Neutral Citation Number: [2026] EWHC 370 (Ch)

Case No: CH-2025-000001

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
ON APPEAL FROM THE ORDER OF HHJ MONTY KC OF 17 DECEMBER 2024
CASE NO F10CL333

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

Date: 23/02/2026

Before :

Sir Anthony Mann, sitting as a judge of the High Court

- -

Between :

Christopher Fisher	**Appellant**
- and -	
Colin Dinwoodie	**Respondent**

- -
- -

Andrew Butler KC and Richard Alford (instructed by **Direct Access**) for the **Appellant** Mr Fisher
Shane Sibbel (instructed by **Fieldfisher LLP**) for the **Respondent** Mr Dinwoodie

Hearing date: 5th December 2025

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Approved Judgment

This judgment was handed down remotely at 10.00am on 23rd February 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives and other websites.

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SIR ANTHONY MANN SITTING AS A JUDGE OF THE HIGH COURT

Sir Anthony Mann :

Introduction

1. This is an appeal from an order of HHJ Monty KC, sitting in the County Court at Central London, made on 17th December 2024 pursuant to a reserved judgment delivered on 4th November 2024. In that decision he ordered the defendant, Mr Fisher, to pay the sum of £220,364 (and equitable interest) as part of the sums owing on the taking of an account between the two parties to this action (Mr Fisher and Mr Dinwoodie). The account arose after a determination by HHJ Monty in a previous trial that Mr Fisher owed Mr Dinwoodie fiduciary duties of which he was in breach and that he held certain shares on trust for Mr Dinwoodie. That judgment was delivered on 15th November 2021 and was the subject of an unsuccessful appeal (to me, as it happened) in which judgment was delivered on 26th May 2023. This judgment assumes that those two judgments will be read along with this one, and I will not recite all the detail of those judgments, though it may be necessary to refer to specific parts from time to time. At this point I will merely set out the general background to this matter as it appears from findings and determinations in those judgments.

2. Mr Fisher and Mr Dinwoodie were participants in a joint venture tailoring business in which they were at first partners (as held by HHJ Monty). Various companies were incorporated to carry on that business. The shares in those companies were held by Mr Fisher and the essence of the previous judgment of HHJ Monty was that the shares in the original companies were held as to 50% on trust for Mr Dinwoodie, and that Mr Fisher owed fiduciary duties to Mr Dinwoodie in respect of their activities, identified as being fiduciary duties in relation to the intended vesting of shares in Mr Dinwoodie. An appeal from HHJ Monty's determinations was dismissed by me ([2023] EWHC 1279 (Ch)), other than a modification of an injunction granted by him whose effect I narrowed.

3. In his order of 28th April 2022 HHJ Monty made various declarations regarding some of the shares, ordered their transfer and made the following order for the taking of an account based on the breach of fiduciary duties:

> "9. The Defendant shall by 15 June 2022 file and serve an account ("the Account"), verified by a witness statement pursuant to CPR PD 40A paragraph 2, together with supporting documents, detailing (as at the date of the Account):
>
> (1) All monies received by the Defendant from AML, QTV, BME or BEM since 8 November 2017;

(2) All monies received by the Defendant since 8 November 2017 from:

(a) Design & Alter Limited (company number 11104627) ("DAL")

(b) Design & Alter Bespoke Limited (company number 11148096) ("DABL")

(c) BP Tailoring LLP (company number OC392665) ("DAT LLP")

(d) DA Studio 63 Limited (company number 13126023) ("DA 63")

(e) DA Studio 14 Limited (company number 13220621) ("DA 14")

(f) Bride & Alter Limited (company number 13221467) ("BAL")

(g) Studio 63 Tailors LLP (company number OC435793) ("Studio 63"); and

(h) any other company which is trading or has traded (i) out of premises leased or previously leased by AML and/or (ii) using the trade marks, goodwill or other assets transferred by the Defendant from AML and/or QTV, including (if applicable) Reboutique Limited (company number 13125988) ("Reboutique") and/or Mish Mash Ventures Limited (company number 13126110) ("Mish Mash");

(3) All shares received by the Defendant since February 2018 in AML and BME.

in each case, whether such receipt by the Defendant was direct, indirect, legal, beneficial, in his own name, in the name of his agents, trustees or nominees (whether individuals or corporate entities), or paid to a third party for the Defendant's benefit (including but not limited to any payments to discharge the Defendant's liability for legal fees or costs).

10. The Defendant shall specifically include the following documents, insofar as such documents are within his control, when providing the Account:

> (1) All bank statements and any management accounts or ledgers from 8 November 2017 to the present for each of the companies referred to in paragraphs 9(1) and (2) above; and
>
> (2) All communications and other documents within the Defendant's control relevant to the issue of whether the shares issued in or around March 2020 in AML and BME to the Defendant's brothers and partner were beneficially received by those individuals or received on behalf of the Defendant.
>
> 11. The Defendant shall by 15 June 2022 transfer to the Claimant any monies or shares which the Defendant identifies in the Account as due to the Claimant.
>
> 12. The Claimant shall by 4pm on 4 August 2022 serve a written notice of objections to the Account (if so advised), verified by a witness statement, pursuant to CPR PD 40A paragraph 3.
>
> 13. There shall be liberty to apply for further directions and/or consequential relief."

4. I shall use the same abbreviations to describe the companies where it is relevant to refer to them. Of those companies, those described in para 9(1) of the order were the companies operating during the joint venture period, and the others were companies to which the businesses were subsequently transferred. After the termination of the joint venture Mr Dinwoodie played no part in the business and Mr Fisher remained heavily involved in the companies. I deal below with the steps taken in pursuit of the account, which are relevant to procedural complaints raised by Mr Fisher.

5. As will appear, Mr Fisher served an account which showed certain sums as having been taken from some of the companies by way of what he referred to variously as fees, interest and the repayment of expenses. The effect of the judgment under appeal was that he was obliged to pay all those sums to Mr Dinwoodie without deduction or allowance against any of them. On this appeal it was heavily emphasised that the effect of that was that Mr Fisher got nothing by way of remuneration for his efforts in the business, and it was said that this was contrary to principle so he appeals the decision below.

6. On this appeal Mr Andrew Butler KC argued the case for the appellant, Mr Fisher, and Mr Shane Sibbel appeared for Mr Dinwoodie as respondent. I commend their succinct and clear submissions which gave me a great deal of assistance.

Procedural history

7. The procedural steps taken after the first order (and the appeal) followed the directions given by the judge. They were all taken while the appeal from the original judgment was pending, a stay having been removed. It is necessary to consider them and their content because one of the grounds of appeal involves considering whether the judge should have embarked on a consideration of the payments at all as opposed to giving directions which would have involved the hearing of oral evidence and further argument.

8. On 22nd June 2022 Mr Fisher provided his account exhibited to a witness statement. He admitted paying himself £108,431 from the original joint venture companies BME and AML, and £81,233 from newer companies (or limited partnerships) DAL, DAT LLP (that is to say, BP Tailoring LLP) and Studio 63. There was a subsequent dispute as to whether the account should be taken to demonstrate that he took a further sum of £30,700 from Studio 63, which the judge resolved in favour of Mr Dinwoodie. These sums, in aggregate, formed the basis of the sums ultimately ordered by the judge. At this stage no bank statements or management accounts of any of the companies were provided. Mr Fisher has claimed that he has resigned as director of the companies and no longer has those documents. The exhibits to the account were some VAT returns, some invoices rendered by Mr Fisher to various companies and a reproduction (not a copy) of entries for his personal bank account with a lot of detail redacted. There remain disclosure issues between the parties. It would seem that Mr Dinwoodie considers that Mr Fisher has not given proper disclosure of payments received or of documents.

9. On 30th September 2022 Mr Dinwoodie filed a Notice of Objections, exhibited to a witness statement from his solicitor. It took a point about the absence of supporting documentation and disclosure, and drew the inference that Mr Fisher had drawn more than he disclosed. It submitted that all the sums that were disclosed fell to be treated as unauthorised profits for which Mr Fisher had to account and which he had to pay and made the point that no equitable allowance should be permitted. He referred to an alleged under-declaration of £30,700. I will need to return to more detail about these points in due course.

10. On 5th December 2022 Mr Dinwoodie applied for "further directions and consequential relief (as set out in the draft order [annexed])". That draft order sought payment of the £189,664 said to be disclosed as receipts and the further sum of £30,700, "by way of his account to the Claimant of the profits of his breaches of fiduciary duty". It also sought a disclosure statement and other relief which is not germane to this appeal. It was supported by a witness statement from Mr Dinwoodie's solicitor which, in bare terms, sought payment of the sums just referred to on the basis of the proper principles applicable to accounts.

11. A hearing of that application was listed for 28th July 2023 but it was vacated because of the parties' unavailability. In October or November of the same year it was relisted to be heard on 6th June 2024, which became the hearing before HHJ Monty. That lengthy delay is obviously regrettable, but it was common ground that neither party was responsible for it.

12. For the purposes of that hearing Mr Fisher prepared a "Response Document" which observed that Mr Dinwoodie seemed to be seeking summary disposal "of what are complex accounting issues between the parties", and that Mr Fisher had responded in as much detail as possible so that the application could be properly managed. It was said that it was likely that further directions would be necessary, with further evidence, before the account could be disposed of. Its other challenges appear below.

13. 3 days before that document Mr Fisher had signed a further (third) witness statement in response to the application of Mr Dinwoodie. Details appear below. Mr Dinwoodie responded to this evidence in a further witness statement from his solicitor. It contained some generalised submissions as to whether Mr Fisher had fulfilled the burden on him of demonstrating the propriety of his receiving the specific sums in question.

14. Finally, on the day before the hearing before HHJ Monty, Mr Fisher provided a third very short witness statement dealing with an inconsistency in his account over whether he had received the disputed £30,700 and explaining why he had not. The detail of this appears below. It also sought to explain the reason behind two particular payments which were in aggregate £14,264, and to explain briefly receipts based on alleged loans. So far as relevant to this appeal, details again appear below.

The judgment of HHJ Monty

15. The judge below dealt with most matters very shortly in what was, in the circumstances, a very short judgment. In paragraph 12 he dealt with three issues he had to decide. The second and third are not relevant to this appeal. The first was said to be:

> "(1) Should the Defendant be ordered to make a payment or payments to the Claimant?"

16. At paragraphs 16-24 he set out briefly six principles that he considered, on the authorities referred to, governed the award of an account of profits. Not much issue is taken as to the way he formulated his brief summary; the issues on this appeal are more based on an averment that on a proper elaboration and proper understanding of those issues Mr Fisher should not have been ordered to pay the sums he was.

17. In his next section he considers: "Should there be an order for payment?" I will deal with relevant detail when I consider the various grounds of appeal, but for the time being a general description suffices. He took the sums which Mr Fisher himself admitted he had taken from the companies, commenting from time to time on the absence of evidence for what Mr Fisher had explained them to be. He resolved the factual uncertainties about the disputed £30,700 in favour of Mr Dinwoodie (ie holding that the sum was actually received by Mr Fisher) and decided he could do that because the evidence was clear (paragraph 43) and in the same paragraph reached his conclusion that the sums payable to Mr Dinwoodie were the aggregate of the sums received by Mr Fisher:

> "In my judgment, these sums are directly linked to the breaches of fiduciary duty."

18. Then he rejected arguments that the profits should be limited to 50% of the sums received by Mr Fisher.

19. All this was in very short order and with little elaboration.

20. In his next section he rejected the claim for an equitable allowance in respect of Mr Fisher's own work for the companies because such a course was, on the authorities, exceptional, Mr Fisher's dishonesty militated against it and there was an absence of an evidential basis and proper detail for the claim, giving two examples of unsatisfactory evidence on the point.

Ground 1 - procedural unfairness

21. This ground is expressed as follows:

> "The decision of the court was unjust because of a serious procedural or other irregularity in that, in light of the value of the account, the complexity of the issues raised, and/or the various disputes of fact between the parties, the Court should not have proceeded to dispose of the account in a summary fashion, and without hearing oral evidence/cross-examination."

22. It is right to observe that the skeleton argument of Mr Alford below took the point that it was not appropriate to deal with the matter at that hearing for the reasons just summarised. However, it is also right to observe that his skeleton argument does go on to resist the relief on substantive grounds. The judge recorded Mr Alford's position at paragraph 42, but concluded in paragraph 43:

> "43. I do not see why, if the evidence is clear, which in my view it is, the court should not make an order for payment today. I am entirely satisfied that the Defendant, on the basis of the account he has provided and on the evidence I have summarised, should be ordered to pay a total of £108,431 + £81,233 + £30,700. In my judgment, these sums are directly linked to the breaches of fiduciary duty."

That is the short finding which is challenged.

23. Mr Butler's case on this centres on what he said was a summary disposal of the questions the judge decided when what should have happened, on the basis of the material filed, and on the basis of what Mr Fisher's position plainly was, was that there should have been directions for the resolution of disputed matters, with a further hearing to resolve them with the benefit of oral evidence. While he did not dispute the jurisdiction of the court to make a summary determination of matters on an account procedure, this was not a case in which the jurisdiction should have been exercised; but it was. The judge failed to take into account the nature of the evidence, stated that there was no evidence when there was in fact some, failed to recognise that the state of the evidence on the £30,700 point was such that it could not be resolved without cross-

examination, and rejected evidence from Mr Fisher which needed to be properly tested (and indeed failed to refer to Mr Fisher's important third witness statement at all).

24. He also went further and submitted that the judge's behaviour demonstrated a form of bias. At the first trial he had made seriously adverse findings about Mr Fisher's credibility, and while those were not challenged on the account hearing, the tenor of the hearing was such that it might be thought that the judge was never going to believe a word Mr Fisher said, and the procedure was so peremptory and unfair as to lead the fair-minded observer to form the view "that the whole process was tainted" (the words used in the skeleton argument), relying on *Re Medicaments and related Classes of Goods* (No 2) [2001] 1 WLR 700 at paragraph 85).

25. I will deal first with this last challenge, which is in effect an actual bias allegation, which can't be disguised by the word "tainted". The first point is that it was not a point expressly taken in the Grounds of Appeal. A bias point needs to be clearly articulated with particulars given, and it was not. Furthermore, I do not consider that there is anything in the point, and wonder whether it should ever have been raised. There is no doubt that the judge dealt with the points before him briskly, as will appear, but that is not a basis for a bias allegation. The added fact that he had previously found Mr Fisher to be untruthful is a relevant further factor which provides context for the allegation about what happened at the hearing, but it would not have led to a successful application for recusal based on actual or apparent bias, and it does not provide enough further material to demonstrate that there was actual bias at the account hearing. A judge's swift disposal of matters may demonstrate that he/she thinks that the case should not be prolonged, but that is the sort of judgment that judges make every day without being biased in favour of one party or the other, or without giving the reasonable observer grounds for considering that there is bias.

26. I turn, therefore, to the other unfairness points, which may have rather more substance and which require an analysis of the procedure adopted. What happened in this case does indeed appear to be a kind of summary disposal of this matter. That is not necessarily improper if the circumstances permit it. It might be thought that the relatively small sums involved meant that such an approach was more, rather than less desirable, but it is nothing like determinative, and in this case one has to bear in mind that it would seem that the monetary claim is not the end of the matter. It would appear that Mr Dinwoodie will now be pursuing further sums on the footing that the sums hitherto received are not all that Mr Fisher actually received, and to that end further disclosure will be or is sought. That being the case, Mr Dinwoodie would presumably point to the present judgment as being determinative of all relevant legal matters and all that he now has to do is to prove receipt of further sums. Again, if a summary determination is fair, there is nothing wrong with that, but that prospect has to form part of the consideration of whether it was appropriate in this case. It therefore necessary to consider whether there were indeed disputes of fact and/or law which required a trial

rather than a summary determination on the documents filed, and whether Mr Fisher has been procedurally disadvantaged.

27. Part of this point is procedural, and in order to determine that it is necessary to go back to the beginning of the process and consider the course of the matter which led it to arrive before HHJ Monty in the form that it did.

28. The starting point is the order in the account. It is significant to note that it was not for an order for an account of sums received by Mr Fisher for which he should account to Mr Dinwoodie. Had that been the case it would have been necessary and appropriate, within such an order which identifies the end result, for the order to make directions providing for him to specify what sums he received from the companies (which was the order made) and for him to identify what deductions or other matters ought to be taken into account in taking the account. Such an order might or might not have provided for some disclosure by Mr Fisher at that stage - it would probably have been a good idea. That would have required him clearly to identify any deductions and any allowance that he sought for remuneration. There would then have been a mechanism for challenging those matters, and their propriety, and an opportunity for Mr Dinwoodie to challenge, for example, whether Mr Fisher had disclosed all the sums that he received. At some point there would have been a direction for disclosure going to whatever points were then in issue if not already given.

29. That, however, was not the nature of the account ordered. The judge's order of 28th April 2022 was just for an account of the moneys actually received by Mr Fisher from the various companies, together with an order for disclosure. There were then some consequential provisions as set out above.

30. Strictly speaking the notice of objections would contain merely a challenge as to the amounts received, and not any other matters. So Mr Fisher would have complied with the obligations in the account by just specifying what he had received and their (alleged) nature, which is what it basically did, and the challenge in the notice of objections would merely go to whether Mr Dinwoodie accepted Mr Fisher's account of what he had received. That would be merely part of the activity of a proper account of what should be treated as profits and what allowances should be made. It is slightly unfortunate that the account started off on slightly the wrong foot, though as will appear attempts were made to right it.

31. Mr Fisher responded to that order by filing a lengthy account dated 14th June 2022 which, although lengthy, dealt just with receipts from the companies, with some

disclosure which he would say was in response to the disclosure obligations contained in the account order. It contained various explanations. The amounts disclosed were those summarised in the judgment of HHJ Monty. That was proper compliance with the order. Nothing more was required, procedurally speaking (leaving aside questions of whether the disclosure was adequate).

32. The notice of objections followed on 30th September 2022. It did not confine itself to challenging the accuracy of the disclosure of the payments (though it did that); it set out a claim that all the moneys received were profits from the breach of fiduciary duty, challenged the effect of the characterisation of some receipts as fees or interest on loans (or the effect of that characterisation on the liability to account), pointed out that Mr Fisher had not claimed an equitable allowance, had provided no evidence in support, and gave reasons why he should not be entitled to one. The notice claimed that Mr Fisher was liable to account for all the sums received (paragraph 15) and pointed up additional matters not explained in the account (which were apparently not pursued at the hearing before the judge below). At paragraph 18(3) the notice took a point about the discrepancy which led to an alleged underpayment of the £37,700 which the judge ultimately dealt with in favour of Mr Dinwoodie. It dealt with other points about shares which are not germane to this appeal.

33. Thus the notice of objections raised the points which were ultimately before the judge. One thing that can be said about them at this stage is that while it is correct to point out that Mr Fisher had not claimed an equitable allowance, the original order did not make that a necessary part of his account. He was obliged only to account for receipts that he had received.

34. On 5th December 2022 Mr Dinwoodie made the application which ultimately came before the judge. It sought the payment of the sums ultimately found by the judge and equitable interest, within 14 days of the date of the order. It also sought disclosure which was the same as that ordered previously. There was also some other relief which is not germane to this appeal relating to share ownership, and it sought a hearing date of one day for the Shares Issue, but said nothing about a hearing date of the account issues. The application was supported by a witness statement from Mr Dinwoodie's solicitor which claimed that the moneys paid out of the companies ought to be paid to Mr Dinwoodie (paragraph 15 and section C).

35. As appears above, a hearing date in 2023 for the account was given, but rejected by the parties and the 2024 date was later given. On 13th May 2024 Mr Fisher provided a Response to the application (signed by counsel - it was not a witness statement) for the purpose of the forthcoming hearing on 6th June 2024. It observed that Mr Dinwoodie was apparently seeking summary disposal of the "complex accounting issues between

the parties" and that Mr Fisher was responding in as much detail as possible so that the application and account could be properly managed and that it was likely that further directions would be likely to be required (paragraph 2). It set out Mr Fisher's position that all the money that he received was expenses or remuneration and that the companies in question survived only by dint of Mr Fisher's activities. That would seem to raise the equitable allowance point, though not in terms. It also took the point that the moneys received were not profits, and identified that as one of the issues "to be determined on the account", the others being the sort of points on which the judge ruled. Procedurally, paragraph 12 pointed out (correctly) that Mr Fisher's obligation under the procedure was to account for payments, not for profits or net profits. In addition, paragraph 37 correctly points out that up until then Mr Fisher had merely been asked to provide an account of moneys received, but says that insofar as necessary "at this stage" a right to an equitable allowance was asserted for "extensive work in relation to the Companies". Paragraph 44 maintained that if there was a liability to account it should be to the paying entities (the companies) and not to Mr Dinwoodie.

36. Before then, on 10th May 2024 Mr Fisher provided a further long witness statement (his third) to deal with a disclosure issue, a joinder issue and the application by Mr Dinwoodie for payment. Paragraph 6 stated that he presumed that the first two elements would be dealt with at the forthcoming June hearing, but that directions would be required for the third so that the account could be dealt with by a District Judge. In paragraph 40 he refuted the suggestion that he had paid himself any sums other than those disclosed. He challenged the suggestion that he had received "profits" and maintained that some of the payments to him represented "hard earned income for time and expert services" and that it was a fundamental part of the arrangement between the parties that he should be allowed to do so. He said he worked 4-5 days a week in the various companies, doing various described tasks. Paragraph 70 refers to his doing a 30-40 hour week. Paragraph 117 refers to £929 being reimbursement of expenses which he could not by then identify. Some of the rest of the statement seeks to show how he left fees in some of the companies and lent moneys. Paragraph 159 returns briefly to his assertion that he has been duly and proportionately rewarded for his "seniority and leadership, … skill and experience .." in running the companies and continues to seek to justify his receipts as properly earned income.

37. Mr Dinwoodie responded with a further witness statement from his solicitor. It makes a number of submissions about Mr Fisher's apparent case, including that the burden was on him to establish that the moneys received by him were not profits in breach of his fiduciary duties and that he had not done so and pointing out that the sums claimed in the December application were sums which Mr Fisher himself admitted having received. Paragraph 21 challenges the presumption of Mr Fisher that the hearing would be a directions hearing only and says that delay would seriously prejudice Mr Dinwoodie. Paragraph 42 says that Mr Dinwoodie maintained his application for relief.

38. Last, Mr Fisher filed a fourth witness statement the day before the hearing in which he dealt with evidential differences about whether he received the £30,700 sum referred to above in the section describing the judgment.

39. That is the procedural background (not always fully developed at the hearing before me) to this Ground. Mr Butler submitted that Mr Fisher and his team were not fully expecting to have to deal with all issues and his junior was deprived of the opportunity of having his leader there. The hearing ought to have been for directions only and it was unfair to have it treated in a manner analogous to summary judgment application. There were matters that needed to be tested by oral evidence and further development.

40. That account of the background demonstrates the following.

41. First, the application before the judge (the December application) was in substance a sort of summary judgment application based on what the claimant saw as obvious and established facts - the receipt of the moneys which was said to flow from the breach of fiduciary duty. Mr Sibbel accepted the analogy with summary judgment.

42. Second, neither the original account order nor any subsequent directions order provided for the orderly development and resolution of the issues which would arise on the taking of an account of the sums due and payable as a result of the breach of fiduciary duty (the account of profits). The original order provided for only one element of that - the sums received by Mr Fisher.

43. Third, despite that, the issues were developed at least to some extent in the evidence and particularly as a result of the notice of objections. That raised the challenges to Mr Fisher's entitlement to keep the moneys and took the previously unraised point about an equitable allowance. Mr Fisher responded to those points in his third witness statement. All the points could therefore be said to be in play, or at least put out in the open, despite the fact that strictly they did not arise on the account as ordered.

44. Accordingly, it cannot be said that the judge did not have before him formulated cases with at least some evidence, despite the formulation of the terms of the account. He also had the benefit of his findings at his original trial and (so far as relevant) anything arising from my judgment on appeal from that judgment. What he had, in substance, was an application for summary judgment on the basis of the material he had. So the

question becomes whether he was justified in granting summary judgment in those circumstances.

45. That gives rise to two questions within this Ground. The first is a procedural question - should the judge have embarked on a consideration of the merits at all, or should he have treated the matter before him as being merely an application for directions without considering the merits on a summary judgment application. Putting it another way, should the hearing have been treated as so obviously a directions only hearing that the only fair decision was to treat it as such and not embark on a summary determination at all. The second, which is again within this Ground, is whether the material justified summary judgment at all. I will deal with the procedural point here. The more substantive point is more appropriately dealt with when considering the other Grounds of Appeal so far as appropriate.

46. So the first question is whether the procedure was unfair because Mr Fisher was legitimately expecting the hearing to be for directions only and no more. I do not consider that this is a justifiable challenge. Mr Fisher, and his team, may have considered that that would be the proper course, but it does not follow that it was the only course, and they had not been led to expect that that would happen by anybody. The premise of Mr Dinwoodie's application was that it was clear on the materials at the time that Mr Fisher was liable to pay the sums in question. It was not an application for directions which somehow morphed into a summary judgment. It is clear that Mr Dinwoodie took the view that there should be a substantive hearing, and Mr Alford's own skeleton argument for Mr Fisher contained arguments going to a substantive determination of the main points. No doubt he was wise to do that. But it cannot be said that that he had some sort of legitimate expectation or the like to the effect that it would be a directions-only hearing. It was a hearing at which it was obviously going to be said that the main issues should be addressed, rightly or wrongly. Accordingly, although the way in which the matter arrived before the judge was less than satisfactory because of the original framing of the issue, it had developed into something which the judge was entitled to consider as an application for judgment and it was not procedurally unfair to do so because that was how the application itself was impliedly framed.

47. That question is different from the second one, which is whether the material under any head was sufficient to justify a claim for summary judgment. I refer to that in the next section of this judgment and in the context of the more specific challenges.

The approach to this case as a summary judgment matter

48. There was no dispute as to the sums which Mr Fisher admitted he received, other than the £30,700 point. There was a dispute as to whether he had disclosed everything, but that was not dealt with. The essence of the application was that Mr Fisher admitted he received the sums found by the judge, and that the previous findings about fiduciary duty and its breach meant that there was an established factual and legal basis for ordering that that sum be paid, and that was clear for summary judgment purposes. If that is to be challenged then it must be on the footing that there were other relevant disputed facts, or perhaps important background facts which needed investigation, and/or that in any event the issues involved were too complex for determination without a fuller trial.

49. Looking at Mr Butler's submissions, the relevant facts were said to be the way in which the joint venture was said to work, various loans which Mr Fisher said he made to the companies and the work undertaken by Mr Fisher for the companies. He complains that the judgment below hardly refers to the third witness statement of Mr Fisher where much of that material is said to appear. It is true that little explicit mention is made of that witness statement, but the important point is not whether it is actually referred to but whether it contains material which makes a trial appropriate and summary judgment on any relevant points inappropriate.

50. Insofar as the application falls to be treated as an application for summary judgment then the proper approach, as usual, is to treat factual assertions made by the defendant going to the defence as true for the purposes of the application unless they can be rejected as being plainly untrue on the basis of sound evidence (or a sufficient degree of implausibility) which contradicts them. That is not an easy hurdle for a claimant to surmount. One therefore has to treat Mr Fisher's evidence in that way and consider whether there are any factual matters which have to be treated as true and which might go to a defence, or which raise questions of fact which need further elaboration at a trial. I approach the rest of this judgment, where relevant, on that footing.

51. I also bear in mind the way in which the original account was phrased - it was an account of sums received only - and the way in which the issues were made to emerge, as referred to above. It must be borne in mind that Mr Fisher was not obliged, at least originally, to raise matters which would go to the substantive challenges, and when he ultimately did so he did so in reply evidence rather than his "first time round" evidence, and that was capable of affecting what might be expected of him in his evidence.

52. It is also necessary to consider whether any resulting issues of law and their application to the facts which arise are issues which are better dealt with at a trial on the basis of a fuller consideration than takes place on a summary judgment application. It is now well established that questions of law can be decided on an application for summary

judgment if nothing would be gained from having the benefit of a full trial - see the oft-cited judgment of Lewison J in *Easyair Ltd v Opal Telecom* [2009] EWHC 339 (Ch) at para 15. The judge below obviously considered that the application to the law to the facts was sufficiently clear as not to require a trial.

53. This approach has to be applied to various points arising in the appeal, and I shall apply it when considering the other grounds because it is convenient to consider it in particular contexts. However, the most obvious factual point in relation to which it arises is in relation to the £30,700, and I shall consider that first and separately.

The £30,700 point

54. This point arose as follows. In paragraph 18 of his account of income Mr Fisher records that he received £29,990 from a company known as Studio 63. However, that would appear to be inconsistent with a higher figure later in the same account based on VAT returns in paragraph 28 where sums "summarised by receipt" are recorded and which show £60,690 as having been received. The notes to that paragraph say "Only fees and gross expenses returned for VAT purposes are treated as gross income". The difference between the two figures is the £30,700 figure referred to above.

55. That discrepancy was commented on by Mr Dinwoodie's solicitor in his fifth witness statement and Mr Fisher sought to deal with it in his fourth, filed the day before the hearing before the judge. He explained that his VAT returns were prepared on an accruals basis (which is plausible) and that that is why paragraph 28 showed a higher figure. That was consistent with a further sum shown in paragraph 18 which was a figure for £38,000 shown as unpaid fees (though that particular number does not quite match up).

56. The judge held that he would not go behind the VAT return figure because paragraph 28 referred to receipts, and that on the evidence it was established that Mr Fisher had received the larger sum, meaning that he had under-declared the amounts received from Studio 63 by £30,700 and that sum fell to be paid with the other sums found to have been received. He accepted that he should give the benefit of any doubt to Mr Fisher, but in his judgment the position was clear (paragraph 40).

57. This is a determinatoin which in my view cannot be sustained. It is true that Mr Fisher's account document demonstrated an inconsistency, but that was explained in a way

which was not implausible and in the light of the plausible explanation there was no justification on the material that the judge had for preferring one figure rather than the other. The explanation of Mr Fisher was not the sort of explanation which could be rejected on a summary judgment application. This was not a point which could be determined without testing at a trial. To that extent at least, and assuming it to be a point going to Ground 1, the appeal should be allowed.

Ground 2 - profits

58. Ground 2 of the Grounds of Appeal is as follows:

> "**The Court was wrong to treat the sums to which reference was made in F's "Account" dated 22 June 2022 as profits for the purposes of an account of profits. Further or alternatively (and with regard to the differing categories of receipt) (i) fees that F had legitimately earned were not profits; (ii) payments of interest on loans he had made to the companies were not profits; (iii) reimbursement of legitimate business expenses were not profits**."

59. At the heart of this point is the question of what are the "profits" for which a fiduciary should account. In its application to this case it needs to be applied to the three elements identified in the Ground - fees, interest and reimbursement of expenses. The main claim is for fees, with (according to Mr Butler) £4,970 in respect of expenses and £24,702 in respect of interest on loans. The judge below did not break down the figures in that way but he did refer to sums for expenses and interest which I have found it difficult to reconcile with Mr Butler's present breakdown. However, what he did do was observe what he described as an absence of evidence about expenses and any loan agreements. Although he does not expressly say so, I think it is to be inferred that he considered the absence of evidence that sums bore that character was a reason to treat them as being accountable profits - at paragraph 22 he referred to the fact that the burden of showing that profits were not sums for which the fiduciary should account rests on the fiduciary.

60. Mr Butler's central point was that properly earned fees were not profits for these purposes; nor were expenses reimbursement and interest. He submitted that this was not the more typical case of using a fiduciary position to gain an advantage which the fiduciary should never have had, such as acquiring shares (one of his examples - apt on the facts of the present case), property or a business advantage. The nature of the payments is said to demonstrate that. So far as fees are concerned, they should not be treated as profits if they are legitimately earned and not excessive (which Mr Butler

said Mr Fisher's fees drawings were). There is a parallel with leaving out of account legitimate expenses, which are not treated as a profit - *Global Energy Horizons v Gray* [2021] 1 WLR 2264. The reimbursement of expenses cannot be regarded as profits at all; nor can the payment of interest on loans, which has a different source and does not amount to a profit.

61. Mr Sibbel took the point in his skeleton argument that Mr Butler's point was a new point on this appeal. It probably is but Mr Sibbel met it head on and did not really press that I should not deal with it (sensibly, in my view). I shall therefore do so.

62. The answer to this point lies in considering with care what an account of profits is intended to do in this area of the law.

63. The nature the action for an account of profits against a fiduciary has recently been the subject of the decision in the Supreme Court in *Recovery Partners GP Ltd v Rukhadze* [2025] 2 WLR 529, a decision which was not available to the judge below in this case though the appeal was pending at that time. In that case Lord Briggs, delivering the majority judgment identified the purpose of the principle requiring accounting as follows:

> "16. The essential purpose of the rule that a fiduciary must not without his principal's consent keep for himself a profit from his position as such, and the related rule that a fiduciary must avoid placing himself in a position where his interest and his duty may conflict (usually called the conflict rule), is to protect or deter those who have undertaken an obligation of single-minded loyalty to someone else from being tempted by human frailty to fall short of that obligation."

64. Neither that case, nor any other case, seems to provide a definition of "profits" for these purposes but that is because the issue does not seem to have arisen. The answer is usually obvious - it is some form of net benefit from the wrongdoing in question. I use the word "net" because that is built into the concept of profits and because such alternative expressions as there are have the element of "net" built in.

65. A limited amount of light is shone on the point by *FHR European Ventures LLP v Makarious* [2015] AC 250 (the only authority I was shown on this point) where at paragraph 6 Lord Neuberger said:

> "36. Another well established principle, which applies where an agent receives a benefit in breach of his fiduciary duty, is that the agent is obliged to account to the principal for such a benefit, and to pay, in effect, a sum equal to the profit by way of equitable compensation … However, if equity considers that in all cases where an agent acquires a benefit in breach of his fiduciary duty to his principal, he must account for that benefit to his principal, it could be said to be somewhat inconsistent for equity also to hold that only in some such cases could the principal claim the benefit as his own property "

66. So profit means benefit. The use of the apparent synonym "benefit" has built into it proper deductions such as proper expenses before one determines the profit. Otherwise one cannot identify the "benefit" properly. In *Recovery* itself the trial judge allowed the defendant disbursements in calculating the profits, as one would expect (see paragraph 13 of the judgment of Lord Briggs). The inquiry is therefore as to the net benefit flowing from the breach of fiduciary duty (I use the expression "flowing from" in a neutral way so as not to pre-judge questions arising out of the decision in *Recovery* about what I will call, a little hesitantly, causation).

67. In most cases the apparent profits (benefit) is likely to be uncontroversial, but in this case Mr Butler submitted that Mr Fisher's payments for work he did should not be treated as profits (benefit) in relation to breach of duty because the payments were not gratuitous and because they were not moneys "which ought to have been made for the beneficiary" (per Arden LJ in *Murad v Al Suraj* [2005] EWCA Civ 959 at para 85). He stressed the need to attribute alleged profits to their proper source in order to determine whether or not sums should truly be treated as profits (see the discussion in the Australian case of *Grimaldi v Chamelion Mining (No 2)* [2012] FCAFC 6). In this case the alleged profits fell to be attributed to the "sweat" of Mr Fisher and should not be treated as a profit as a result. He submitted that the judge below failed to address this point at all in his judgment despite being urged to scrutinise whether the payments properly related to the assets of the joint venture and the breaches of duty found (see the skeleton below at paragraph 48).

68. It is true that the judgment below did not address this particular point in all its refinements, but that is probably because it is not apparent that it was raised in that way. At paragraph 19 the judge noted that "profit" means "benefit" (citing *Mankarious*). In paragraph 25 he identified the first of the main issues:

> "First, to what extent are the moneys the Defendant admits to paying himself properly to be analysed as the profits of the breach of his fiduciary duties?"

To which he provided the answer:

> "26. As to the first question, the Claimant's position is that all of the payments made by the Defendant to himself are profits deriving from the breach of fiduciary duty, because (as was reflected in the form of the revised injunction, and as explained and confirmed in Sir Anthony Mann's judgment on appeal) the Defendant was and remained under a duty not to make an unauthorised profit from the joint venture companies or assets originating from them which he has misappropriated; and because the Defendant has only been able to pay those moneys to himself by seizing sole control of the companies, denying the Claimant's interests in them, and wrongfully excluding the Claimant (see the findings of fact in my liability judgment). These two points or either of them clearly provide the link between the breach of duty and the profit."

69. Then in paragraph 43 he held that all the payments identified, including sums claimed as fees, were sums payable as being linked to the breaches of duty.

70. In order to do so it is necessary to consider the scope and nature of the fiduciary duty and its breach, and the receipts' connection with that breach, the latter of which points is actually the subject of Ground 3.

71. The duty or duties in question were referred to in the previous judgments in this case. In his judgment of December 2021 the judge considered whether the evidence showed a fiduciary relationship and held that it did. It arose out of circumstances in which Mr Fisher was to set up a company or companies in place of a partnership arrangement which had hitherto existed between them (on the judge's findings). Then in paragraph 101 he said:

> "101. Having made that finding, I have no hesitation in also concluding that Mr Fisher's retention of legal title to the shares

> in the consultancy companies and the original DA companies was contrary to the parties' agreement and a breach of the fiduciary duty owed by him to Mr Dinwoodie not to act otherwise than in good faith and with loyalty in relation to the shareholding of the company.
>
> 102. Mr Fisher ought to have transferred half the shares to Mr Dinwoodie. He did not. He then wrongly denied the existence of any agreement to that effect when the two men fell out in late 2017, and not only did he fail to act in accordance with that agreement, he took the post-November 2017 steps to dilute the value of the equitable interest which, in my judgment, Mr Dinwoodie had in those shares."

That finding was reflected by me in my judgment on the appeal:

> "The judge's finding was as justifiable in relation to the DA companies shares as in relation to the BEM companies' shares. In relation to both sets of shares Mr Fisher was in breach of duty in failing to give Mr Dinwoodie his entitlement."

That reflects what the breach of duty was. He was entrusted with allocating the shareholding and he deliberately failed to do it.

72. The first consequence of that was that Mr Dinwoodie was shut out of the company in legal terms and then in practical terms. The second was that Mr Fisher was left in control, and he could do what he liked. What he did was to pay himself significant sums of money, mainly in respect of what he said were fees. In this context it needs to be remembered that the account so far deals only with fees received. His evidence makes it clear that over time he had (on his case) become entitled to more fees which he never actually drew. He also procured transfers of the business to new companies, from some of which he again claimed fees.

73. The effect of the judgment below is that those fees were treated as profits for which Mr Fisher had to account. Mr Butler challenges that finding. His main reason was because Mr Fisher worked for them - since he worked for them they cannot be profits. I do not agree with that reasoning. They were a benefit to Mr Fisher which he only managed to get because he wrongfully assumed control of the companies. While the court will

allow proper expenses to be taken into account in determining the amount of a profit (because the concept of profits involves the deduction of proper expenses) there is no necessary conceptual reason for treating the labour of the recipient as an expense for these purposes. The fiduciary duty bar on the making of a profit is to prevent a fiduciary from taking improper advantage of his/her position and its strictness is in part justified on the footing of its having a deterrent effect. This deterrent effect or purpose is reflected in various authorities and was referred to by Lord Briggs in paragraph 16 of *Recovery*:

> "The essential purpose of the rule that a fiduciary must not without his principal's consent keep for himself a profit from his position as such, and the related rule that a fiduciary must avoid placing himself in a position where his interest and his duty may conflict (usually called the conflict rule), is to protect or deter those who have undertaken an obligation of single-minded loyalty to someone else from being tempted by human frailty to fall short of that obligation." (my emphasis).

74. It looks to the benefits received, and while it allows proper deductions it does not embark, at this point of the account, on an assessment of whether the recipient has somehow earned them. That is not to say that work done is left out account. It can be taken into account in a different way in allowing a just allowance for work done - a point which arises later in this appeal. But that is the stage at which the inquiry arises; it does not arise at the stage of assessing profits. At that stage one is looking to benefits, and the taking of money for fees is capable of qualifying even if it might be said that they were, at least to some extent, "earned". The breach of duty provided an opportunity to take them, and that is sufficient for these purposes. Mr Butler's skeleton argument referred to the alternative possibility that the matter might be taken into account at the later stage (equitable allowance), and he was right about that. The consequence of that is that an appropriately heavier burden is placed on the fiduciary in terms of justification (see below) than might be the case if one brought in the "work done" at the stage of assessing what the profits should be taken to be.

75. Although the point has not been expressly considered in the authorities, there are pointers which indicate that this is the correct approach. In *Industrial Developments v Cooley* [1972] 1 WLR 443 a director left his office so that he could gain a contract for which he had been negotiating as a director. He was then engaged under that contract and earned fees and remuneration. A claim was made against him for an account of all fees and remuneration that he earned, and because he was in breach of his fiduciary duties that was apparently the account ordered. The possibility that his fees and remuneration were on analysis not profits, because he worked for them, does not seem to have occurred to anyone in the case, and the account seems to have been ordered on the footing that they were sums for which he should have accounted notwithstanding

that he did in fact (presumably) work for them. That case seems to me to confirm that Mr Butler's point in relation to the fees is wrong.

76. Similarly, it would seem that fees were treated as something for which a wrongdoer should account in *Gray v Global Energy Horizons Corporation* [2020] EWCA Civ 1668. Their being fees for which some work was presumably done did not per se seem to exclude them from the account (subject, presumably, to the just allowance point).

77. Mr Butler sought to draw a distinction between fees taken in respect of the pre-breakdown period (said to be £80,000) and fees taken in respect of the later period. Both sets of fees were taken post-breakdown but in respect of the former, he said, that was purely a matter of timing. They should not be treated as profits in the account.

78. This point fails too. They were paid, without agreement, at a time when Mr Fisher was running the companies as he saw fit, to the exclusion of Mr Dinwoodie. It should be noted that the judge found that the breakdown of the relationship between the two men was in part attributable to a "rumbling disagreement" as to what fees should be charged. Mr Fisher's paying himself at a time when he had assumed control of the business means that it is appropriate to treat what he took as a profit. This is what the judge found (paragraph 30) and I agree. Again the appropriate way of dealing with a potentially unfair application of the doctrine to those payments would be mitigated by the just allowance discretion.

79. Accordingly Mr Butler's attempts to exclude the fees from the account at this stage of the reasoning fail. If work done for them falls to be taken into account at all it must be via the just allowance route. I should say that this assumes for the moment that they had a sufficient nexus with the breach of duty, a point which is the subject of Ground 3.

80. There remains the question of whether this conclusion was one that should have been reached on a summary judgment basis, or whether there is something that requires a trial. In my view there is nothing at this stage of the reasoning which requires a trial. The equitable allowance point is a different matter and is dealt with below under that heading.

81. Next is the question of interest. The judge records that £16,180 was recorded as "Gross Interest/Expenses" for one comapany (DAL) and £12,563 "Gross Interest" for another (BP Tailoring). In respect of the former he recorded that there was no disclosure of any loan agreement nor any evidence about interest rates, and he observed that, while it was

unclear, the "loans" in respect of which it was said to be payable might be accrued but unpaid fees. He recorded that there was no evidence from Mr Fisher in relation to the "Gross Interest" figure.

82. Having recorded those matters the judge did not return to them before reaching his short conclusion that all sums received ought to be paid. Presumably he reached that conclusion in respect of the interest because of what he apparently viewed as being a shortcoming in the evidence in the account. In paragraph 22 he had identified the principle that it was for the defaulting fiduciary to show that the profit is not one for which he should account. It is to be assumed that he found that, in respect of interest, that burden had not been fulfilled. In paragraph 49, in the context of considering a just allowance, he considered some of the evidence about the Studio 63 (alleged) loan and observed that on the material supplied by Mr Fisher it was impossible to ascertain what was going on.

83. Mr Butler submitted that interest on loans should not be treated as part of the profits for the purposes of the account any more than would the repayment of principal. The companies satisfied a contractual liability. It would be odd if the companies having done so, they should have to do so again if Mr Fisher had to pay the interest to Mr Dinwoodie.

84. I am afraid I do not understand this latter point. If it turned out that the interest was a profit for which he had to account (pay), then the companies would not be under any obligation to pay Mr Fisher again (assuming a liability to pay in the first place). They had satisfied their liability and it is nothing to do with them that Mr Fisher had to pay the moneys to Mr Dinwoodie.

85. Otherwise Mr Butler's case seemed to be that interest was not capable of being a profit for these purposes. So far as he was advancing that case I would reject it. It seems to me that it is capable of being a profit (benefit) if the loan was made during the period of the breach of duty. It is a benefit. The way of dealing with it would be to consider it as part of the just allowance inquiry. If there was a loan on fair terms at a fair rate of interest, the court might allow the interest as an allowance. Otherwise it is perfectly legitimate to regard it as a benefit from the breach for which there should be an account.

86. However, it is not apparent that the argument gets that far in this case. The judge's findings seem to be that he was not satisfied that there was evidence that it was payment of interest at all. If the judge was not satisfied that Mr Fisher's explanation was correct then the payments do not bear the character of interest, and since there was no other

justification then Mr Fisher would have to account for them. That seems to have been the conclusion of the judge.

87. So the question takes one back to Ground 1 and whether such determinations should have been made at that stage. The state of the evidence was as follows. Mr Fisher's account described the sums in general terms whilst providing no details of the principal sum involved and how it arose. His obligation was to identify payments received, together which supporting documents which "detailed" those receipts. The level of detail of supporting documents required is not immediately apparent from his claim to interest, but whatever it is he should have provided some. The notice of objections (paragraph 12(3)) took the point that interest on "director's loans" were accountable sums where the interest was on unpaid fees (it seemed impliedly not to challenge interest on loans where Mr Fisher provided the principal, so far as there were any). Mr Fisher's third witness statement, intended to meet the notice of objections, does little or nothing to meet that point. There is no reference to interest, and two references to loans (in paragraphs 137 and 146) are to moneys outstanding from two entities (the LLP and Studio 63) which are not the two identified by the judge.

88. The essential finding of the judge was that moneys in respect of the "interest" were received, but the evidence was inadequate to justify its receipt on that basis, whatever the alleged principal might be said to have been. In my view that was a conclusion he was entitled to reach on the evidence and to decide it on the summary basis on which he did. Mr Fisher did not provide enough material to justify the point going off to a trial. This Ground of Appeal in relation to the alleged interest fails.

89. The third element challenged under this head is the reimbursement of expenses. This is a pure evidential point as it stands. A genuine reimbursement of expenses would not be part of the profits for which a fiduciary is obliged to account, and I did not understand Mr Sibbel to contend otherwise. The judge determined, in short order, that "There has been no evidence given by the Defendant in respect of the expenses." (paragraph 33).

90. Part of the expenses are within the "Gross Interest/Expenses" received in respect of DAL. No explanation of the expenses was given by Mr Fisher, and in respect of some expenses he said he could not now recollect what they were in respect of (that of itself is not implausible given the lapse of time). Mr Butler did not seek to point up any particular evidence which the judge had overlooked. The judge was entitled to take the view that he did in the procedural situation in which the case found itself, and this element of the appeal fails.

Ground 3 - nexus

91. At this point it is necessary to consider the link between the duty, the breach and what are said to be the profits. Ground 3 of the Grounds of Appeal claims:

> "The Court was wrong to conclude that there was a reasonable relationship between the breach of fiduciary duty and the profits in respect of which payment was ordered."

The test which the judge set himself is in his paragraph 20:

> "20. Thirdly, the profits sought to be paid over must bear a reasonable relationship to the breach of duty proved, which need not be a direct causal link; it will usually be sufficient if the profit arose within the scope of the defaulting fiduciary's conduct in breach of duty: *Ultra.frame (UK) Ltd v Fielding (No 2)* [2006] FSR 17, *Gray v Global Energy Horizons Corporation* [2020] EWCA Civ 1668, *Murad v Al Sara*j [2005] EWCA Civ 959."

92. The finding of the judge is contained in one sentence (in paragraph 43):

> "In my judgment, these sums are directly linked to the breaches of fiduciary duty."

The reference to "these sums" is a reference to all the sums in respect of which he gave judgment.

93. The question of the required degree of connection between benefits received (profits) and the breach of duty was recently revisited in *Recovery*, where it was the main point in issue in the Supreme Court. The proper test (as both parties in the present case accept) is set out in paragraph 6 of the majority judgment delivered by Lord Briggs:

> "36. … The question is not, would the profit have been made even if there had been no antecedent breach of fiduciary duty, but did the profit owe its existence to a significant extent to the application by the fiduciary of property, information or some other advantage which he enjoyed as a result of his fiduciary position, or from some activity undertaken while he remained a fiduciary which the conflict duty required him to avoid altogether. For that purpose the court looks closely at the facts, i.e what actually did happen, but does not concern itself with what might have happened in a hypothetical "but for" situation which did not in fact occur."

Although this formulation was not available to the judge below, Mr Butler accepted that it does not make much difference to this appeal. From that I infer that he is not suggesting that the judge applied a materially different test.

94. Mr Butler's submission was that the relevant relationship between the profits claimed and the breach of fiduciary relationship found and relied on did not exist. The breach of fiduciary duty was a failure to deal with the shareholdings properly and that does not have the relevant relationship with the profits claimed. Had the sums been drawn as dividends then that would be an example of a sufficiently related profit; but the things which the judge held to be profits were not sufficiently closely related. He also posed the rhetorical questions - what should happen now that Mr Dinwoodie has his shareholding (or his entitlement has been established), and what is the position between Mr Fisher and the companies. As to the first, are the fees now rendered legitimate or is Mr Dinwoodie still entitled to the profits? As to the second, if the fees are rendered improper does Mr Fisher have to pay them back to the company as well? Furthermore, if Mr Dinwoodie receives the profits and the shares he benefits twice over, because Mr Fisher's work has enhanced (or even created) value in the shares.

95. There was a certain amount of debate as to whether or not the fiduciary duty extended beyond that expressly found, being a fiduciary duty in respect of the formal arrangements (including proper allotment) of the share in the joint venture companies, but I do not consider it necessary to engage in that debate. I agree with Mr Sibbel's submissions to the effect that the failure to deal properly with the shares meant that Mr Fisher was able to assume and exercise control over the activities of the companies (including the second set of companies to which the business was transferred) to the exclusion of Mr Dinwoodie and he was thereby able to draw the sums that he withdrew. The profits were attributable "to a significant extent" to the application of the advantages that Mr Fisher arrogated to himself. That is a short answer to the point. It is an evaluative assessment and the judge's conclusion was one which he was entitled to reach, and indeed in my view is the obvious answer as well.

96. The rhetorical questions posed by Mr Butler do not gainsay this conclusion. The shareholding (or entitlement) does not alter the causation aspect at all. Mr Fisher was enabled to take his benefits by failing to give Mr Dinwoodie his shareholding entitlement. That, as a matter of fiduciary duty causation, remains a legal and factual conclusion. Insofar as it gives Mr Dinwoodie the penny and the bun, then that is because Mr Fisher should never have had the bun in the first place and the deterrent function of the account of profits justifies making him disgorge it (as does the no profit rule associated with fiduciary duties). The point about the companies and impropriety does not work either. It does not follow from the fact of a breach of fiduciary duty vis-à-vis Mr Dinwoodie that the drawing of fees was improper vis-a-vis the paying company. Those fees may or may not be improper vis-à-vis the company. If he was rendering valuable services then they may not. But in any event, once again the deterrent aspect of the application of the restraints on those who owe fiduciary duties means that Mr Dinwoodie is still entitled to recover. The same applies to the "same twice over" point.

97. I therefore conclude that the judge below was entitled to find a sufficient nexus between the fiduciary duty, the breach and the sums involved and this Ground fails.

Ground 4 - Equitable allowance

98. The judge below considered a submission that Mr Fisher should be allowed an equitable allowance in respect of the work done by him and rejected it. Ground 4 of the Grounds of Appeal says:

> "4. The Court's exercise of its discretion in relation to the question of an allowance was flawed, in that (a) the Court appears to have applied too rigorous a test; (b) placed an inappropriate degree of weight on (i) what he had held to be F's dishonest conduct and (ii) a perceived lack of detail in F's evidence; and (c) excluded from consideration several relevant factors, as identified in the skeleton argument."

99. The judge below considered that the law on equitable allowance was relevantly set out in *Recovery* in the Court of Appeal ([2023] Bus LR 646) in paragraphs 111-123 which he identified but did not set out. It is right to observe that the question of an equitable allowance was not the subject of the appeal to the Supreme Court. He went on to reject

the claim for an equitable allowance on the basis that it required exceptional circumstances which were not present, Mr Fisher's continued use of the companies despite the first judgment and an injunction, and his dishonesty pointed against the allowance (as a matter of discretion), there was no evidential basis, and no detail was given of the work done. He then went on to give examples of what he said were inadequate details of loans and said he would be careful in attributing weight to Mr Fisher's evidence when it came to an allowance, and he determined he would not exercise his discretion in favour of Mr Fisher.

100. Those are the findings which Mr Butler criticises.

101. Both sides accepted that the paragraphs cited from *Recovery* in the Court of Appeal contained an appropriate summary of the law. I will not set them out in extenso but can safely reproduce the following principles from Paragraphs 112 and 116:

(a) The court undoubtedly has a discretion to allow a defaulting fiduciary a reasonable allowance in respect of his/her efforts in creating the profit, in addition to the expense incurred in doing so (paragraph 112).

(b) While unjust enrichment has at best only a limited role in relation to the strict rule, the equitable allowance is capable of, and is an appropriate mechanism for, mitigating the harshness of the basic rule.

(c) To allow such an allowance is exceptional, but care must be taken with that potentially extreme word. A proper reading of all the relevant paragraphs reveals that is not exceptional in the "once in a blue moon" sense:

"… an equitable allowance will not be the usual order or one which the defaulting fiduciary can expect as of right. It is in this sense that the exercise of the jurisdiction is exceptional." (paragraph 116)

That suggests a lesser degree of exceptionality than a highly stringent or highly strict test. Nonetheless the court will doubtless be very careful in exercising the jurisdiction bearing in mind the partially deterrent purpose of the account of profits.

(d) "… the ultimate test, which was that applied by Wilberforce J in *Phipps v Boardman*, is whether it would be inequitable for the beneficiaries to step in and take the benefit of the profits made by the fiduciary without paying for the skill, labour and risk which has produced it." (paragraph 116)

(e) " ..it will not be inequitable for beneficiaries to take the profits without

making an allowance for remuneration if and to the extent that such an allowance would be seen as encouraging fiduciaries to breach their fiduciary duties." (paragraph 116)

(f) Culpability is not a complete bar, and an allowance can still be made where there is "a degree of culpability" (paragraph 122)

102. Mr Butler's first submission was that the judge applied too stringent a test by over-emphasising the requirement of exceptionality. I consider there is something in this point. The flavour of the judgment, especially in the light of its brevity, suggests that the judge may not have had fully in mind what exceptionality involves despite his reference to the relevant paragraphs of *Recovery*.

103. His second complaint is that the judge placed too high an emphasis on Mr Fisher's dishonesty. His dishonesty is plainly a factor which he was entitled to take into account, and I will return to this point when I have considered the other points.

104. The finding of a lack of detail in the evidence is perhaps justified as a pure matter of fact, because there is not much real detail, though the judge's examples do not seem to me to go to the point because they refer to loans and not remuneration. However, there was a significant amount of evidence about what Mr Fisher did in his third witness statement, though it was not particularised. In paragraph 70 he described himself as working for 4-5 days a week for the various companies, describing various areas of activity (none of which are surprising) and that he took on extra book-keeping and payroll activities after the lady conducting those activities left. He asserts that this conferred considerable benefit on the companies over time (paragraph 74). At paragraph 159 he asserts that the fees he received (and fees which he said he was entitled to but which he did not draw down) were for his own hard work, and in paragraphs 69 and 162 he asserts that his working for the companies and being paid for his work was always something that he and Mr Dinwoodie had envisaged before their break-up. In paragraph 143 he gives limited details about his rate of charging for Studio 63T LLP (detail which is not present for the other companies for whom he claims to have charged fees). The rest of the witness statement is mainly devoted to explaining why various companies collapsed and how none of them have returned a profit, had a positive balance sheet or declared a dividend.

105. The first question to be addressed requires a return to Ground 1 and the level of detail that Mr Fisher would be expected to provide. This was, I remind myself, the equivalent of a summary judgment application. One treats the evidence of the respondent on such an application as being true unless sufficiently clear falsity is demonstrated. In those

circumstances one should treat as true (on this issue) what Mr Fisher says about his work and what he and Mr Dinwoodie envisaged.

106. It is not clear that the judge below approached this point with that particular in mind. In paragraph 48 he twice made the point that Mr Fisher had not provided sufficient detail. There are two ways in which that can be taken. The first is a credibility point - the absence of detail is evidence which gainsays the truth of the generalised assertion. The second is an evidential point - the witness has not given enough detail to overcome some necessary hurdle.

107. It is not wholly clear which of those approaches the judge below was adopting. It is possibly both. If it was the former it was not, in my view, a finding which the judge was entitled to make in the circumstances. The generalised assertion about the amount of work done was plausible and could not necessarily be dismissed as untrue because of a lack of detail. If it was the latter then it can certainly be said that if the third witness statement was intended to be Mr Fisher's full case on an equitable allowance then it would probably not be enough to justify one. While it would be too much to expect detail such as time sheets (on which I agree with Mr Butler) one would expect more detail about how he calculated and charged the fees to which he said he was entitled at the time, and more particulars of his activities and perhaps how the fees compared to the trading profits of the companies. One could probably think of other relevant factors, but those will do for the moment. Part of that context would be the fees he charged other companies and which he claimed he was entitled to but did not take. A bigger and more detailed picture would be expected, in the absence of which the claim for an equitable allowance would fail.

108. Therefore on this point one has to return to the Ground 1 point. Was it right to expect Mr Fisher to make his whole case at that stage of the proceedings bearing in mind the procedural history which appears above. In relation to this claim and this point I do not think that should have been expected of Mr Fisher. In a more conventionally framed account of profits the point would have been taken by him earlier and, bearing in mind it is a potentially difficult point requiring focused evidence, directions would have been given to establish the evidential basis of the claim (and the opposition to it). I do not think it right to expect Mr Fisher to make his case in his third witness statement bearing in mind he was not required to make it at the outset, and while he was responding to the notice of objections his witness statement reserved the right to file further evidence "should the court give further directions in relation to the resolution of issues in the account" (paragraph 2). Of course, he is not entitled to reserve such a right, but that paragraph does indicate that there would be more evidence to come when "issues" are teased out, and it would be unfair on Mr Fisher to hold it against him that he did not file more detail on the equitable allowance point. A respondent to a summary judgment application does not necessarily have to file his/her full evidential case in response to that application.

109. Accordingly a lack of detail would not be a reason for dismissing the equitable allowance claim. If that were the only or main reason for dismissing it then the appeal would succeed on this point. However, the judge had another principal reason for dismissing it, namely the use of the companies in the face of the original judgment and the injunction against a background of dishonesty. *Recovery* in the Court of Appeal emphasises that culpability is relevant, though not a complete bar. In this case it would probably be a strong factor against an allowance, but, again bearing in mind the summary nature of these proceedings and the way the point was developed (or not developed) I do not consider it should have been treated (if it was) as being an obvious standalone bar. The reference to the use of the companies after the injunction and judgment may be an over-statement of the undesirability of what happened, but it is unnecessary to go into the detail of that.

110. Accordingly, I do not consider that a finding against an equitable allowance should have been made when it was in these proceedings. The issue required more development evidentially and I think that Mr Fisher was entitled to have that happen. I acknowledge that, on the facts as they appear to me, Mr Fisher may well have a very difficult case to advance on this point for a variety of reasons, and I will mention one. One of the points made by Mr Butler was that the moneys which Mr Fisher received were but small recompense for the amount of work that he put in over the whole period and does not amount to "plundering" the companies. That does not seem to me to be a particularly robust point in the way it was put. The moneys received were, on Mr Fisher's own evidence, but a proportion of the fees that he claimed across all companies, much of them being undrawn and left in the companies (on his evidence). The scale of that is not apparent, but it is a significant matter when considering the "plundering" point and may tell against Mr Fisher at the end of the day. However, I do not think it was right to deprive Mr Fisher summarily of the right to advance a more detailed case.

111. In relation to this Ground, therefore, the appeal succeeds and the matter should be remitted to the County Court for a determination of the point.

Conclusion

112. It follows that I allow the appeal in relation to the £30,700 payment point, and in relation to the ruling against the equitable allowance (Ground 4). Otherwise I dismiss the appeal. The order that needs to be made to reflect that determination will have to be the subject of consideration after the hand-down of this judgment.