Neutral Citation Number: [2021] EWCA Civ 143

Case No: A4/2020/0974

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS AT BRISTOL
CIRCUIT COMMERCIAL COURT
HHJ Russen QC (Sitting as a Judge of the High Court)
[2020] EWHC 290 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/02/2021

Before:

LORD JUSTICE HENDERSON
LORD JUSTICE MALES
and
LORD JUSTICE STUART SMITH

- -

Between:

FAIRFORD WATER SKI CLUB LIMITED	**Respondent**
- and -	
1) CRAIG RONALD COHOON	**Appellants**
2) CRAIG COHOON WATERSPORTS (A FIRM)	

- -
- -

Hugh Sims QC & Katie Gibb (instructed by **Harrison Clark Rickerbys Ltd**) for the **Appellants**
Siward Atkins QC (instructed by **Wilmot & Co**) for the **Respondent**

Hearing dates: 2nd & 3rd February 2021

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand down is deemed to be 10.30am on Tuesday 9th February 2021.

Lord Justice Males:

1. This appeal is concerned with whether a company director failed sufficiently to disclose his interest in a management agreement entered into in 2007 between the company and a firm of which the director was a partner and, if so, the appropriate consequences. HHJ Russen QC, sitting in the Business and Property Court at Bristol, held that the director failed to declare the nature of his interest in the agreement as required by section 317 of the Companies Act 1985, with the consequence that the company was entitled to recover management fees paid during the six years prior to the issue of proceedings. The director, Mr Craig Cohoon, appeals, contending (among other things) that sufficient disclosure was made and that, even if it was not, in circumstances where all concerned were aware of his interest in the firm and he acted honestly and reasonably throughout, the judge ought to have exercised his discretion under section 1157 of the Companies Act 2006 to relieve him of liability. The company resists the appeal and cross appeals, contending that its claim was to recover trust property, with the consequence that no limitation period applied pursuant to section 21 of the Limitation Act 1980 and that it is therefore entitled to recover the fees paid during the whole 10 year period in which the management agreement was in force.

The facts

2. The Respondent private company, Fairford Water Ski Club Ltd ("the Club"), is the freehold owner of a lake and surrounding land near Fairford in Gloucestershire. Its business is that of running a members' club centred on water skiing on the lake and related activities on land. Its revenue is derived from membership fees, from renting and selling (on long leases) lodges and static caravans near the lake, and from charging visitors with touring caravans to stay on its land. At the material time in 2007, the First Appellant (Mr Craig Cohoon, referred to in the judgment as "Craig" in order to distinguish him from other members of his family: I shall do likewise) was the chairman and a director of the Club. The other directors were Mr Colin Garner, Mr Ian Hamilton and Mr Derek Thompson.

3. In addition to being a director of the Club, Craig was a partner, with his son Scott (who later also became a director of the Club), in the Second Appellant, Craig Cohoon Watersports ("Watersports"), an unincorporated partnership whose business involved running a water ski school at the lake and operating a shop for the sale of water ski equipment. From around 2007 until January 2017 Watersports operated its business from a building at the lake known as the Old Rangoon Pub. It occupied the building under a lease from the Club which was effective from 10th May 2007, although only formalised in June 2012, for which it paid an annual rent of £20,000.

4. The two businesses were independent of each other but, as the judge observed, they were "somewhat intertwined" reflecting, no doubt, the informal way in which they were run, without rigorous attention to the requirements of company law. The Club's day to day administration was conducted from Watersports' shop premises, with Craig and his son Scott effectively running the Club's business as well as that of Watersports. That remained the position until January 2017, when new directors were appointed and Craig resigned as a director of the Club.

5. On 30th October 2017 the Club commenced this action claiming damages totalling approximately £1.55 million from the Appellants and from Craig's wife Jane and son

Scott for numerous alleged breaches of their duties as directors (or in Jane's case, as an alternate director) of the Club. There were initially some 38 heads of claim, some of which involved a challenge to hundreds of underlying payments. Some of the claims succeeded, while others failed. Some were relatively trivial, while others were more substantial. It is fair to observe that the multiplicity of claims and the crowded trial timetable meant that this was not an easy case to try and that the judge had a formidable task to keep track of all the points which needed to be determined.

6. One of the successful claims, and the only one with which we are now concerned, was for repayment of fees totalling £350,000 paid to Watersports for the management of the site between 2007 and 2017. The Club's primary case was that there was no agreement for these payments to be made and that they were unauthorised payments made by Craig, but the judge rejected that case. He found that a management agreement was entered into between the Club and Watersports in May 2007, albeit never put into writing, whereby the Club would pay to Watersports the annual sum of £35,000 for managing the site. He found also that, notwithstanding a dispute about the quality of service provided by Watersports, Watersports had in fact managed the site and that at all material times the directors of the Club had known that it was doing so and was being paid the annual sum of £35,000 for this.

7. However, the judge accepted the Club's alternative case that it was entitled to recover the management fees (although he limited this recovery to the difference between the management fees and the lease rental and held that the claim in respect of the earlier years was barred by limitation) on the ground that Craig had failed to declare the nature of his interest in the agreement at a board meeting, as required by section 317 of the Companies Act 1985. Whether or not there had been sufficient disclosure is the principal issue in this appeal, but it is important to make clear at the outset that (1) it is common ground that at all times the directors and shareholders of the Club knew of Craig's interest in Watersports, (2) it was not alleged that Craig was in breach of any of his other duties as a director so far as the management agreement was concerned (for example, his duty to act in good faith in the interests of the Club) and (3) Craig acted honestly and reasonably throughout. It is apparent, therefore, that if there was a breach of Craig's duty of disclosure, it was a highly technical breach.

8. The background to the management agreement is that Watersports/Craig had been providing management services to the Club for some years before 2007 and had been paid for doing so, as well as occupying and paying rent for the Old Rangoon Pub. However, at the Club's annual general meeting held on 22nd March 2006, a shareholder questioned the relationship between the Club and Craig, expressing dissatisfaction about it and suggesting that this needed to be investigated.

9. The concern thus expressed was discussed by the directors, with all four of them in attendance, at a board meeting on 29th April 2006. The minutes record the discussion as follows:

> "The Board discussed at some length the issues raised at the recent AGM, concerning the governance of the company, and its relationship with Craig Cohoon Waterski School. It was noted that obtaining any meaningful external valuation was difficult due to the unusual nature of the facilities involved. It was agreed that the most important factor was the net position with regard to

> payments to and from the parties, arising from the relationship, and the Board is satisfied that the current position represents fair value for both parties."

10. The upshot of the meeting was that it was agreed "to reconsider the basis on which club facilities are leased and the provision and cost of management and supervision of club activities". To this end Mr Garner and Mr Hamilton were asked to form a sub-committee of the board.

11. Exactly what was done by this sub-committee is not clear, perhaps not surprisingly after a lapse of 13 years, but it is apparent that Craig made proposals to the other directors in an email dated 23rd December 2006 that the annual rent for the Old Rangoon Pub should be increased to £20,000 and that the management fee should be increased to £26,000 from their current levels. Mr Hamilton responded to the effect that "we need to put things on an arm's length basis", with a market rent for the pub and a market rate for management services.

12. The topic was discussed further at a board meeting on 4th January 2007. Mr Garner and Mr Hamilton (i.e. the members of the sub-committee) were present with Craig. Mr Thompson sent his apologies. The minutes record:

> "The Board meeting was convened to discuss the Company's relationship with Craig Cohoon Waterski School, and the role of site manager played by Craig Cohoon, in particular, the board wish to discuss proposals tabled by CC and presented to the subcommittee set up at the previous meeting, which would significantly alter the arrangements between the parties, with regard to the site rental fee paid by the ski school and the site management fee charged to the club.
>
> In these discussions, due regard was taken of the potential conflict of interest, that arises due to CC's position.
>
> IH and CG [Mr Hamilton and Mr Garner] agreed that the arrangements with the ski school should represent fair market and arm's length terms. It was also agreed that the affairs of the club had become substantially more complex in recent years, and that the current level of management fee was no longer realistic.
>
> It was agreed that CC would obtain two external opinions as to the market value of the retail and residential property currently rented to the ski school.
>
> It was also agreed that a new agreement between the parties should bring together the three elements of the existing arrangements:
>
> - Rental of the buildings
>
> - Rental of the water

- Provision of site management services

into a single agreement. …"

13. As the minutes state, the meeting was called for the specific purpose of discussing the relationship between the Club and Watersports and all concerned were alive to "the potential conflict of interest". The judge found that the proposals tabled by Craig were those contained in his email dated 23rd December 2006.

14. In the event no independent valuation of the Old Rangoon Pub was ever obtained. As I shall explain, this was a point to which the judge was to attach considerable significance. However, it was not a point on which the Club had relied in its pleadings and accordingly Craig and those advising him had not focused on it in preparing for the trial.

15. The next annual general meeting of the Club was held on 27th March 2007. In his Chairman's Report, Craig reported as follows:

> "The Chairman reported on the request made by Graham Holton at last year's AGM that the fees paid for the hire of the lake and shop premises are reviewed to ensure that a market rate was being paid. The Chairman informed the meeting that independent specialists had been appointed to assess the fees and rent that FWSC should charge for the use of the lake and premises and the fee that should be paid by FWSC for the management of the site.
>
> It was concluded that fees of £20,000 should be charged for the rental of the lake and premises.
>
> It was reported that the management of the site would warrant an annual charge in the region of £70,000.
>
> It was concluded that a net figure of £15,000 to £20,000 would be paid for the management of the site. These will be effective from 2007".

16. It is not clear what Craig had in mind when he said that independent specialists had been appointed to assess the fees and rent to be charged, though it was not suggested that he would have had any reason to mislead the meeting about this. Mr Hamilton's evidence was that it had become clear that it would be difficult to find a comparable for Watersports' situation, at least so far as the appropriate rent for the Old Rangoon Pub was concerned, but that he had spoken to some estate agents with experience of the leisure industry in order to get an indication of likely charges for management of the site. The judge thought that it was on this basis that shareholders were told that management of the site could cost in the region of £70,000.

17. The judge regarded the "conclusion" that a net figure of £15,000 to £20,000 would be paid for management of the site as a conclusion reached by the shareholders, albeit not minuted as a formal resolution. For my part, bearing in mind that the minutes do refer to other decisions being the result of such resolutions, I would read this as a part of the

Chairman's (i.e. Craig's) report to the meeting of the conclusions which the directors had so far reached in their discussions. We do not know what informal discussions (i.e. outside of a formal board meeting) had taken place between the directors since the January board meeting, but it is entirely plausible that the subject had been further discussed.

18. A further board meeting was held on 10th May 2007, attended by Craig and Mr Hamilton, but not by the other directors. However, it was normal practice to give the directors notice of board meetings and there is no reason to think that this had not been done. The minutes record:

> "Following earlier board discussions, and the proceedings of the recent AGM, CC has invoiced the club for a £10,000 management fee for 2006. For 2007 the club will charge the ski school £20,000 rental for the water usage and the old pub buildings and CC will charge a management fee of £35,000. New contracts in respect of each of these arrangements are being prepared by the company's solicitor."

19. It is not clear whether Craig did invoice the Club for a £10,000 management fee for 2006 or whether, if he did, this was in addition to the £5,000 which was in fact paid. However, there is no claim in respect of the 2006 management fee, so it is unnecessary to pursue this further.

20. In the event, despite what was contemplated by the minutes, no written management agreement was ever prepared and a formal lease was not executed until 2012. However, as the judge found, the fact that the arrangements were not reduced to writing does not mean that no relevant agreement was made. The judge found that an agreement was made, and that "those previously on the board understood that (after May 2007 just as before) Watersports did act as Site manager up until January 2017".

21. The Club's accounts for the year end 31st December 2007 stated, under the heading "Transactions with Directors", that £20,000 had been received from Watersports for rent of the building and use of the lake and associated facilities, and that a site management fee of £50,000 was payable to Watersports. That latter figure is something of a mystery which the judge was not able to resolve and, although Mr Hugh Sims QC for the Appellants made a number of suggestions, we are not in a position to resolve it either.

22. Later accounts did not contain a similar note until the 2011 accounts, approved by the Board in September 2012. These stated, under the same heading:

> "During the 12 months ending 31 December 2011, Fairford Waterski Club Limited received £20,000 in rental income, paid £35,000 management fees and purchased goods and services to the value of £12,051 from Craig Cohoon Waterski & Pro shop, a partnership operated by Craig Cohoon and Scott Cohoon."

23. By this time Scott had become a director of the Club.

24. There matters remained until January 2017 when new directors, hostile to Craig, were appointed. Craig resigned as a director and Watersports' management of the site was terminated.

The legislation

25. The underlying principle, which can be traced back to the speech of Lord Cranworth in *Aberdeen Railway Co v Blaikie Brothers* (1854) 1 Macq 461, 471, is that a director must not put himself in a position of conflict or potential conflict, or enter into a contract with the company of which he is a director whereby he receives remuneration or benefits, unless that has been consented to by the shareholders. However, as noted in *Buckley on the Companies Acts* at para 1058, it has long been the practice for a company's articles to provide that in certain circumstances, and subject to certain conditions, a director may put himself in such a position of conflict. In the case of the Club, the articles incorporated Table A in Schedule 1 to the Companies Act 1948, which included Article 84 as follows:

> "(1) A director who is in any way, whether directly or indirectly, interested in a contract or proposed contract with the company shall declare the nature of his interest at a meeting of the directors in accordance with section 199 of the Act."

26. The Articles permitted a director who had made such a declaration to vote in regard to any contract or arrangement in which he was interested and to count towards a quorum for the meeting.

27. Section 199 of the 1948 Act was superseded by section 317 of the 1985 Act, which provided as follows:

> "(1) It is the duty of a director of a company who is in any way, whether directly or indirectly, interested in a contract or proposed contract with the company to declare the nature of his interest at a meeting of the directors of the company.
>
> (2) In the case of a proposed contract, the declaration shall be made—
>
> (a) at the meeting of the directors at which the question of entering into the contract is first taken into consideration; or
>
> (b) if the director was not at the date of that meeting interested in the proposed contract, at the next meeting of the directors held after he became so interested.
>
> (3) For purposes of this section, a general notice given to the directors of a company by a director to the effect that—
>
> (a) he is a member of a specified company or firm and is to be regarded as interested in any contract which may, after the date of the notice, be made with that company or firm; or

> (b) he is to be regarded as interested in any contract which may after the date of the notice be made with a specified person who is connected with him (within the meaning of section 346 below),
>
> is deemed a sufficient declaration of interest in relation to any such contract.
>
> (4) However, no such notice is of effect unless either it is given at a meeting of the directors or the director takes reasonable steps to secure that it is brought up and read at the next meeting of the directors after it is given.
>
> (5) A reference in this section to a contract includes any transaction or arrangement (whether or not constituting a contract) made or entered into on or after 22nd December 1980.
>
> …
>
> (9) Nothing in this section prejudices the operation of any rule of law restricting directors of a company from having an interest in contracts with the company."

28. Failure to disclose an interest in accordance with section 317 renders a contract voidable by the company under the general law: *Hely-Hutchinson v Brayhead Ltd* [1967] 1 QB 549; *Guinness Plc v Saunders* [1990] 2 AC 663. The remedy of rescission is subject to ordinary equitable principles, including the principle of *restitutio in integrum*.

29. Section 317 of the 1985 Act was superseded in its turn by section 177 of the Companies Act 2006, which provides:

> "(1) If a director of a company is in any way, directly or indirectly, interested in a proposed transaction or arrangement with the company, he must declare the nature and extent of that interest to the other directors.
>
> (2) The declaration may (but need not) be made—
>
> (a) at a meeting of the directors, or
>
> (b) by notice to the directors in accordance with—
>
> (i) section 184 (notice in writing), or
>
> (ii) section 185 (general notice).
>
> …
>
> (6) A director need not declare an interest— …
>
> (b) if, or to the extent that, the other directors are already aware of it (and for this purpose the other directors are treated

> as aware of anything of which they ought reasonably to be aware; …"

30. Section 185, referred to in subsection (2)(b)(ii), corresponds to section 317(3) and (4) of the 1985 Act. It provides:

> "(1) General notice in accordance with this section is a sufficient declaration of interest in relation to the matters to which it relates.
>
> (2) General notice is notice given to the directors of a company to the effect that the director–
>
> (a) has an interest (as member, officer, employee or otherwise) in a specified body corporate or firm and is to be regarded as interested in any transaction or arrangement that may, after the date of the notice, be made with that body corporate or firm, or
>
> (b) is connected with a specified person (other than a body corporate or firm) and is to be regarded as interested in any transaction or arrangement that may, after the date of the notice, be made with that person.
>
> (3) The notice must state the nature and extent of the director´s interest in the body corporate or firm or, as the case may be, the nature of his connection with the person.
>
> (4) General notice is not effective unless–
>
> (a) it is given at a meeting of the directors, or
>
> (b) the director takes reasonable steps to secure that it is brought up and read at the next meeting of the directors after it is given."

31. For present purposes, three differences between the terms of section 317 of the 1985 Act and section 177 of the 2006 Act may be noticed:

(1) The 1985 Act requires disclosure of "the nature" of the director's interest in the contract, while the 2006 Act requires disclosure of "the nature and extent" of that interest; it was at one time suggested that this difference in language was significant, but the point fell away in the course of the hearing.

(2) The 1985 Act requires disclosure at a meeting of the directors, but notice (other than a general notice) may also be given in other ways under the 2006 Act.

(3) The 2006 Act contains express provision, which the 1985 Act does not, stating that disclosure is unnecessary if or to the extent that the other directors are already aware of the director's interest or reasonably ought to be.

32. Transitional provisions set out in the Companies Act 2006 (Commencement No. 5, Transitional Provisions and Savings) Order (S.I. 2007/3495) provide that section 177 of the 2006 Act applies where the duty to declare an interest arises on or after 1st October 2008, but that section 317 of the 1985 Act continues to apply in relation to a duty arising before that date. Although there was at one time an issue before us as to which of these provisions is applicable in this case, by the conclusion of the appeal it was accepted that the relevant provision is section 317 of the 1985 Act.

33. Section 1157 of the 2006 Act enables the court to relieve a director who acted honestly and reasonably from liability for breach of duty as a director, either wholly or in part. It is common ground that this section applies regardless of whether the duty arose before or after 1st October 2008. It provides:

> "(1) If in proceedings for negligence, default, breach of duty or breach of trust against—
>
> (a) an officer of a company or
>
> (b) a person employed by a company as auditor (whether he is or is not an officer of the company),
>
> it appears to the court hearing the case that the officer or person is or may be liable but that he acted honestly and reasonably, and that having regard to all the circumstances of the case (including those connected with his appointment) he ought fairly to be excused, the court may relieve him, either wholly or in part, from his liability on such terms as it thinks fit."

The judgment

34. Having found that the management agreement had been concluded at the 10th May 2007 board meeting, the judge identified "the real issue" as being "whether or not the contract … was entered into following due compliance with the Club's Articles in relation to the disclosure of Craig's personal interest (through Watersports) in the Management Agreement". The applicable requirement was as set out in section 317 of the 1985 Act which, as explained above, requires a director interested in a contract or proposed contract with the company "to declare the nature of his interest at a meeting of the directors of the company", a requirement with which, the judge said, there had to be strict compliance.

35. The judge found that Craig did not comply with this requirement. In so concluding, he focused on the board meeting of 10th May 2007, noting that the minutes do not record any such disclosure at this meeting, but rather that the new arrangement was the product of earlier board discussions. However, the earlier discussions at the meeting on 4th January 2007 were in general terms which did not focus upon the specific terms of any proposed contract. Even at the AGM on 27th March 2007, the net payment to Watersports had not been determined, but was to be within a range between £15,000 and £20,000 (the figure ultimately agreed was at the bottom of this range). The judge attached particular importance also to the absence of any independent valuation of the lease on the Old Rangoon Pub, which meant that the board did not have sufficient

information to determine whether the overall arrangement was justified, by which he must have meant that it represented fair value. As he put it:

> "238. It is therefore obvious that there was no information available to the board (or the sub-committee) which would have assisted either the board or the shareholders in deciding whether the extent of Craig's proposed conflicting interest – in the form of the net payment to be made to Watersports – was a justified one. After all, an independent opinion that the rent should be significantly more than the £20,000 subsequently decided upon would probably have shaken any assumption that a net payment of £15,000 to Watersports was justified."

36. The judge emphasised in addition that compliance with section 317 "required disclosure of the specific amount of the fee to be paid under the Management Agreement".

37. There are therefore, as I read the judgment, two distinct but related strands in the judge's reasoning. The first is that disclosure needs to be made once the final terms of the contract between the director and the company, including the amount to be paid, have been established; that this only occurred at the 10th May 2007 board meeting, when no disclosure of Craig's interest in the contract was made; and that earlier disclosure of Craig's interest in Watersports at the January 2007 board meeting was insufficient because the contract terms had not been agreed at that stage. The second is that it was not enough for the board to be told that Craig was interested in the contract; in addition, it had to be provided with independent information enabling the directors to determine whether the net fee payable was justified.

38. The judge's ultimate conclusion was that the consequence of this failure to comply with the requirements of section 317 was that the Club was entitled to recover from Craig (but not from Watersports) the difference between the management fee and the lease rental (i.e. £15,000 *per annum*) paid during the six years before the commencement of proceedings, but that recovery of earlier payments was barred by limitation. The legal basis on which he reached this conclusion was a matter of some controversy between the parties. That is to some extent because the pleadings on this issue are exiguous in the extreme and, although the parties addressed a host of points in their written submissions, these were never formulated with the precision which might have assisted the judge to find a clear path through the undergrowth. However, it is unnecessary to explore this further because it is common ground that, if the judge was wrong to conclude that there was non-compliance with section 317, the appeal must be allowed and the further points with which the judge grappled do not arise. I propose, therefore, to focus on this issue.

The submissions on appeal

39. The grounds of appeal were narrowed considerably during the hearing. For the Appellants Mr Hugh Sims QC submitted, in outline, that it was sufficient that Craig's interest as the principal partner in Watersports was disclosed, which it had been at the January 2007 board meeting when the relationship between Craig and Watersports was a distinct item of business; that it was apparent that the directors at the May 2007 board meeting had this disclosure well in mind; that this relationship was known to and

understood by all of the directors; and that this was sufficient compliance with Craig's duty of disclosure under section 317. He pointed out that subsection (3) allows a general notice to be given in very general terms and submitted that it would be odd if subsection (1) applied a much more stringent standard.

40. As to the judge's view that an independent valuation of the rental figure in the lease was necessary in order for the board to give its informed consent to the management agreement, Mr Sims noted that this was the judge's own point which had not been part of the Club's case below, and submitted that there was no evidence to suggest that the rental was below a market rate and, in any event, an independent valuation was unnecessary when the board and the shareholders had agreed the figures.

41. For the Club Mr Siward Atkins QC did not seek to support the judge's view that an independent valuation of the rental figure was necessary, acknowledging that this had not been part of the Club's case. He accepted that it was not necessary for all of the terms of a proposed contract to have been finalised before a compliant disclosure could be made under section 317, but submitted that the critical question was when those terms had become sufficiently clear and that this could not occur until the amount of the fee had been settled; that only occurred at the 10th May 2007 board meeting and accordingly it was only at that stage that a disclosure of Craig's interest in the contract could validly be made; but this had not happened. The discussions at the earlier January 2007 meeting had been, as the judge had found, much too general.

Discussion

42. I begin with the language and purpose of section 317. For the purpose of this appeal, it seems to me that six points are relevant.

43. First, the section is in wide terms, in that it applies to any kind of interest, whether direct or indirect, which a director may have in a contract or proposed contract with the company of which he is a director. The nature of the declaration which the director is required to make will depend on the nature of his interest and the context in which the point arises.

44. Lord Radcliffe explained this requirement in the Privy Council case of *Gray v New Augarita Porcupine Mines Ltd* [1952] 3 DLR 1 at 14, referring to legislation in materially the same terms as section 317:

> "There is no precise formula that will determine the extent of detail that is called for when a director declares his interest or the nature of his interest. The amount of detail required must depend in each case upon the nature of the contract or arrangement proposed and the context in which it arises. His declaration must make his colleagues 'fully informed of the real state of things' (see *Imperial Mercantile Credit Assn v Coleman* (1873) LR 6 (HL) 189 at p 201, per Lord Chelmsford). If it is material to their judgment that they should know not merely that he has an interest, but what it is and how far it goes, then he must see to it that they are informed (see Lord Cairns in the same case at p 205)."

45. If the nature of the director's interest is clear and obvious, as in the case of an uncomplicated contract between the company and the director, very little may need to be said. If the director's interest is more indirect, a fuller explanation may be necessary. What is required is a clear declaration of the nature of the director's interest so that the board is "fully informed of the real state of things".

46. Second, the declaration must be made at a board meeting. Declarations outside of board meetings do not count. Similarly, and in contrast with the position under the 2006 Act, a declaration must be made, even if the interest is already known to the other directors. The rationale for this requirement was explained by Lightman J in *Neptune (Vehicle Washing Equipment) Ltd v Fitzgerald* [1996] Ch 274 at 283A-E:

> "The object of section 317 is to ensure that the interest of any director in any actual or proposed contract shall (unless the procedure has been adopted of giving a general declaration under subsection (3)) be an item of business at a meeting of the directors. Where a director is interested in a contract, the section secures that three things happen at a directors meeting: first, all the directors should know or be reminded of the interest; second, the making of the declaration should be the occasion for a statutory pause for thought about the existence of the conflict of interest and of the duty to prefer the interests of the company to their own; third, the disclosure or reminder must be a distinct happening at the meeting which therefore must be recorded in the minutes of the meeting under section 382 and clause 86 of Table A (consider in particular section 382(3)). Failure to record the declaration (if made) exposes the company and every officer in default to a fine (see section 382(5)) but does not preclude proof that the declaration was made and that section 317 was complied with. The existence of this record operates as a necessary caution to directors and shadow directors who might otherwise think that their interest might pass unnoticed if the contract falls to be scrutinised at some later date; and it affords valuable information for shareholders and creditors alike in case they later wish to investigate a contract."

47. Third, disclosure may be of "a contract or proposed contract with the company". It follows that the disclosure may be made (and generally should be made) before the contract is concluded. The reference to a "proposed contract" contemplates that the terms of the contract may not necessarily have been finally settled by the time of the board meeting at which the declaration is made.

48. Fourth, in the case of a proposed contract, the declaration must be made "at the meeting of the directors at which the question of entering into the contract is first taken into consideration". This contemplates that the question of entering into a contract may be under consideration by the directors over a series of board meetings. If so, the declaration must be made at the first such meeting, but need not be repeated at every subsequent meeting.

49. Fifth, a general notice under subsection (3) may be given in very general terms. It is sufficient in such a case for the director to give notice that he is a member of a specified

company or firm and is to be regarded as interested in any future contract which may be made with that company or firm. Nothing more is required. In particular, because the negotiation of any such contract may lie in the future, there is no question of any need for disclosure of its terms or the amount of any payment, let alone that it represents value for money. I accept the submission of Mr Sims that the general nature of the requirement under subsection (3) casts light upon what must be done in the case of a specific notice given under subsection (1). It would indeed be odd if subsection (1) requires a director to give notice of something close to the final terms of a proposed contract, when under subsection (3) nothing of the kind is necessary.

50. Sixth, the purpose of section 317 is to ensure disclosure of the director's interest in a contract or proposed contract. It is not concerned with whether entry into the contract is in the company's interest. As Mr Sims pointed out, there are other statutory and fiduciary duties on directors, such as the need to act in good faith in the interests of the company and the duty to put the company's interests first. Accordingly, as he put it, there is no need to invest section 317 with any requirement to do the work of other statutory or fiduciary duties.

51. Drawing these points together and applying them to the facts of the present case, I conclude that the disclosure made by Craig was sufficient to comply with section 317.

52. The whole context for the board meeting on 4th January 2007 was the conflict of interest between the Club and Craig resulting from his existing role as manager of the site. That conflict had been expressly raised at the Club's 2006 annual general meeting, had been discussed at a board meeting on 29th April 2006, and had led to the formation of the sub-committee and the proposals put forward by Craig in his email of 28th December 2006 for a revised management agreement. As the minutes record, the January 2007 board meeting was convened specifically to discuss this relationship. The existence of "the potential conflict of interest" arising due to Craig's position was expressly acknowledged in the minutes, as was the fact that "due regard" thereof was taken by the directors. Although the amount of any management fee had not yet been determined, it was agreed that the current level of the fee "was no longer realistic" and would therefore need to be increased.

53. The nature (and if necessary, the nature and extent) of Craig's interest in the new management agreement was already known to the other directors and so was obvious. For all practical purposes, as all concerned understood, Craig *was* Watersports. That being so, it was unnecessary to say any more. The context meant that the directors were "fully informed of the real state of things". Moreover, the objectives described by Lightman J in *Neptune* were achieved. The conflict of interest was an item (in fact the main item) of business at a board meeting. There was a "statutory pause for thought", indeed the process was not in any way rushed as the final management agreement was the result of a process of discussion over a period of months. The disclosure was recorded in the minutes of the meeting.

54. Moreover, this was in my judgment "the meeting of the directors at which the question of entering into the contract [was] first taken into consideration" and was therefore the appropriate occasion for the declaration of interest to be made. By this stage the parties' negotiations had reached a stage at which it was accepted that Watersports would continue to manage the site in the same way as it had been doing, and that its fee for doing so would be increased. That was enough for the directors to understand that Craig

had an interest in the contract, whatever amount was finally settled on for the fee. There is no reason why Craig could not have given a general notice under subsection (3) which would have covered any future contract of whatever nature between the Club and Watersports. There was equally no reason why he should not have made a declaration under subsection (1) relating to the specific management agreement under consideration, the basic structure of which was clear even though the fee had yet to be agreed. In my judgment, on a fair reading of the minutes of the January meeting, that is what he did.

55. However, even if it were necessary to focus on the 10th May 2007 meeting at which the amount of the fee was finally agreed, that meeting cannot be viewed in isolation from what had gone before. Indeed, the discussion of the management agreement was expressly introduced as "following earlier board discussions". That is a plain reference back to the January meeting and demonstrates that the directors had well in mind what had been said there about Craig's conflict of interest. What had been said there was effectively incorporated into the discussion at the May meeting, without needing to be repeated. To have stated yet again that Craig had a conflict of interest would have "served no conceivable purpose" and "would have been mere incantation" (cf. *per* Simon Brown J in *Runciman v Walter Runciman Plc* [1992] BCLC 1085 at 1093f).

56. I can deal more briefly with the second strand of the judge's reasoning, that any declaration of Craig's interest was insufficient because of the absence of an independent valuation of the rent payable under the lease. This was, as Mr Atkins frankly accepted, the judge's own point which first appeared, at any rate in its developed form, in the judgment. The judge found at [259] that the rent of £20,000 *per annum* was not financially disadvantageous to the Club, and accordingly his point was limited to the fact that no independent valuation was provided to the directors before this figure was agreed. In my judgment this point was not open to the judge. The consequence of the way in which it emerged was that the Appellants had no opportunity to investigate in advance of the trial precisely what had happened about these valuations. Although Craig and Mr Hamilton were asked some questions about them in cross examination, it is not surprising that they had very little recollection. However, if notice of the point had been given, it is possible that matters would have appeared in a different light.

57. In any event, however, I do not accept that it was necessary for the directors to be provided with an independent valuation of the rent under the lease in order for there to be compliance with section 317. The directors were well aware that they had not been provided with such a valuation, and indeed that such a valuation would be difficult to obtain, but nevertheless decided, with full knowledge of Craig's interest in the management agreement, to go ahead. They were entitled to do so. If the absence of a valuation was relevant at all, it would have been relevant to a case (which was not advanced) that Craig had failed to act in good faith in the best interests of the Club, but in any event such a case would have failed in view of the judge's finding that the rent was not financially disadvantageous (i.e. that it represented a market rate).

Other matters

58. My conclusion that the disclosure made by Craig was sufficient to comply with section 317 means that the other interesting issues on which we heard argument, such as the juridical basis for the remedy granted by the judge, the availability of *restitutio in integrum* in circumstances where Watersports had in fact acted as site manager between

2007 and 2017, and whether Craig should be relieved of any liability pursuant to section 1157 of the 2006 Act, do not arise. Nor does the cross-appeal.

59. As I said at the outset, it is apparent that, if there was a breach of Craig's duty of disclosure, it was of a highly technical nature. Indeed, if the duty to declare an interest had arisen on or after 1st October 2008 so that section 177 of the 2006 Act was the relevant statutory provision, it would not even have been arguable that there was any failure of disclosure by Craig. That might suggest that there was a compelling case for relief under section 1157. However, as these further issues do not arise, I express no final view and propose to say nothing more about them.

The counterclaim

60. I should, however, mention briefly Watersports' counterclaim for damages for wrongful termination of the management agreement. This was a claim for one year's management fee in lieu of notice, on the basis that the agreement was terminable by reasonable notice and that a reasonable notice would have been one year. The judge did not deal with this because, on the view which he took, it was unnecessary to do so. But on the basis that the Club was not entitled to rescind the management agreement for non-disclosure of Craig's interest in it, the counterclaim does arise. Mr Sims accepted, however, that it would be necessary to remit this claim to the judge to determine what would have been a reasonable period of notice and what profit, if any, Watersports would have made during the period of notice if it had continued to perform site management during that period. Rather than have such a remission, which would have incurred further costs for what was on any view a modest claim, the Appellants indicated during the hearing that they would limit their counterclaim to nominal damages.

Disposal

61. I would allow the appeal, holding that (1) the Club's claim in respect of fees paid under the management agreement must be dismissed and (2) the Club is liable to Watersports for nominal damages for wrongful termination of that agreement.

Lord Justice Stuart Smith:

62. I agree.

Lord Justice Henderson:

63. I also agree.