the zoning and sale for development of its land, all the while being part of the group of companies which included the developer.

[19] For the purposes of reduction of the agreement on the ground of misrepresentation, it was not necessary for the pursuers to prove either fraud or negligence (cf *Ferguson* v *Wilson* (1904) 6 F 779, and paragraph [20] of the Lord Ordinary's Opinion). But fraud or negligence might be relevant in a question of damages or other remedies which might yet be sought. In any event, there were sufficient averments inferring either fraudulent or negligent conduct such that the pursuers were entitled to a proof before answer on those issues also.

[20] The materiality of any matters upon which misrepresentations had been made was a matter for a proof before answer (cf paragraph [19] of the Lord Ordinary's Opinion in the section dealing with disclosure, although a contrary view appeared to be adopted in paragraph [22] in the section dealing with misrepresentation). The pursuers were entitled on the averments to lead evidence about matters which they regarded as material and about which they contended they were misled. Obviously the court might ultimately take a different view, but materiality was a matter which required inquiry into the facts.

[21] The Lord Ordinary erred in holding that the averments relating to the nature and content of the representations, and their effect on the other contracting parties, were irrelevant, without an inquiry into the facts. The case should be remitted to a different Lord Ordinary for a proof before answer, as the decision reclaimed against demonstrated that the judge had already made a decision.

For the first, third, and fourth defenders (HH, Pollpledge, and Pollpledge's nominee)

[22] Disclosure: The pursuers' case rested solely on the terms of the joint venture agreement. The matter was therefore properly one for debate, rather than a proof before answer.

[23] The concept of "beneficial owner" was irrelevant. Any subsequent division of the profits was unimportant. The only relevant question was a landowner's ability to commit the land to the project in terms of the joint venture agreement.

[24] In terms of clause 3.1 the developer was to use its best endeavours to achieve zoning equivalent to that set out in the development appraisal (part 2 of the schedule to the agreement). There was no scope therefore for the developer to attempt to "devalue" the land. If some discrepancy arose, clause 6.2 provided for payment to parties of any uplift in value achieved through (say) increased density of units or an alternative use of the land. Also in the introductory definitions section, open market value was to be as agreed or as assessed by an expert. Thus there was no question of the developer managing to achieve something contrary to the interests of the joint venturers.

[25] The back-minute between HH and the Cuthills had not been secret. The back-minute was referred to in the burdens section of the feu disposition granted by the Cuthills.

[26] There was no warranty in the joint venture agreement – indeed nothing in the agreement – about beneficial ownership. It was not a term of the joint venture agreement that a joint venturer should be a "beneficial owner". There was no prohibition against representative ownership. There were no averments that the pursuers asked whether all the proposed participants were beneficial owners.

[27] As for the question of a partnership, the Lord Ordinary was correct not to characterise the relationship as a partnership. There were no averments of other activities beyond the joint venture agreement which would satisfy the test of partnership (cf *Lindley, Partnership (19th ed)* paragraph 2-12). In essence, it was an agreement to pool land in order to achieve favourable planning permission. Because parties had joined together, resulting in a whole site being available for development, they had agreed to equalise the value of the

land per acre, so that there was no distinction between industrial land and other land. The ability of one party to cause disruption was controlled by clauses 2.2.1 and 2.2.2. The key duties in respect of zoning were placed on the developer, and the remaining parties had few duties. Clause 4 of the agreement ("Mutual duties of the Joint Venturers and the Developer") contained standard provisions and did not support an analysis of partnership. There were no provisions for sharing losses, and no powers to bind others.

[28] HH had purchased land from the Cuthills before the joint venture agreement was entered into, as Mr Headon's concern had been to ensure that when he approached the various landowners with the "pooling of land" proposition, he would not be cut out of the deal. The development appraisal (prepared by Mr Headon) had been agreed by the joint venturers. The parties with votes were the university, the trust, HH, and Mrs Cuthill.

[29] Each contracting party knew that Mr Headon had a group of Headon companies, of which HH, Pollpledge and Headon Properties were three. It was known that HH and Pollpledge had an association. It was also known that HH had acquired land from the Cuthills. There were provisions ("an overage arrangement" or an "anti-embarrassment provision") such as clause 6.2 ensuring that the Cuthills, for example, would receive a fair payment in the event of any uplift in value of the development land. The price paid to the Cuthills for the sale of their land to HH was on a public register for all to see. The existence of the back-minute between HH and the Cuthills was referred to in the burdens section of the feu disposition. The minute made it clear that there were continuing rights and obligations as between the Cuthills and HH. The inference from the arrangements was that it would make no sense for the Cuthills to dispone the land at a "bare land value", but equally it would make no sense for HH to have purchased the land at a "hope value" price. All the parties had the benefit of professional advisers.

[30] Mr Sandison QC for the pursuers was correct to acknowledge that clause 4.2 (duty of frank disclosure during the joint venture) did not provide a basis for the pursuers' argument. Equally the information about the minute was not something which required to be disclosed during the joint venture, as it did not affect the objects of the joint venture. Clause 4.4.4 explicitly envisaged that the joint venturers might have rights over each other's land (for example, servitudes or contractual rights). Clause 4.4.5 obliged the joint venturers to execute such conveyances and deeds as were necessary: that provision emphasised that the venture was not dealing with common property. Clause 7.1 made provision for a situation where the assumptions in the joint venture agreement (relating to title and the development appraisal) were established to be incorrect to the extent that there was "material prejudice": either unanimous agreement of the joint venturers on this matter was required, or a third party expert would decide. The university had sought to invoke clause 7.1, and the matter had been referred to a third party expert.

[31] In all the circumstances, this was not a situation where the pursuers were exposed to risk arising from an inequality of knowledge. The Lord Ordinary correctly summarised matters at paragraphs [16] and [18] of his Opinion. There had been no inequality of knowledge which was material and relevant. The fiduciary duty contended for by the pursuers was too wide: it went beyond the circumstances of a partnership, and sought to protect the position of parties negotiating the commercial terms on which they would be willing to enter into a joint venture. There was no authority for such a broad duty. The Lord Ordinary was correct in paragraph [16] to distinguish *Conlon* v *Simms*, which involved non-disclosure on a matter which went to the heart of a legal partnership, focusing on the affairs of the partnership. The circumstances of the present case were also very different

from those in cases such as *Smith* v *Bank of Scotland* 1997 SC (HL) 111, where the interests of an unrepresented and unadvised wife were ignored.

[32] The Lord Ordinary had not erred in his conclusion on disclosure.

[33] Misrepresentation: There had been no misrepresentation, express or implied. It was not represented that HH was the "beneficial owner" in the sense used by the pursuers. The statements simply described the operation of the joint venture agreement. The pursuers' position was an extreme one, which went beyond the operation of the joint venture and into the private affairs of each joint venturer (for example, the particular circumstances in which a joint venturer would be obliged to pass on all or most of the sale proceeds to someone else, whether because of trust obligations, or remuneration to employees of the joint venture, or an undertaking given to a bank).

[34] It was not averred that, in the course of the negotiations leading to the joint venture agreement, anyone had stipulated that beneficial ownership was important. It was not averred why the defenders knew or ought to have known that beneficial ownership was important. There was no mention of beneficial ownership in the contract, and the lack of such a mention was relevant when assessing the pre-contract negotiations (*Cramaso LLP* v *Visc Reidhaven's Trs* 2014 SC (UKSC) 121).

[35] Fraud and negligence: Mr Sandison QC submitted that the pursuers did not require to prove either fraud or negligence. But fraud and negligence were pled, and there were no averments to support either. It could only be assumed that an attempt was being made to set up a fraud or negligence claim with a view to preserving any right to claim damages. The pleadings relating to fraud and negligence were irrelevant and lacking in specification.

[36] Conclusion: The reclaiming motion should be refused. However, if a proof before answer were to be allowed, it was unnecessary to remit the case to another judge.

For the second defenders (the late Mr Cuthill and Mrs Cuthill)

[37] Senior counsel for the second defenders adopted the submissions made on behalf of the first, third and fourth defenders, and made the following further submissions.

[38] Misrepresentation: The late Mr Cuthill had been a retired farmer. The Cuthills found it convenient to enter into the minute of agreement with HH and to receive money. They retained a degree of control and interest in the joint venture by means of the ransom strips. Otherwise they had little involvement in the project.

[39] In relation to the alleged representation on 31 May 2000 when Mr Cuthill "told the meeting that Mr Headon had acquired land from him and would wish to be a landowner participant in the proposed development" (Article 6 of Condescendence), that representation had been made about an individual (Mr Headon) and not about a corporate concern (such as HH). As Mr Headon was not a contracting party to the joint venture agreement, the pursuers could not allege that the representation had induced them to enter into the joint venture contract.

[40] As for the meeting at the Old Course Hotel on 23 October 2000, all that was averred in Article 6 of Condescendence was that Mr Cuthill remained silent when Mr Headon made a representation that his "company had acquired land from Bill Cuthill" followed by comments about the desire to achieve the maximum value for the land. Nothing inaccurate was said which required correction by Mr Cuthill. As the minute of agreement between the Cuthills and Headon Properties Limited was concluded on 22 September 2000, and as no title deed was granted by the Cuthills until 1 December 2000, it was indeed the case that as at 23 October 2000, one of Mr Headon's companies had a personal right to obtain a feu disposition, but was not yet infeft. Thus nothing was said which could induce the belief that

HH had "beneficial ownership" of the land in the sense used by the pursuers, leading them to enter into the joint venture agreement in that mistaken belief.

[41] Furthermore, the joint venture agreement, to which Mr Headon was not a party, was not concluded until some three years later on 2 October 2003, and there were no averments about negotiations during these years (particularly no averments about any negotiations involving the Cuthills).

[42] In conclusion, there were no relevant averments about any misrepresentations on the part of the Cuthills, and certainly not any fraudulent or negligent misrepresentations.

[43] Disclosure: Senior counsel submitted that a pre-contract duty of disclosure arose only in paradigm cases such as partnership, insurance, marriage and separation. In insurance contracts for example, the proposer was privy to all the information which the insurer might require concerning health, or previous bad conduct. That was indeed a contract of utmost good faith. In England, the concept of *uberrimae fidei* applied to a limited class of cases: insurance, separation in a family situation, proper partnership, and divorce agreements. The present case did not concern a partnership, but rather a contract of a lesser nature, a joint venture.

[44] Registering with the VAT authorities was something which had to be done, and using the partnership avenue was the nearest one could come to being a legal *persona*: but such registration was not determinative in law. The Lord Ordinary was correct to conclude that the personality for VAT purposes was not conclusive. Mr Cuthill had nothing to do with the representations made to the VAT authorities.

[45] There was no partnership in the present case. The joint venture had no independent legal *persona.* There was no provision in the detailed contract for joint and several liability for debts. There was no provision creating mutual agency. The majority of the work was to

be done by the developer. An individual joint venturer could sell his or its interest, whether or not the others agreed (clause 4.5), whereas non-assignability and *delectus personae* were normally features of a partnership. The agreement was simply an agreement to pool heritable property, and did not create a partnership.

[46] Thus the Lord Ordinary was correct to reject the argument that there must be disclosure in the circumstances of this case. A decision in favour of the pursuers would result in the extension of a duty of disclosure to a wide range of commercial contracts.

Reply for the pursuers

[47] Disclosure: The pursuers' case was that a partnership had been created, giving rise as a matter of Scots law to a pre-contract duty of disclosure. No reliance was placed on any more general duty of good faith, or duties arising from an imbalance of bargaining power or knowledge.

[48] "Business" covered virtually any activity or venture of a commercial nature, including a one-off transaction (*Lindley, Partnership* paragraph 2-02). In the present case, the parties chose to describe themselves as carrying on a business. As for mutual agency, if there was a partnership qualifying in terms of section 1(1) of the 1890 Act, then there would be mutual agency and liability for the debts of the partners (*Lindley* paragraph 2-13). In any event, a partnership could exist although the partners did not undertake liability for debts. In relation to non-assignability, the parties had foreseen this issue and had provided for it, and section 31 of the 1890 Act dealt with a partner assigning his share of the partnership.

[49] It was being suggested that the reference to the back-minute in the burdens section of the feu disposition amounted to disclosure of the agreement between HH and the Cuthills that any profit made out of the land deal would be handed back to the Cuthills. But (i) as a

matter of fact, the parties had agreed that an examination of title would be carried out by one adviser only on behalf of all the parties. As it happened, it was HH's solicitor who did the noting of title for all the joint venturers. (ii) It was not the law that a duty to disclose would be satisfied by providing a party with the means of finding out what should have been disclosed (*Parks of Hamilton (Holdings) Ltd* v *Colin Campbell* [2008] CSOH 177). (iii) If it were assumed that the feu disposition had been actively considered by those advising the university and the trust, the inferences argued for could not necessarily be drawn from the price of £249,000, for several reasons. First, the sale was far from a straightforward sale. The land was carved up by ransom strips, which provided the Cuthills with considerable power. Anyone noting the price of £249,000 would take that factor into account. Secondly, HH was prohibited from selling outside the joint venture. Thirdly, the content of the back-minute was truly "private information", not known to either the university or the trustees. Fourthly, the pursuers offered to prove that the information was material in the sense that it "*might* influence the mind of a prudent contractor" (Lord Atkin at page 227 of *Bell* v *Lever Brothers*, emphasis added). Fifthly, the pursuers offered to prove the effect of the discovery of the information on the pursuers, all as set out in Article 7 of Condescendence. It was averred that the pursuers realised that HH was not the same as the other landowners, that HH had no interest in the value of the land, and that HH was in effect a "cuckoo in the nest". Had there been disclosure of the content of the minute of agreement, HH would not have been admitted to the joint venture at all, and certainly not on the terms it was. The court could not, without hearing evidence, conclude that the information, had it been disclosed, was not capable of persuading the pursuers as prudent persons to alter their position. Sixthly, many features of the joint venture agreement indicated that the newly discovered information was material. For example, the need for unanimity of the voters in

relation to certain important matters (clause 2.2.1). Mr Cormack had suggested that the developer could not make any change which might be prejudicial to the interests of the landowners without their consent: however that was not so. The development appraisal was an item not listed in clause 2.2.1: the developer could make changes to the appraisal which the joint venturers either had to approve or disapprove: if the former, they could not later claim "material prejudice"; if the latter, they could claim "material prejudice" but would have to request a renegotiation of contract terms. Also it was arguable that the back-minute breached the introductory assumption that HH had a good title without any conditions that would be materially prejudicial to the joint venture. Other contractual provisions which pointed to the materiality of the information contained in the back-minute included the prohibition against selling land to someone outside the joint venture. In conclusion, the question "What would a prudent person do, had the truth been known?" could not be answered by reference to what that person did in ignorance of the truth.

[50] Misrepresentation: The terms of the joint venture agreement could not be treated as a guide to what a contracting party might have done had the truth been known. The proper question was whether the issue might have caused a prudent person (assessed objectively) not to contract at all, or to contract on different terms. In paragraph [20] of his Opinion, the Lord Ordinary did not criticise the averments relating to misrepresentation, or fraud or negligence, as lacking in specification.

Discussion

The partnership issue

[51] Section 1 of the Partnership Act 1890 provides:

"1. **Definition of partnership**

> (1) Partnership is the relation which subsists between persons carrying on a business in common with a view of profit …"

[52] A joint venture may, as a matter of law, constitute a partnership. As Lord President Cooper explained in *Mair* v *Wood* 1948 SC 83 at page 86:

> " … A joint adventure is simply a species of the *genus* partnership, differentiated by its limited purpose and duration (which necessarily affect the extent of the rights and liabilities flowing from the relationship), but in all other essential respects indistinguishable from any other partnership. 'A joint adventure … differs in no respect except its transient nature … from an ordinary mercantile partnership' (More, Notes to Stair, p, xcviii). 'A joint adventure is as proper a partnership as any other' (Bell's Illustrations, vol I, p 264). I may also refer to Bell's Principles, section 392; Commentaries, (7th ed) vol ii, p 538; and Maclaren's Practice, p 270. So far from expressly departing from these common law doctrines, the Partnership Act, by section 32(b), tacitly accepts them …"

[53] The question whether or not a partnership exists must, in my view, depend upon the particular facts and circumstances of the case. At one end of the range of possible circumstances might be a situation where one farmer invites his neighbour to maximise the value of their respective landholdings by lodging a joint planning application covering both, and by agreeing upon the appointment of certain professionals to help them achieve their goal. Such a situation might well not qualify as "carrying on a business in common with a view of profit". However different or more complex circumstances might, in law, amount to a partnership.

[54] In the present case, the pursuers offer to prove *inter alia* the following:

(i) A carefully negotiated formal joint venture agreement: A 36-page formal agreement involving five parties (one developer and four landowners/joint venturers) was entered into. The parties' rights and duties are set out in considerable detail. The parties have signed the agreement, consenting *inter alia* to registration for preservation and execution. Clause 1.1 states:

> "The Joint Venturers hereby enter into a joint venture established for the Joint Venture Objects."

The objects are set out in clause 1.3.

(ii) A declaration for the purposes of VAT: In clause 1.5, the parties agreed:

> "The Joint Venturers will forthwith apply to the Commissioners of Customs and Excise for registration under section 45 of the Value Added Tax Act 1994 as persons carrying on business in partnership with respect to the Joint Venture and will endeavour to satisfy the Commissioners that they intend to make taxable supplies at such date as is mentioned in paragraph 5 of Schedule 1 to the Act."

Section 45 is headed "Partnerships", and provides *inter alia*:

> "(i) The registration under this Act of persons –
>
> (a) carrying on a business in partnership …
>
> may be made in the name of the firm …"

Clause 1.5 is at the very least an indicator that the landowners/joint venturers regarded themselves as carrying on a business in common with a view of profit. It would be odd if a business relationship were to be classified as a partnership for VAT purposes, but to be regarded as something else for other purposes.

(iii) Further references to the "business" of the joint venture: Clause 1.4, by excluding "*any other … business*" of the joint venturers from the ambit of their agreement, again suggests that the parties regarded themselves as carrying on a business in common with a view of profit in the context of the development of land to the west of St Andrews. That impression is reinforced by clause 2.4.1, which refers to meetings of the joint venturers and/or the developer "for the dispatch of *business* of the joint venture".

(iv) Contributions noted, objects described, necessary consents defined, and powers and duties allocated: Other clauses in the agreement record the contributions to be made by the joint venturers, the objects of the joint venture, the consents that might be required, and the parties' powers and duties. For example, clause 1.3 sets out the objects of the joint venture, including obtaining zoning, planning consent, and a master plan for the development land; optimising the sale value of the development land; and selling the development land to the developer or its nominees. The developer (the third defender) is given certain powers and duties with a view to achieving the objects (clauses 3 and 4, together with the definition of "the Developer's Contribution" in the introductory section). The unanimous consent of the joint venturers is required for certain matters such as the average value per acre of the development land, the format and content of the application for planning consent, the development costs, and the question whether or not the developer is in default (clause 2.2.1).

(v) Ability to refer to a third party expert: The agreement contains dispute resolution procedures, including reference to a suitably qualified expert (for example, the introductory section and clauses 2.2.2, 7.1, and 10).

(vi) Sale and division of the sale proceeds: There are detailed provisions concerning the sale of the development land and the division of the proceeds amongst the joint venturers (for example, clauses 5, 6, and the schedule part 1).

(vii) Material prejudice: In the introductory section, the definition of "material prejudice" (which might lead to the termination of the joint venture or a

renegotiation of its terms) refers to "the interests of the Joint Venturers as a whole", indicating that the parties intended the arrangement to be one where individual interests were to be subsumed into a greater common whole, tending to indicate a partnership relation.

[55] Standing the nature of the arrangements in the joint venture agreement, the overall object of achieving the commercially best profit from the land for the various joint venturers, the nature and number of parties involved in the project, and the circumstances surrounding the entering into of the joint venture agreement, I consider that the question whether or not a partnership had been formed cannot be decided at the stage of debate, but requires investigation into the facts. In my view the pursuers' averments provide a relevant basis for an argument that the landowners/joint venturers did indeed enter into a "relation … between persons carrying on a business in common with a view of profit".

[56] I note the points made in paragraph [17] of the Lord Ordinary's Opinion, said to indicate that a partnership had not been constituted. Addressing each in turn:

(i) It seems to me that the meaning and effect of the VAT provision registering the project as a "partnership" (clause 1.5) should not have been discounted by the Lord Ordinary at the stage of a debate without some explanation concerning this complex area of law. Also clauses 1.4 and 2.4.1 (referred to in paragraph [54] above) have to be taken into account.

(ii) An objective of "exploitation of land" may easily be one of the objects of a business carried on in common with a view of profit.

(iii) The joint venturers undertook a considerable number of duties and functions in order to achieve the objects set out in the joint venture agreement. They were to

"control the management of the joint venture" (clause 2.1), *inter alia* making decisions about the important matters listed in paragraph [62] below. They were to participate in joint venture meetings convened under clause 24 (clause 4.4.1). They were to execute conveyances and other deeds as necessary (clause 4.4.5), provide the developer with all reasonable and necessary assistance (clause 4.4.6), and if necessary be parties to actions to achieve the joint venture objects (clause 4.4.7). They were to allow the developer and authorised persons to enter their land for investigations such as bore holes (clause 4.4.9). I cannot, at least at this stage, endorse the Lord Ordinary's observation that the joint venturers "did not commit themselves to doing much by way of positive action towards achieving the object" (paragraph [17]).

(iv) The absence of any express provision binding the parties in respect of liability for debts or losses is not necessarily determinative. If a partnership is held to exist, the Partnership Act 1890 would supply the necessary provisions. In any event, it seems to me that there are at least some provisions in the joint venture agreement binding the joint venturers in respect of a liability, namely clause 3.4 (liability to repay to Pollpledge the Developer's Contribution in the event of Pollpledge being dismissed); clause 7.7 (any additional funds unanimously agreed to be required by the developer, to be paid in *pro rata* shares); and clause 10.1.3 (liability for fees and expenses of any third party expert). It is also perhaps significant that the agreement takes the trouble expressly to exclude joint liability in certain circumstances (for example, clause 7.6 which allocates any environmental costs specifically to the affected landowner).

(v) Similarly if a partnership were held to exist, the 1890 Act would regulate matters in the absence of any express provision authorising the parties to bind each other in contracts with third parties.

(vi) A partnership may exist despite the lack of common property. Section 2(1) of the Partnership Act 1890 provides that common property does not of itself create a partnership; but equally, common property is not a prerequisite of a partnership. The facts in *Hamilton* v *Allied Domeq plc* 2006 SC 221 were, in my view, very different from the facts in the present case.

[57] Thus I do not agree with the Lord Ordinary that these points have the effect that the pursuers would be "bound to fail" on the issue of the existence of a partnership, even if they proved all their averments. Contrary to the Lord Ordinary's view, I consider that the pursuers are entitled, on the basis of their averments read as a whole, to a proof before answer on the question whether or not a partnership existed.

Whether any duty of pre-contract disclosure arose

[58] If the pursuers succeeded in proving that the joint venturers were in partnership, there would be a stateable argument that the pre-contract negotiations, leading as they did to a contract *uberrimae fidei*, required the parties to disclose to each other anything of significance or materiality which might affect a party's willingness to enter into the partnership and/or to do so on certain terms. As was said by Bacon VC in *Helmore* v *Smith* (1887) 35 Ch D 436 at page 444:

> "… If fiduciary relation means anything I cannot conceive a stronger case of fiduciary relation than that which exists between partners. Their mutual confidence is the life blood of the concern. It is because they trust one another that they are

> partners in the first instance; it is because they continue to trust one another that the business goes on."

Lord Atkin in *Bell* v *Lever Bros* [1932] AC 161 at page 227 observed:

> "… Ordinarily the failure to disclose a material fact which might influence the mind of a prudent contractor does not give the right to avoid the contract. The principle of *caveat emptor* applies outside contracts of sale. There are certain contracts expressed by the law to be contracts of the utmost good faith, where material facts must be disclosed; if not, the contract is voidable. Apart from special fiduciary relationships, contracts for partnership and contracts of insurance are the leading instances. In such cases the duty does not arise out of contract; the duty of a person proposing an insurance arises before a contract is made, so of an intending partner …"

The same approach, adopted by Lawrence Collins J, was approved by the Court of Appeal in *Conlon* v *Simms* [2008] 1 WLR 484, at paragraphs 127 and 128:

> "127 In my judgment there can be no doubt that the principle of *caveat emptor* does not apply to the making of a partnership agreement, and that in negotiating such an agreement a party owes a duty to the other negotiating parties to disclose all material facts of which he has knowledge and of which the other negotiating parties may not be aware. This was made clear as long ago as 1932 in the passage from the judgment of Lord Atkin in *Bell* v *Lever Bros Ltd* …"

Gloag, Contract (2nd ed) at page 507, adopts a similar, if somewhat more tentative, approach. I am not persuaded that the comments in *Miller, Partnership (2nd ed)* pages 159-160 detract from, or undermine, authorities such as *Helmore* v *Smith* and *Bell* v *Lever Bros,* nor am I persuaded that the approach to the existence or otherwise of a duty of disclosure in pre-contract negotiations leading to a partnership should necessarily be different in Scotland and England.

Whether the content of the back-minute was, in the circumstances, a material fact which should have been disclosed in the fulfilment of any duty of disclosure

[59] Whether an issue would, or would not, be material or significant in this particular case for the parties entering into the joint venture agreement, is in my view eminently a

matter for proof before answer: cf the views of the Lord Ordinary in paragraph [19] of his Opinion:

> " … Had I held that the defenders, or any of them, were under a duty to disclose the nature of the first defender's interest to the pursuers, I would have accepted the pursuers' submission that these, along with the pursuers' averment that they would not have entered into a joint venture agreement on the terms they did, were matters requiring proof before answer …"

[60] In this case, the pursuers aver *inter alia* that:

> "Had the pursuers been aware of the true nature of the interest held by the first defender in the Development land, as condescended upon, they would not have admitted that defender to the proposed joint venture, and would not have entered into the pretended Minute of Agreement … The effect of the first defender being admitted to the joint adventure was that it received privileges as a joint adventurer which it would not otherwise have been accorded, in particular a right to participate and vote in the councils of the joint adventure, and to block (subject to a cumbersome and expensive third party dispute resolution procedure) agreement on a wide range of important issues in terms of clause 2.2.1 of the Minute of Agreement, such as the nature of the planning consent to be applied for, the terms for sale of the land, and the existence of circumstances calling for renegotiation of the joint venture agreement. The pursuers would not have been prepared to accord such rights within the joint venture to any party who was not the true beneficial owner of Development Land. They would, in any event, not have been prepared to accord such rights to a party who was not the true beneficial owner of Development Land, but who was closely connected to the Developer … (Article 7 of Condescendence)"

[61] The pursuers' averments that they would not have admitted the first defender to the joint venture were criticised as "a mere assertion". However in my view, on a reading of the pursuers' pleadings as a whole, there is at least a stateable argument that parties seeking to achieve the best possible price for their land might be content to enter into a written joint venture agreement with a power structure drafted on the basis that all the participating landowners had a common interest (i.e. achieving the best profit) and were thus likely to constitute a coherent group controlling and managing the developer (whose interests would not necessarily be aligned with those of the landowners/joint venturers). Provisions relating to policies, decisions, consents, votes, and vetoes would be based on that premise. A

subsequent discovery that one landowner/joint venturer was in a sense a "front" or a "façade", who stood to make no profit or loss from the sale of its particular land, but was, as the holding company of a group of companies which included the developer company, *prima facie* a party whose interests were wholly aligned with the developer's, might be shown in evidence to be significant or material to the landowners when deciding who should be permitted to join the venture and/or when adjusting the checks and balances to be contained in the joint venture agreement.

[62] The voting structure in the joint venture agreement, to which the pursuers agreed on the basis of the information they had, tends to support the pursuers' contentions. The agreement gives a vote on significant matters to each of the four joint venturers/landowners (namely, the university; the trust; the Cuthills; and HH). No vote is given to the developer Pollpledge. Thus the landowners/joint venturers form a "bloc" of voters, with power to appoint the developer (clause 2.3), and to meet with the developer as often as necessary "for the dispatch of business of the joint venture" (clauses 2.4.1 and 3.1.1). The bloc of voters is entitled to vote on various significant matters, including:

- the format and content of the application for planning consent (clause 2.2.1(iii))
- the average value per acre of the development land (clause 2.2.1(i))
- whether the assumptions in the development appraisal were incorrect, leading to material prejudice
- additional developer's contributions (clauses 7.2, 7.6, 7.7)
- whether the developer was to be treated as "in default" (clauses 2.2.1(xii) and 8), whether the developer should be excluded from the project (clause 8.2) and whether rights against the developer should be exercised (clause 8.3)
- the appointment of a replacement developer (clause 2.2.1(x))

- the terms of appointment of a third party expert (clauses 2.2.1 and 2.2.2)

[63] The pursuers, in their averments, offer to prove that in 2003 they entered into the joint venture agreement on the understanding that the bloc of voters were landowners who sought to maximise the profit to be made from their respective plots of land, and who *inter alia* appointed, and to some extent controlled and supervised the developer, ensuring that the joint venture was being conducted in their interests. The pursuers offer to prove that this understanding, which was the basis upon which they entered into the agreement, was subsequently in 2014 demonstrated to be false when they learned of the existence and content of the back-minute, and appreciated that the bloc of voters in fact contained one landowner who stood to gain nothing by way of profit from its plot(s) of land but on the contrary had interests which were apparently wholly aligned with those of the developer. I therefore consider that the voting structure in the agreement lends support to the pursuers' case as pled.

Whether the content of the back-minute was in any event available or in the public domain

[64] On behalf of the first, third and fourth defenders, it was submitted that on the facts as averred in the pleadings no duty of disclosure arose in any event as all the necessary material facts relating to the content of the back-minute were in the public domain. For example, it was known that the developer company Pollpledge was part of the Headon group of companies of which HH was the holding company. Accordingly it was known that there was a connection and, in all likelihood, a degree of co-operation between them. Furthermore, the feu disposition by the Cuthills in favour of HH was easily examinable as it was in the public registers. Not only did the disposition contain a price suggestive of the

existence of an "anti-embarrassment" arrangement between HH and the Cuthills, but there was specific reference to the back-minute in the feu disposition. The pursuers had only to read the disposition and request sight of the back-minute to be in full possession of all the information they required. They could have taken those steps prior to finalising the joint venture agreement.

[65] Those submissions have not persuaded me that it is unnecessary to have a proof before answer. At this stage it seems to me arguable that an obligation to disclose material or significant matters in the course of negotiating the terms of a contract *uberrimae fidei* would not necessarily be fulfilled by an assertion that the matter was discoverable by the other contracting party if he undertook certain inquiries and/or made certain requests, all of which might or would uncover the necessary facts (cf *Park's of Hamilton (Holdings) Ltd* v *Colin Campbell* [2008] CSOH 177). Such an argument appears all the stronger where the entry in the feu disposition specifically relates only to the prohibition of the further transfer of land by HH to anyone other than a Headon company as listed in the schedule to the back-minute (i.e. a question of *delectus personae)* and not to any arrangement for the payment over of the sale profits by HH to the Cuthills. The circumstances surrounding the back-minute, its terms, its availability to joint venturers other than HH and the Cuthills, and the state of knowledge of those other joint venturers, would in my view be appropriate matters for investigation at a proof before answer.

Conclusion in relation to disclosure

[66] In the result it is my opinion that it cannot be said that the pursuers' action as pled on the issue of disclosure "must necessarily fail even if all [their] averments are proved". I should add that I do not accept the defenders' general submission that the pursuers seek to

found their position on the terms of the joint venture agreement, and thus all issues can be decided at a debate without the need for a proof. On the contrary, it seems to me that the pursuers rely upon all the circumstances of the case, requiring evidence about meetings, correspondence, statements (oral and written), documents, and parties' personal knowledge, perceptions, and reactions – in other words, all the circumstances of and surrounding the joint venture agreement. The pursuers are therefore entitled to a proof before answer on the issue of disclosure. I should also add that I do not consider that any decision in this case, reached after a proof before answer, would necessarily provide a precedent in other cases where parties negotiated the commercial terms on which they would be prepared to enter into a joint venture. Each case would depend upon its particular facts.

Misrepresentation

[67] I accept that there may be misrepresentation by omission or by partial statements, depending upon the circumstances (cf *Peek* v *Gurney* (1873) LR 6 HL 377, Lord Chelmsford at page 447, Lord Cairns at page 402; *Park's of Hamilton (Holdings) Ltd* v *Colin Campbell* [2008] CSOH 177, Lord Hodge at paragraph [18]). I agree with senior counsel for the pursuers that the pursuers' averments relating to representations (summarised in paragraph [8] of the Lord Ordinary's Opinion), cannot at this stage be said to be incapable, in the contexts averred, of being held to be misleading. The evidence may demonstrate that the statements referred to caused some participants to take certain decisions on the basis of a misunderstanding or a mistaken view of the role of HH in the joint venture and the nature and extent of the interests of HH, the Cuthills, and the developer. I also accept that what was said, or not said, in relation to those matters might, in a proof before answer, be demonstrated to be "material" misrepresentations in that other contracting parties might not

have entered into the contract on the terms they did, had they known the full facts. The materiality of any particular unknown fact would, in my view, be a matter to be explored in a proof before answer (cf the Lord Ordinary's approach in paragraph [19] of his Opinion, although apparently differing from his approach in paragraph [22]).

[68] Again therefore, on the issue of misrepresentation, it is my opinion that it cannot be said at this stage, without any inquiry into the facts, that the pursuers "must necessarily fail even if all [their] averments are proved". There is sufficient averred on record to entitle the pursuers to a proof before answer on the issue of misrepresentation.

[69] Finally, I considered the question whether any averments of allegedly fraudulent or negligent misrepresentation should be excluded from probation as irrelevant. I note that Article 8 of Condescendence contains the following averments:

> " … given (a) that the first and second defenders [HH and the Cuthills] were fully aware of the true nature of that interest [i.e. HH's interest in the development land which it was contributing to the joint venture]; (b) that they were aware of its likely effect on the willingness of the other prospective joint venturers to admit the first defender to the society of joint adventurers; (c) that the content of the 2000 Minute of Agreement was not made a matter of public record; and (d) that the first defender's directing mind, Joseph Headon, refused to answer questions put to him about the nature of the agreement once suspicions about its existence had been raised; the misrepresentation in question was made fraudulently with a view to inducing the pursuers to act as they did, or at least negligently to that effect …"

In my view, those averments, taken with the pursuers' other averments and read as a whole, cannot be said at the stage of a debate to be clearly insufficient to support allegations of fraud and/or negligence. Ultimately I propose that the pleadings be allowed to proceed to proof as they stand. It may be that some averments will not be proved. No doubt any degree of divided success may be reflected in awards of expenses.

Decision

[70] For the reasons given above, I propose that the reclaiming motion be allowed; that the Lord Ordinary's interlocutors of 20 and 26 August 2015 be recalled; that a proof before answer, all pleas standing, be allowed; and that the case be remitted to the Outer House (the Commercial Court) to proceed as accords.

[71] As evidence has still to be led, it is not necessary that the case should come before the same Lord Ordinary. For the avoidance of any possible future difficulty, the case should be remitted to a different commercial judge.

EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2017] CSIH 61
CA241/14

Lady Paton
Lady Clark of Calton
Lord Malcolm

OPINION OF LADY CLARK OF CALTON

in the reclaiming motion

by

THE UNIVERSITY COURT OF THE UNIVERSITY OF ST ANDREWS; and ANOTHER

Pursuers and reclaimers

against

HEADON HOLDINGS LIMITED; and OTHERS

Defenders and respondents

Pursuers and reclaimers: Sandison QC; Burness Paull LLP (First pursuers) and Gillespie MacAndrew (Second pursuers)
First, third and fourth defenders and respondents: Cormack (sol adv); Pinsent Masons LLP
Second defender and respondent: L Murphy QC; DWF

10 October 2017

[72] I have had the advantage of reading in advance the Opinions of Lady Paton and Lord Malcolm and I am content to concur with them. I did consider that there was some force in the submissions made by senior counsel for the second defenders relating specifically to the averments about alleged misrepresentation by the late Mr Cuthill. I have concluded however that taking into account the complexity of the facts and circumstances it

is not possible at this stage, in the absence of evidence, to conclude that there were no relevant averments.

EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2017] CSIH 61
CA241/14

Lady Paton
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OPINION OF LORD MALCOLM

in the reclaiming motion

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THE UNIVERSITY COURT OF THE UNIVERSITY OF ST ANDREWS; and ANOTHER

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Second defender and respondent: L Murphy QC; DWF

10 October 2017

[73] I have had the advantage of reading a draft of the judgment of your Ladyship in the chair. I agree with it and with your Ladyship's view that the appeal should be upheld. The case should be remitted to the commercial roll for further procedure in accordance with our decision. I wish to add the following observations on some of the issues discussed at the hearing.

Disclosure Duties

[74] The first matter discussed by the commercial judge concerned a pure question of law – what disclosure duties, if any, are owed by parties to each other when negotiating a partnership agreement? The judge's reasoning is set out in paragraph 16 of his judgment, concluding in the following:

> "… a duty incumbent on a prospective partner to disclose every fact that he knew or ought to know would or might be regarded as material by the other prospective partner seems to me to go further than necessary to protect the interests of persons negotiating a commercial agreement, even one that will result in them owing fiduciary duties to one another after the partnership has been entered into."

It may be that the commercial judge expressed no definitive view as to the law, but it is clear that he favours a restrictive approach. The court was told that this is first time that the issue has arisen for direct decision in Scotland.

[75] The position south of the border is not in doubt – see *Bell* v *Lever Bros Ltd* [1932] AC 161, Lord Atkin at 227:

> "Ordinarily the failure to disclose a material fact which might influence the mind of a prudent contractor does not give the right to avoid the contract. The principle of *caveat emptor* applies outside contracts of sale. There are certain contracts expressed by the law to be contracts of the utmost good faith, where material facts must be disclosed; if not, a contract is voidable. Apart from special fiduciary relationships, contracts for partnership and contracts of insurance are the leading instances. In such cases the duty does not arise out of contract; the duty of a person proposing an insurance arises before a contract is made, so of an intending partner."

Lord Atkin's observations were applied by the Court of Appeal in *Conlon* v *Simms* [2008] 1 WLR 484 at paragraphs 127-8. The careful reasoning of the judge at first instance, Lawrence Collins J, was approved.

[76] In Scotland it is established that once parties are partners, they have agreed to a contract which demands "the utmost good faith *inter socios*; staked on the absence of misrepresentation and concealment" – Erskine, *Principles*, 21st ed 393. Bell describes the

contract as one of "exuberant trust", *Principles*,10th ed 358. Gloag, *Contract* 2nd ed 496, says that each partner is entitled to repose confidence in the other; thus a failure to disclose known material facts is a ground for reduction of the contract. For a relatively recent example of this principle in operation, reference can be made to *Ferguson* v *Patrick & James WS* 1984 SC 115. Clark, *Partnership i.82*, states that:

> "The law expects and requires that the conduct of the partners towards each other shall be characterised by the most scrupulous good faith, that they shall zealously act and co-operate for the common good, and that they shall not place their individual interests before that of the company."

The reason for all of this is explained by Bacon V-C in *Helmore* v *Smith* [1887] 35 Ch D 436 at 444:

> "If fiduciary relation means anything I cannot conceive a stronger case of fiduciary relation than that which exists between partners. Their mutual confidence is the life blood of the concern. It is because they trust one another that they are partners in the first instance; it is because they continue to trust one another that the business goes on."

[77] In my view, the considerations which have led to pre-contractual disclosure duties in England and Wales apply with equal force north of the border. If a party is withholding material information, for example, a highly relevant past act of dishonesty, it would make little sense if the obligation to reveal it arose only once the contract was agreed. As the Vice-Chancellor made clear, mutual trust and confidence is a cause of the contract, not a result of it. The commercial judge cites a passage in Miller, *Partnership*, 2nd ed, at pages 156-161; however there is nothing said in it which leads me to doubt the above The author is anxious to avoid the importation of what he considers to be disruptive doctrines from the law of England and Wales, namely the notion of contracts *uberrimae fidei* (contracts of utmost good faith). A passage in Professor TB Smith's *Short Commentary* is cited, where doubt is expressed as to the need for Gloag's list of contracts of utmost good faith. Professor Smith

states that "*bona fides* is fundamental in the Scottish law of contract in a way which it is not in the law of England", and thus the introduction of the superlative adjective may be unnecessary. Perceptively, he adds:

> "The negotiations preceding a contract *uberrimae fidei* do not create a situation in which a man should be more honest than on other occasions, but one in which an honest man would be more candid." (page 837)

[78] A duty of disclosure can arise simply from a fiduciary relationship, for example, trustee and beneficiary, parent and child, and partner to partner. In other cases, the duty arises in advance of a completed bargain because of the nature of the proposed contract, with insurance being a classic example – see *Life Association* v *Foster* [1873] 11 M 351, Lord President Inglis at 359. When negotiating a standard arm's length commercial agreement, both sides are expected to understand that they must look out for their own interests, and, in general, cannot complain if in due course they learn that the other possessed more accurate information. However, in the case of negotiations to enter a partnership, as with insurance, it is the nature of the contemplated relationship which requires each party to state any known circumstances which could influence the other. Another possible way of looking at this would be to identify a fiduciary relationship once parties enter into such negotiations.

[79] The commercial judge returned to the subject at paragraph 18 of his judgment. He stated that there was:

> "no inequality of knowledge in the sense that any party was in possession of private information that another party could not ascertain prior to contractual commitment. The situation is therefore different from that of a proposal for insurance or a subscription for shares in reliance upon information in a company prospectus. In my opinion the imposition of a duty of disclosure in the circumstances of this case would be an innovation supported by neither principle nor precedent. I therefore hold that the pursuers' case based upon *uberrima fides* and a duty of disclosure is irrelevant."

[80] The reference to "the circumstances of this case" injects an element of uncertainty as to the scope of the judge's decision. It is at least possible that he was suggesting that, if the issue of beneficial ownership was so important, enough was known about the purchase of the Cuthill land to place a burden on the reclaimers to make their own inquiries. That is indeed a possible outcome of the present case, though I consider it could only be reached after evidence had been heard. I note that in an insurance case, Lord Esher MR said that it was not necessary to disclose minutely every material fact.

> "The rule is satisfied if he discloses sufficient to call to the attention of the underwriters in such a manner that they can see that if they require further information they ought to ask for it." (*Asfar & Co* v *Blundell* 1896 1 QB 123 at 129)

[81] There may be a concern that a partner, who is keen to escape from what is perceived to be a bad bargain, might cast around for a pretext based on an alleged breach of a pre-contractual duty of disclosure. In itself that would not be a reason for rejection of the duty. In any event, there are important constraints. The undisclosed fact must be shown to be a material fact, in the sense that, objectively, it could influence the judgment of a reasonable and prudent person in the position of the other party. The non-discloser must be aware of the particular fact, and of the circumstances which render it material to the bargain. And before the contract will be reduced, the undisclosed fact must be both material and operative; the latter in the sense that an erroneous belief, which would have been corrected by compliance with a disclosure obligation, caused the party concerned to enter into the contract. Counsel for the reclaimers argued for something akin to a need for "informed consent." I would reject that submission. Absent inducement, the agreement is not defective.

Partnership?

[82] In discussing the issue of whether the joint venture agreement (JVA) resulted in a relationship of partnership, it can be noted at the outset that counsel for the reclaimers disclaimed any argument that, even if the JVA is not a partnership, nonetheless a duty of disclosure arose. The main factors which influenced the commercial judge's view that the JVA is not a partnership were (i) its purpose; being the exploitation of land; (ii) the view that the bulk of the positive duties fell on the developers, not on the joint venturers; and (iii) that there was no common property, no provision for liability for debts, and none for one venturer binding the others in contracts with third parties.

[83] The reclaimers' submission was that the question should be answered after proof. I agree with that submission. At this stage, the only question is that set out in *Jamieson* – in effect, are the reclaimers bound to fail in the offer to prove this part of their case? The respondents contend that they are bound to fail, and this because the only relevant averments concern the terms of the JVA, which speaks for itself in favour of the judge's conclusion. Even if it was appropriate to adopt such a narrow focus, I would not be persuaded that the correct position emerges so clearly from the terms of the JVA that nothing is to be gained from evidence. If nothing else, it would help to put the agreement into its proper context in terms of the background and its purposes.

[84] According to section 1 of the Partnership Act 1890, partnership is "the relation which subsists between persons carrying on a business in common with a view to profit". Section 2 provides that "business" includes "every trade, occupation or profession". There is clear authority that a joint venture of limited purpose and duration can amount to a partnership – *Mair* v *Wood* 1948 SC 83, Lord President Cooper at 86. The statutory definition is sufficiently vague and open-ended that there have been many attempts to put some flesh

on the bones. For example, *Greens Encyclopaedia*, vol 11 para 13, talks of two or more persons placing their property, labour or skill, or some of them, to lawful commerce or business, dividing profits and losses in certain proportions. Lindley (19th ed 2-02) states that "virtually any activity or venture of a commercial nature, including a single 'one off' trading venture, will be regarded as a business for this purpose."

[85] In the present case it seems likely that the key question will be whether the activity pursued by the joint venturers can properly be described as a business. Plainly it is not a social or sporting association, nor a charitable enterprise. So what is it? The view of the commercial judge was that it involves the exploitation of land. That is certainly true, but in itself, does not necessarily point away from a business or commercial activity. Many businesses are concerned with the exploitation of the potential value of land. No doubt the mere realisation of capital assets is not, in itself, a trading activity (*Glasgow Heritable Trust* v *Inland Revenue* 1954 SC 266, Lord President Cooper at 284). However, this decision, and other tax cases, demonstrate how sensitive these issues are to the particular facts and circumstances. A distinction might be drawn between a mere enhancement of value, and a gain arising from the operation of a business aimed at making profit. One might ask whether the profit is derived from activities characteristic of a business venture? Was money, time and effort expended with a view to marketing the land at a profit? Another question might be as to whether the division of labour, etc, as between the joint venturers and the developers has a significant impact on the nature of the association formed between the joint venturers. It can also be noted that the provisions in the JVA relating to the equalisation of land values distinguish the present from combinations designed to maximise individual profitability. There is a degree of "pooling" or commonality of benefits.

[86] The proper answer to such questions might be as much a matter of impression, and similarly in respect of the ultimate decision on whether the relationship can properly be categorised as one of partnership. If so, this would support the reclaimers' submission that, for a fully and properly informed decision, evidence should be allowed.

[87] In summary, I do not consider that the broad objective of the exploitation of ownership of land necessarily points away from a business activity. Nor does the absence of common property. The judge correctly noted the absence of express provision on certain topics, but the Partnership Act often fills in such gaps. In any event, it would be a mistake to assume that common features of a partnership are pre-requisites to the satisfaction of the statutory definition. The reclaimers have pointed to certain parts of the agreement which it is said support an intention to carry on a business in partnership, for example clauses 1.4, 1.5 and 2.4.1. Certainly these are factors to be taken into account, however the issue is determined objectively in terms of the statutory definition.

Misrepresentations

[88] Since the disclosure case is being remitted for a proof before the question is answered, it would be sensible to do likewise in respect of the averments as to misrepresentations. The commercial judge noted the absence of any averment of a misrepresentation to the effect that the first and second defenders were beneficial owners of the Cuthill land. It was factually accurate to say that the first defenders had purchased the land and owned it. It was considered relevant that there was nothing in the JVA to support the proposition that beneficial ownership was regarded as material to the bargain.

[89] In my respectful opinion, the commercial judge's conclusion that there were no relevant averments as to any misrepresentation was based upon an overly restrictive view as

to the nature and scope of the reclaimers' pleadings on this part of the case. The pleadings are summarised at paragraph 8 of his judgment. They go beyond assertions of landownership, and offer to prove that Mr Headon gave the impression that his financial interest in maximising the development value of his company's holding was the same as that of the others, when it was not. In effect, the suggestion is of half-truths, and of being "economical with the truth", both of which can, depending upon the circumstances, amount to misrepresentations, as indeed can silence in certain circumstances. It is generally the case that less emphasis is placed upon pleadings in the commercial court. However I would not place decisive weight on this, not least where detailed pleadings have been provided, and the context is of misrepresentations characterised as either fraudulent or negligent. However, it is important to bear in mind that the case can only be dismissed if the court is satisfied that, even if the reclaimers prove all they offer to prove, their case must fail. I am not of that opinion.

Materiality

[90] At paragraph 22 of his judgment the commercial judge expressed the conclusion that whether the first defenders would enjoy the ultimate profit on the sale of the land was not mutually regarded as material when the agreement was entered into. It seems likely that this was influential in his decision to dismiss the case, since proof of mutually understood materiality is a necessary element for the success of both the non-disclosure and the misrepresentation grounds of reduction. Again the commercial judge was heavily influenced by the terms of the JVA. However, as may already be clear, I do not consider that the issues in the case turn only upon the provisions in the agreement. As to the materiality of any proven misrepresentation, or indeed any non-disclosure, and whether it was

operative in the sense that it induced a party to enter the bargain under a material misapprehension, thereby rendering the agreement defective, I would not encourage such a narrow focus, at least not in the circumstances of the present case. As it happens, throughout the discussion at the appeal hearing, my impression was that counsel for the reclaimers struggled to give a clear and convincing explanation of the basis for the propositions that (a) all parties would have understood the importance of the financial terms of the agreement between the first defenders and the Cuthills, and (b) that, had the reclaimers been aware of the full circumstances, they would not have entered into the JVA. On the face of it, the financial terms were much as might have been expected. And it is not immediately obvious why the developers' holding company would wish to depress the development value of the land, not least given that the bulk of it could be bought at less than full value. However, whatever reservations I might have on these matters, they are not sufficient to persuade me that the *Jamieson* test for dismissal is met.