Chancery Division

A

F & C Alternative Investments (Holdings) Ltd *v* Barthelemy and another (No 2)

Barthelemy and another *v* F & C Alternative Investments (Holdings) Ltd and others (No 2)

B

[2011] EWHC 1731 (Ch)

2010 June 14–Dec 21; Sales J
2011 Jan 12–March 24;
July 14

C

Partnership — Limited liability partnership — Members — Partnership consisting of two individual members and corporate member established under agreement to carry on hedge fund business — Agreement providing for individual members to have right to exercise put options — Whether members of partnership owing fiduciary duties to each other — Whether owing fiduciary duties to partnership — Whether breaches of agreement — Whether put options validly served — Limited Liability Partnerships Act 2000 (c 12), ss 1, 5(1)

D

Partnership — Unfair prejudice — Conduct of affairs — Attribution of responsibility beyond class of case where agency relationship existing — Test to be applied — Companies Act 2006 (c 46), s 994

The claimant was part of a group of companies which carried on a range of businesses in the field of asset management. A limited liability partnership ("the LLP"), consisting of two individual members, the defendants, and a corporate member, the claimant, was constituted under an agreement to carry on a fund of hedge funds business. The agreement was made so as to establish the LLP as a corporate entity under section 1(1)(2) of the Limited Liability Partnerships Act 2000[1] and included terms under which, in certain circumstances involving breach of contract by the claimant, the defendants could exercise a put option to require the claimant to purchase their respective 20% interests in accordance with a valuation formula. Section 1(5) of the 2000 Act stated that, except to the limited extent that it was preserved by the new legislation, the general law relating to partnerships did not apply to a limited liability partnership and section 5(1) provided that the mutual rights and duties of members of a limited liability partnership "shall be governed" primarily by agreement between the members. In three interrelated sets of proceedings in respect of the LLP, (i) the claimant brought a Part 7 claim seeking declaratory relief to the effect that the purported exercise of the put options on three occasions by the defendants was invalid; (ii) the defendants brought a petition against the claimant and its parent company under section 994 of the Companies Act 2006[2] (as applied to limited liability partnerships) claiming that they had conducted the affairs of the LLP in an unfairly prejudicial manner; and (iii) the claimant cross-petitioned claiming that the defendants had themselves conducted the affairs of the LLP in a manner unfairly prejudicial to it.

E

F

G

On the claim and the petitions, and questions as to the fiduciary duties which were owed by the parties to each other and the LLP, the test to be applied in relation to attribution of the unfairly prejudicial conduct for the purposes of section 994 of the 2006 Act and how the section applied where a person with compliance officer responsibilities took action—

H

[1] Limited Liability Partnerships Act 2000, s 1: see post, para 67.
S 5(1): see post, para 69.
[2] Companies Act 2006, s 994(1): see post, para 75.

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A *Held*, giving judgment for the defendants on the Part 7 claim, (1) that, in the circumstances, the first two put options had been validly served by the defendants (post, paras 175, 177, 188, 1113).

(2) That a limited liability partnership was not a partnership in the traditional sense, in which the individuals owed fiduciary duties to each other in relation to the management of the affairs of the partnership and when acting as agents for the partners; that the Limited Liability Partnerships Act 2000 and the associated regulations did not provide for the members in a limited liability partnership to owe B each other fiduciary duties but laid down a minimal legal framework for the operation of a limited liability partnership, leaving most of the detailed rules for the operation of such an entity to be worked out by the parties to the agreement which established it, with a considerable degree of freedom of contract; that, in the absence of a statutory requirement and taking into account (a) the fact that a limited liability partnership had corporate personality, (b) the stipulation in section 5(1) of the 2000 Act that the mutual rights and duties of members of a limited liability partnership "shall be C governed" primarily by agreement between the members, (c) the extent to which the parties were left free under the legislative regime to fashion a range of different forms of governance arrangements in relation to a limited liability partnership, and (d) the underlying legal principles according to which a fiduciary duty to act in good faith towards another person would arise, it was necessary to refer back to basic equitable principles in order to decide whether and what fiduciary obligations arose in the context of a limited liability partnership; that the precise content of both D the particular fiduciary obligations and the duty of good faith was informed by the particular factual and contractual context in which they were located; that the members of the LLP did not owe fiduciary duties to each other in addition to the contractual obligations set out in the agreement and no fiduciary duties were owed by the members to the LLP since neither the claimant nor the defendants, qua members, had direct control over the affairs or property of the LLP; and that, accordingly, the defendants were entitled to have their interests in the LLP bought out by the claimant E pursuant to their valid exercise of the put options (post, paras 207, 208, 211, 213–215, 217, 218, 227, 228–231, 233, 236, 237, 240, 255, 259, 1113).

White v Jones [1995] 2 AC 207, HL(E), *Redwood Master Fund Ltd v TD Bank Europe Ltd* [2006] 1 BCLC 149 and *Hawkes v Cuddy (No 2)* [2009] 2 BCLC 427, CA applied.

Bristol and West Building Society v Mothew [1998] Ch 1, CA considered.

(3) Allowing the petition and dismissing the cross-petition, that the test of F attribution of responsibility for unfairly prejudicial conduct to a defendant in a claim under section 994 of the Companies Act 2006, beyond the narrow class of case where an agency relationship existed, was whether the respondent was so connected to the unfairly prejudicial conduct in question that it would be just in the context of the statutory regime contained in sections 994 and 996 to grant a remedy against him in relation to that conduct; that that standard reflected the requirements of fair commercial dealing inherent in the statutory regime but everything depended upon the facts of a particular case; that, although it would be rare for an unfair prejudice G case to be established where someone in the position of a compliance officer had acted in accordance with what he believed in good faith to be his duty, serious departure from the relevant standards of fairness in a particular context would be capable of constituting unfairly prejudicial conduct for the purposes of section 994; that the defendants failed in their wider claim that the claimant had conspired to close the LLP but succeeded in other parts of their complaint; and that, accordingly, the claimant and its parent company would be held liable under section 994 for H unfairly prejudicial conduct of the affairs of the LLP (post, paras 178, 187, 188, 259, 1094–1096, 1098, 1099, 1103–1105, 1113).

Scottish Co-operative Wholesale Society Ltd v Meyer [1959] AC 324, HL(Sc), *In re Macro (Ipswich) Ltd* [1994] 2 BCLC 354 and *O'Neill v Phillips* [1999] 1 WLR 1092, HL(E) applied.

Fisher v Cadman [2006] 1 BCLC 499 distinguished.

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The following cases are referred to in the parts of the judgment reported: A

Attorney General of Belize v Belize Telecom Ltd [2009] UKPC 10; [2009] 1 WLR 1988; [2009] Bus LR 1316; [2009] 2 All ER 1127; [2009] 2 All ER (Comm) 1, PC
Barque Quilpué Ltd v Brown [1904] 2 KB 264, CA
Berkeley Community Villages Ltd v Pullen [2007] EWHC 1330 (Ch); [2007] 3 EGLR 101
Bristol and West Building Society v Mothew [1998] Ch 1; [1997] 2 WLR 436; [1996] 4 All ER 698, CA B
British Airways Pension Trustees Ltd v Sir Robert McAlpine & Sons Ltd (1994) 45 Con LR 1, CA
Broadcasting Station 2GB Pty Ltd, In re [1964–1965] NSWR 1648
Canwest Global Communications Corpn v Australian Broadcasting Authority (1997) 24 ACSR 405
Company (No 005287 of 1985), In re A [1986] 1 WLR 281; [1986] 2 All ER 253 C
Dore v Leicestershire County Council [2010] EWHC 1387 (Ch)
Edge v Pensions Ombudsman [1998] Ch 512; [1998] 3 WLR 466; [1998] 2 All ER 547, Sir Richard Scott V-C; [2000] Ch 602; [2000] 3 WLR 79; [2000] ICR 748; [1999] 4 All ER 546, CA
Fisher v Cadman [2005] EWHC 377 (Ch); [2006] 1 BCLC 499
Hawkes v Cuddy (No 2) [2007] EWHC 2999 (Ch); [2008] BCC 390; [2009] EWCA Civ 291; [2009] 2 BCLC 427, CA D
Hilton v Barker Booth & Eastwood [2005] UKHL 8; [2005] 1 WLR 567; [2005] 1 All ER 651, HL(E)
Howard Smith Ltd v Ampol Petroleum Ltd [1974] AC 821; [1974] 2 WLR 689; [1974] 1 All ER 1126, PC
Kelly v Cooper [1993] AC 205; [1992] 3 WLR 936, PC
Little Olympian Each-Ways Ltd, In re [1994] 2 BCLC 420
Lumley v Gye (1853) 2 E & B 216 E
Mackay v Dick (1881) 6 App Cas 251, HL(Sc)
Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service [2010] NSWCA 268; 15 BPR 28,563
Macro (Ipswich) Ltd, In re [1994] 2 BCLC 354
Mediterranean Salvage and Towage Ltd v Seamar Trading and Commerce Inc [2009] EWCA Civ 531; [2010] 1 All ER (Comm) 1; [2009] 2 Lloyd's Rep 639, CA F
News Corpn Ltd, In re (1987) 70 ALR 419
OBG Ltd v Allan [2007] UKHL 21; [2007] Bus LR 1600; [2008] 1 AC 1; [2007] 2 WLR 920; [2007] 4 All ER 545; [2008] 1 All ER (Comm) 1, HL(E)
O'Neill v Phillips [1999] 1 WLR 1092; [1999] 2 All ER 961, HL(E)
Peters' American Delicacy Co Ltd v Heath (1939) 61 CLR 457
Redwood Master Fund Ltd v TD Bank Europe Ltd [2002] EWHC 2703 (Ch); [2006] 1 BCLC 149
Scottish Co-operative Wholesale Society Ltd v Meyer [1959] AC 324; [1958] 3 WLR 404; [1958] 3 All ER 66; 1958 SC (HL) 40, HL(Sc) G
Smith & Fawcett Ltd, In re [1942] Ch 304, CA
Southern Foundries (1926) Ltd v Shirlaw [1940] AC 701; [1940] 2 All ER 445, HL(E)
Stirling v Maitland (1864) 5 B & S 840
Vatcher v Paull [1915] AC 372, PC
Vercoe v Rutland Fund Management Ltd [2010] EWHC 424 (Ch); [2010] Bus LR D141 H
White v Jones [1995] 2 AC 207; [1995] 2 WLR 187; [1995] 1 All ER 691, HL(E)

No additional cases were cited in argument or referred to in the skeleton arguments.

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A **CLAIM** and **PETITIONS**

By a Part 7 claim form issued on 6 March 2009 the claimant, F & C Alternative Investments (Holdings) Ltd (a member of the F & C group of companies the head company of which was F & C Asset Management plc ("F & C plc")), sought declaratory relief to the effect that the purported exercise of put options by the defendants, Francois Barthelemy and B Anthony Culligan, was invalid. The defendants counterclaimed for orders to give effect to what they maintained were their rights to have their respective interests in a limited liability partnership, F & C Partners LLP ("the LLP"), bought out by the claimant pursuant to their exercise of the put options.

The defendants petitioned for relief under sections 994 to 996 of the Companies Act 2006 against the claimant, the LPP and F & C plc, claiming C that the affairs of the LLP had been, or were being, conducted in a manner unfairly prejudicial to their interests as members of the LLP. By a cross-petition issued on 28 April 2010 the claimant cross-petitioned for relief under sections 994 to 996 of the 2006 Act.

The facts relevant to the issues on which this case is reported are stated in the parts of the judgment reported.

D *Catherine Newman QC*, *Andrew Ayres* and *Sam O'Leary* (instructed by *Norton Rose*) for the claimant.

Leslie Kosmin QC and *Andrew Thompson* (instructed by *Jeffrey Green Russell*) for the defendants.

The court took time for consideration.

E 14 July 2011. **SALES J** handed down the following judgment.

Introduction

1 This case concerns a limited liability partnership, F & C Partners LLP ("the LLP"). The LLP has two individual members and a corporate member. The individual members are Mr Anthony Culligan F ("Mr Culligan") and Mr Francois Barthelemy ("Mr Barthelemy"). I refer to them together as "the defendants", since they are the defendants to the Part 7 claim which forms part of the proceedings before me. The corporate member is F & C Alternative Investments (Holdings) Ltd ("Holdings").

2 Each of the defendants has a 20% interest in the LLP's profits and capital and each has 20% of the members' voting rights. Holdings has a 60% G interest in the LLP's profits and capital and 60% voting rights as a member.

3 Holdings is part of the F & C group of companies, which carry on a range of businesses in the field of asset management. The head company in the group is F & C Asset Management plc ("F & C plc"). Holdings is a wholly-owned subsidiary of F & C plc. I refer to the F & C Group collectively as "F & C ".

4 The board of directors of Holdings comprises F & C plc as corporate H director and Mr Alain Grisay ("Mr Grisay"). Mr Grisay is the chief executive officer ("CEO") of F & C plc. He is one of two executive directors on the board of F & C plc. The other is Mr David Logan ("Mr Logan").

5 The LLP is constituted under an agreement dated 3 December 2004 between Holdings, the defendants and the LLP itself ("the agreement").

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The agreement included terms under which, in certain circumstances involving breach of contract by Holdings, the defendants could exercise a put option to require Holdings to purchase their respective 20% interests in the LLP at a stipulated multiple of the profits of the LLP in defined periods. The defendants maintain that Holdings has acted in such a way as to trigger their right to exercise the put option under the agreement. They say that they validly exercised their put options by notices given on 25 February 2009, alternatively by notices given on 22 May 2009, alternatively by notices given on 24 December 2009. Holdings denies that there has been any valid exercise of the put option.

6 The defendants also maintain that Holdings and F & C plc have engaged in unfairly prejudicial conduct in the operation of the LLP so that they are entitled to relief under the provisions of sections 994 to 996 of the Companies Act 2006 ("sections 994 to 996"—formerly sections 459 to 461 of the Companies Act 1985), in the form of an order that Holdings and F & C plc buy out their interests in the LLP. Sections 994 to 996 apply in relation to the LLP by virtue of the Limited Liability Partnerships Act 2000 ("the LLPA") and the contractual choice made by the parties to the agreement not to exclude the operation of those provisions. Holdings and F & C plc deny that they are liable under these provisions. Holdings also maintains a claim of its own against the defendants under sections 994 to 996.

7 This is the judgment in three inter-related sets of proceedings in respect of the LLP:

(i) A claim under CPR Pt 7 by Holdings against the defendants ("the Part 7 claim"), seeking declaratory relief to the effect that the purported exercise of the put options by the defendants is invalid. This claim was issued on 6 March 2009 after the first purported exercise of the put options on 25 February 2009 and has been amended to cover the other purported exercises of the put options on 22 May 2009 and 24 December 2009. In these proceedings the defendants counterclaim for orders to give effect to what they maintain are their rights to have their respective interests in the LLP bought out by Holdings pursuant to their exercise of the put options.

(ii) A petition by the defendants for relief under sections 994 to 996 ("the petition"), claiming that the affairs of the LLP have been, or are being, conducted in a manner unfairly prejudicial to their interests as members of the LLP. In the petition, the principal relief the defendants seek is a declaration that their exercise of the put options was valid and effective and/or an order that Holdings or F & C plc purchase their respective interests in the LLP at a price advantageous to them.

(iii) A cross-petition by Holdings for relief under sections 994 to 996 ("the cross-petition"), claiming that the affairs of the LLP have been, or are being, conducted by the defendants in a manner unfairly prejudicial to Holdings' interests as a member of the LLP. In the cross-petition, the principal relief sought by Holdings is an order requiring the defendants to transfer their interests in the LLP to Holdings at a price advantageous to it.

8 The hearing before me constituted the trial on liability, with questions of the amount of any payment to be made by any party found liable being hived off to a later hearing. With the agreement of the parties, argument in relation to fixing the principles to be applied in determining

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A the amount of any payment to be made (which is to be treated as part of the trial on liability) has been postponed until after this judgment is handed down.

The course of the hearing

9 The trial was very long (some 95 days), starting on 14 June 2010 and B concluding on 24 March 2011, with breaks at various points. Norton Rose are the solicitors acting for F & C. Jeffrey Green Russell ("JGR") act for the defendants. Catherine Newman QC was leading counsel for F & C, Leslie Kosmin QC for the defendants. Unfortunately, part way through the trial Mr Kosmin fell ill and had to drop out of the case. This was at a point after the witnesses of fact for F & C had all given their evidence and been cross-examined by him. Fortunately, Mr Kosmin's junior in the proceedings, C Andrew Thompson, is very experienced. He took over the presentation of the defendants' case, a task which he ably performed.

Hedge funds, funds of hedge funds and the making of the agreement

10 F & C is a group of companies providing asset management services to clients. As a group it offers a wide range of financial products and D services. Unsurprisingly, F & C attaches great importance to its client relationships in order to retain clients and keep their assets under F & C management. F & C devotes considerable effort to maintaining its relationships with clients on a long-term basis, in particular by seeking to understand and respond to their investment needs. To retain the trust and confidence of its clients, F & C's client account managers and marketing E staff seek to ensure that clients are given sound advice appropriate to their needs about what assets and investment products they should invest in. F & C has an obvious interest to attract its clients to invest in its financial products to earn the fees associated with that, but it also has a long-term interest to retain the confidence of its clients which tempers the extent to which its personnel advising clients will seek to press them to invest in particular F & C products.

F 11 By 2004, F & C had identified that it had a gap in its product range in the form of a fund of hedge funds ("FoHF"). A FoHF is a managed fund investing in a portfolio of hedge funds. Hedge funds are investment funds set up to pursue specialised trading strategies, including hedging transactions, short-selling of investments to benefit from market movements and so forth. An investment in a hedge fund (or in a FoHF) is not a standardised G investment product and there can be considerable differences between hedge funds and the particular investment strategies they pursue. Hedge funds are thus to be distinguished from investment funds, sometimes referred to as "long only" funds, which hold shares or bonds in the hope that they will rise in price. Hedge funds hold themselves out as being able to generate high returns for investors above general market movements, on the basis of the financial skill and acumen of those managing them. They generally charge H high fees each year of the order of 2% of the value of assets under management ("AUM"), plus 20% of the increase in value of those assets (which may be contrasted with, for example, the far lower fees charged in relation to investment in financial products which simply aim to track particular market indices).

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12 FoHF managers such as the LLP hold themselves out as being able to generate high returns on the basis of having skill in picking high-performing hedge funds to be included in their FoHF's portfolio of investments. As is common for FoHFs, the LLP charged annual management fees of the order of 1% of the value of AUM plus 10% of the increase of the value of those assets over the year. These fees are levied by FoHFs in addition to the fees levied by the underlying hedge funds in which they invest. Investment in FoHF products is thus a relatively expensive form of investment in financial products.

13 Hedge funds and FoHFs often market themselves as "absolute return" financial products. The LLP held its funds out as absolute return products. The objective of an absolute return product is to increase the value of the investment whatever may be happening to the general equity or bond markets. An absolute return investment product is thus to be distinguished from a relative return investment product, where the investor understands that the performance of the investment is to be assessed by comparison with movements in the general markets or indices to which it is linked.

14 An absolute return product in the form of an investment in a hedge fund or FoHF is not risk free. On the contrary, there may be substantial risks associated with the trading strategies adopted. None the less, the aim and hope is that the strategies adopted by hedge funds will allow for a degree of de-coupling or non-correlation of their investment performance with the general trends of equity and bond markets. This feature of hedge funds can make them attractive to large institutional investors such as pension funds or insurance companies, since it affords them an option to diversify their basket of investments in managing their overall risk and liability profile and offers scope to purchase (at significant cost, as noted above) what is hoped will be an element of protection against a significant downturn in general markets.

15 There is no complete guarantee that hedge funds will achieve absolute returns, and the extent to which they can avoid correlation of performance with general markets will depend upon their particular strategies and the specific factors which may move markets in one direction or another and the time period over which such factors may operate. If there is a general fall in the market, that may affect hedge funds too. But the aim and hope is that the strategies they adopt may allow them to recover more speedily than the markets in equities or bonds.

16 It may be observed here that, in a certain sense, the holding of cash in an interest-bearing bank account is an absolute return product, since its nominal monetary value will steadily increase with the payment of interest. But a cash holding is fundamentally different from an absolute return product in the form of an investment in a hedge fund or FoHF, in that it does not carry with it the significant risk of a decrease in its nominal value which is associated with hedge fund investments and, as the other side of the same coin, it does not carry with it (as hedge fund or FoHF investments do) the prospect of a significant increase in its nominal value above the rate of inflation and bank lending rates.

17 By 2004, the defendants had acquired extensive experience in the financial markets, working for various institutions, and particular expertise in managing FoHF products. They were looking to find a more profitable outlet for their talents than employment in a financial institution. They put together a detailed business plan for a proposal to set up a FoHF business in

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A which they would have shares as part owners alongside a financial institution. They approached several institutions with their proposal and found that F & C was interested in pursuing it.

18 F & C had an extensive client base, which it could introduce to FoHF products launched and marketed under its auspices, and the defendants had the expertise in managing a FoHF which F & C lacked. The business proposal put forward by the defendants was for them to be the managers of B FoHF products marketed under the F & C brand name. The particular expertise they presented themselves to F & C as having was in the management of FoHF products. They laid claim to no special expertise in the management of other financial products, including what were referred to at trial as "single strategy hedge funds". Single strategy hedge funds are funds invested in a particular specialised area following a specific investment C strategy. The nature of expertise in running a FoHF is to have a reasonable understanding of and knowledge about a range of hedge funds so as to be able to select a basket of hedge funds which offer good performance overall (as distinct from being expert in the implementation of any particular hedge fund strategy).

19 It was agreed that F & C (using Holdings as the relevant vehicle) and the defendants should form a limited liability partnership together on the D basis of respective interests of 60%, 20% and 20%, to carry their FoHF proposal into effect. Accordingly, in December 2004 the LLP was formed by the making of the agreement between Holdings (as the corporate member), the defendants and the LLP. The primary focus of the agreement was upon the LLP being operated as a vehicle to manage FoHF products and that was the sole focus of the LLP's business from its inception. All the parties E hoped that the LLP would be very profitable.

20 The agreement created the LLP as a limited liability partnership governed by the LLPA. The agreement set out a detailed constitution for the LLP and contained elaborate provisions governing the division of income to be received from clients and the distribution of its profits.

21 F & C maintained that the formation of the LLP proceeded on the basis of certain understandings between the parties, not set out in the F agreement, such as that the LLP would confine its business to FoHF products alone. I find that the evidence does not support such a case. Judged on an objective approach, the parties agreed that the terms of the agreement should govern their relationship, without it being qualified by such understandings as F & C alleged. This position was further underlined by the inclusion of an "entire agreement" clause in the agreement, stating that G the agreement constituted "the entire understanding between the parties relating to the LLP": clause 34, set out at para 58 below.

The classes of client, marketing services and fees payable by the LLP to Holdings under the agreement

22 The agreement defined three classes of client. The division as H between Holdings and the LLP of income from any particular client was to be governed by the class into which that client fell. The classes were set out in the fifth schedule to the agreement, which stipulated the amounts which the LLP was to pay Holdings for general marketing services. The classes were: (i) "core clients": para 1.1 of the fifth schedule. These were clients with whom F & C had an especially close and established relationship in the

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provision of investment management services. This category included companies in the Friends Provident associated group companies and the Friends Provident pension scheme (referred to together in this judgment as "Friends Provident"), companies in the Eureko BV associated group companies (including, in particular, companies associated with Achmea Holding NV, referred to together as "Achmea"), and "PVF Associated funds/entities" (a group of Dutch pension funds, referred to together as "PVF"). (ii) "Existing clients": para 1.2 of the fifth schedule. These were other clients for whom F & C was already managing investments as at the date of the agreement; and (iii) "new clients": para 1.3 of the fifth schedule.

23 The fifth schedule to the agreement provided for a different allocation of fees received from clients of the LLP depending upon which class of client they fell into. It stated that "the LLP shall pay the corporate member for the general marketing services provided pursuant to clause [13.7 of the agreement] as set out below", and stipulated that: (i) in relation to core clients, "the LLP will rebate to the corporate member any fee charged . . . above [0·5% of AUM] per annum" and that "where the LLP charges a performance fee . . . the LLP shall pay 40% of any such performance fee to the corporate member"; (ii) in relation to existing clients, where funds were transferred from a mandate managed by F & C into a fund or mandate managed by the LLP, the payments by the LLP to the corporate member were to be the same as for core clients, and where new funds were invested for management by the LLP, the LLP would retain from any management fee the first 0·5% of AUM per annum and would pay the corporate member 50% of any management fee above that (since the management fee would ordinarily be 1% of AUM per annum, the amount to be paid by the LLP to the corporate member would usually be 0·25% of AUM per annum), together with 20% of any performance fee; and (iii) in relation to new clients, the LLP was to keep the entirety of the fees charged to those clients where the LLP "has been independently and directly engaged by such clients" (i e not through the marketing efforts of F & C), and where such clients "have been introduced to the LLP by F & C " the payments by LLP to the corporate member were in principle to match those in respect of existing clients that awarded new money for management by the LLP, but "subject to board approval by the LLP" (such approval "to be assessed on the basis of the contribution of the F & C sales staff").

24 Clause 13.7 of the agreement provided:

> "The corporate member shall provide general marketing support as determined at the discretion of the corporate member for the activities of the LLP using the existing marketing operations of the F & C group. The LLP shall pay the corporate member and/or F & C group for such services as set out in the fifth schedule, as amended by unanimous board approval from time to time."

25 Para 1.3.1 of the fifth schedule expressly provided that "marketing will be co-ordinated by the corporate member". Since Holdings, the corporate member, did not have a marketing department or function of its own, this meant that Holdings was to procure the provision of marketing services by the marketing (or distribution) function within the F & C group, subject to what was said in clause 13.7. Paras 1.1 (core clients) and 1.2 (existing clients) of the fifth schedule did not contain any express provision

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A equivalent to that in para 1.3.1 regarding co-ordination of marketing by the corporate member, but it is clear from the context of the fifth schedule in which they appear that it was contemplated that the payments for which those paragraphs provided would be for "general marketing services" by F & C involved in retaining core and existing clients as clients of the F & C group and encouraging investment by them in the LLP's funds.

B **26** The fifth schedule also included provision at para 1.4 for the payment of an additional incentive fee by the LLP to the corporate member on assets managed by the LLP belonging to a core client or an existing client increasing in value when above certain threshold amounts. This fee was intended to provide a further incentive for F & C to encourage its clients to invest in funds managed by the LLP.

27 The payments by the LLP to Holdings provided for in the fifth C schedule in respect of marketing services by F & C were expenses of the LLP and were payable out of its funds in the same way as other expenses (such as the remuneration costs of employees of the LLP), irrespective of (and prior to calculation of) the LLP's profits or losses in any year. The fees for marketing services were thus a way in which F & C extracted value from the LLP which operated apart from F & C's rights to share the profits of the LLP D according to its 60% ownership of the LLP.

28 Similarly, the defendants were not confined to receiving moneys from the LLP equivalent only to their respective 20% shares in the profits of the LLP. As set out below, under the terms of the agreement they had a right to take monthly advance drawings from the LLP as, in effect, a priority claim on the profits and resources of the LLP.

E

The terms of the agreement

29 The agreement is a carefully drafted contract which comprises the constitution of the LLP and governs the relationship between the corporate member and the defendants as members and between them and the LLP itself. As set out in the first schedule to the agreement, Holdings provided F £500,000 of equity capital for the LLP, £500,000 of equity preference capital, £1,000,000 of regulatory capital and £500,000 of working capital—a total capital contribution by Holdings of £2·5m. The individual members each provided only £1,000 of capital.

30 Holdings also assumed certain obligations to ensure that the working capital of the LLP would be maintained at a certain level for the first two years of its existence (clause 8.4) and that the regulatory capital of G the LLP, as required by the Financial Services Authority ("the FSA"), would be maintained at the necessary level: clause 8.3. I was informed that the minimum required regulatory capital for the LLP was about £300,000. If for any reason the LLP's capital became depleted below that amount, Holdings could come under an obligation to inject further capital into the LLP to ensure that it met the FSA's capitalisation requirements.

H **31** Clause 8.3 provides:

"The corporate member shall be required, upon the request of the board, to make from time to time such additional capital contributions, which shall be designated as forming part of the regulatory capital, as are necessary, in the reasonable opinion of the board, to ensure that the LLP

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maintains the minimum level of regulatory capital required by the FSA . . .” A

32 Clause 8.4 imposed a further obligation on Holdings, upon the request of the board, to provide additional capital if more were required to provide the LLP with sufficient working capital to continue its business operations for at least two years from the commencement date set out in the agreement, 3 December 2004 (a period which had elapsed by the time the B dispute between the members arose).

33 Clause 4 of the agreement provides:

“4. Business

“4.1 The business of the LLP shall be to carry on the business of (1) conducting on a discretionary basis the management of fund of hedge funds vehicles and segregated accounts and investment management C services; (2) marketing and promoting shares or interests in such vehicles; (3) activities associated therewith; and (4) such other business activities as may from time to time be determined by the board.”

34 Clause 5 provides for the business of the LLP to be carried on in the name of “F & C Partners LLP” and for the LLP to make use of the F & C name and brand subject to certain conditions. This reflects the underlying D commercial bargain that the LLP should trade using the F & C name and offering investment products branded as part of F & C’s suite of investment products.

35 Clause 6 provides for the production of accounts for the LLP. Clause 6.1 states: “It shall be the responsibility of the board to ensure that proper books of account are maintained giving a true and fair view of the E business and the affairs of the LLP.” Clause 6.3 provides:

“The board shall ensure that, in respect of each accounting year of the LLP, there is drawn up a profit and loss account and a balance sheet (taking no account of goodwill) of the LLP in accordance with generally accepted accounting principles in the United Kingdom (the ‘LLP accounts’). The board shall also ensure that the LLP accounts in respect F of each accounting year of the LLP are audited in accordance with the requirements of the Act.”

36 Clause 8 governs the operation of capital accounts for each member of the LLP and the capital contributions to be made by them.

37 Clause 9 governs the allocation of income profits and losses through the mechanism of distribution accounts for each member. Clause 9.3 sets G out an ordered sequence for allocation of income profits of the LLP. First, an amount equal to notional interest on the working capital contributed by the corporate member is to be allocated to Holdings’ distribution account. After that, clause 9.3.2 provides:

“Second, there shall be allocated to the distribution account of each member (other than the corporate member) an amount equal to the H aggregate of the drawings made by that member for that accounting year. In the event that the balance of income profits of an accounting year is insufficient to make such an allocation, the available income profits shall be divided amongst the members (other than the corporate member) in the same proportions as each member’s aggregate drawings for that

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A accounting year bears to the total of the aggregate of the drawings of all members (other than the corporate member) for that accounting year."

The effect of this is that, after payment of notional interest on working capital, the defendants have first claim upon income profits for payment of their drawings in each year.

38 Clauses 9.3.3 and 9.3.4 provide for allocations of income profits to B the corporate member's distribution account in certain circumstances where the corporate member has borne additional costs or losses in the past. It is only after this series of priority allocations of income profits has been worked through that, under clause 9.3.5, any remaining income profits are allocated to the distribution accounts of the members according to the agreed proportions set out in the first schedule (60% for Holdings and 20% for each of the defendants).

C **39** Clause 9.5 provides: "Any income losses of the LLP in respect of an accounting year shall be allocated to the distribution account of the corporate member."

40 The overall effect of clause 9, therefore, is that, after allocation of notional interest on working capital, the individual members have priority claims in relation to the income profits of the LLP in any year, while the D corporate member bears any income losses. This is of significance because this distribution of risk in respect of profits and losses coloured the respective attitudes of the parties to what should be done in running the business of the LLP as it entered the difficult environment in the financial markets which arose in the course of 2008.

41 Clause 10 of the agreement provides for allocation of capital profits and capital losses. Clause 11 deals with drawings and withdrawals of E profits. It provides in relevant part as follows:

> "11.1 There shall be paid to each member (other than the corporate member) on the payment date in each month an amount of drawings (the 'drawings amount') in anticipation of that member's entitlement to income profits for the accounting year. The drawings amount in the case of each member shall be such amount as is determined by the board and F notified to that member in writing. The board shall have discretion from time to time to vary the drawings amount in respect either of all members or such members as the board may determine and notification of any such change shall be given by the board to the member(s) whose drawings amount has been changed . . ."
>
> "11.6 If the LLP accounts show that in the relevant accounting year G any member drew pursuant to the provisions of this clause 11 in excess of the amount credited to that member's distribution account for that accounting year then such excess shall not be debited against the distribution account of the relevant member but shall be allocated as a debit to the capital account of the corporate member."

42 I refer to the payments contemplated by clause 11.1 as the H defendants' "advance drawings". By letters dated 16 March 2005, the LLP notified each of the defendants that his advance drawings amount each month would be £12,500. It was agreed that these amounts were to be paid on the twenty-fifth of each month.

43 This part of the agreement and the letter are significant because they define the extent to which the defendants have a right to receive a monthly

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income from the LLP by way of advance drawings (amounting to a total of £150,000 per annum. for each defendant) taken as a priority charge against any income profit of the LLP and, absent such profit, to be taken out of the LLP's capital provided by F & C. By virtue of clause 18.4.11 of the agreement (set out below), any variation to the monthly advance drawings of the defendants requires the unanimous decision of the board of the LLP. It was the failure of the LLP to make payment of the monthly advance drawings due to the defendants on 25 February 2009 which led them to serve their first put option notices on that date ("the first put option notices").

44 Clause 12 of the agreement governs the transfer of members' interests in the LLP.

45 Clause 13 is headed "Members' obligations and duties". Clause 13.1 provides in relevant part as follows:

> "Each of the members (other than the corporate member) agrees that: 13.1.1 he shall devote his whole time and attention to the business, subject to the necessary time and attention which such member is required to devote to other business activities as agreed by the board, except during holiday leave (as provided for in clause 16), or following the occurrence of a withdrawal event; . . . 13.1.4 he will conduct himself in a proper and responsible manner and use his best skill and endeavour to promote the business; and 13.1.5 he will comply with all statutes, regulations, professional standards and other provisions as may from time to time govern the conduct of the business or be determined by the board as standards to be voluntarily applied by the LLP to the business."

46 Clause 13.6 provides: "Each member shall at all times show the utmost good faith to the LLP."

47 Clause 13.7 is set out at para 24 above. For discussion of the effect of this provision, see paras 325ff below.

48 Clause 15 is headed "Non-Disparagement". Clause 15.2 provides:

> "The corporate member agrees, on behalf of itself and all entities in the F & C group, that entities in the F & C group and their respective employees shall not at any time make, publish or communicate to any person or entity, including but not limited to persons who to the extent the corporate member is aware are or have at any time been clients or customers of the LLP or any affiliate of the LLP, or investors in funds or other investment vehicles whose assets are managed by the LLP or any affiliate of the LLP, any disparaging remarks, comments or statements concerning other members of the LLP, any officer, member, partner or employee of such other member or any fund or other investment vehicle whose assets are or have at any time been managed by the LLP or any affiliate of the LLP."

49 The agreement provides for there to be a management committee ("the mancom"), a board for the LLP ("the LLP board") and a compensation committee ("the compensation committee"). Clause 17 is headed "Management of the LLP". It provides in relevant part as follows:

> "17.1 The LLP shall have a management committee which, subject to any applicable legislation, including the Act [the LLPA], shall have responsibility for the management and control of the business and the affairs of the LLP and shall have the power and authority to do all things

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A necessary to carry out the purpose of the LLP. In particular, and without prejudice to the generality of the foregoing, the management committee shall be responsible for: 17.1.1 the determination of the day-to-day allocation of the resources of the LLP; 17.1.2 the monitoring of all aspects of business control and processes; 17.1.3 the proposing of annual budgets for the approval of the board; 17.1.4 the determination and monitoring of marketing strategies; 17.1.5 the determination and monitoring of risk B management strategies; 17.1.6 the determination and monitoring of due diligence processes; and 17.1.7 the determination and prioritisation of IT development requirements. 17.1.8 The management committee shall carry on and manage its responsibilities with the assistance from time to time of the members and of agents or employees of the LLP as they shall deem necessary. The members, other than in the capacity of members of C the management committee, shall have no right or authority to act for the LLP or to take any part in the management of the LLP or to vote on matters relating to the LLP other than as provided in [the LLPA] or as set forth in this agreement."

"17.3 The members of the management committee shall be Francois Barthelemy, Anthony Culligan and such other persons as may be D determined by the board from time to time. The board may at any time resolve to remove any person from the management committee or appoint any person to the management committee and such removal or appointment shall be effective on the date falling one month after the passing of such board resolution. The board shall also be responsible for appointing the chairman of the management committee. The chairman shall have the right to appoint an alternate for any meeting. In the event E that any person wishes to resign as a member of the management committee, such person shall give written notice of his wish to resign to the board and his resignation shall be effective on the date falling one month after the date of such written notice.

"17.4 The management committee shall meet regularly as determined by the chairman and in any event at least once every two months . . . All decisions of the management committee may be reached by a simple F majority and each member present . . . shall have a single vote. In the event of a tied vote, the chairman of the management committee shall have a casting vote or may escalate such vote to the board."

Mr Fernando Ribeiro ("Mr Ribeiro"), a senior manager within F & C, was the designated chairman of the mancom.

50 Clause 18 is headed "The board of members". It provides in relevant G part as follows:

"18.1 The LLP shall have a board which, notwithstanding clause 17, shall be responsible for the following matters (together with such other matters as are referred to elsewhere in this agreement as the responsibility of the board): 18.1.1 the determination of the strategic direction of the LLP and the making of any material change in the H general nature of the business of the LLP or the business of any subsidiary undertaking of the LLP from time to time; 18.1.2 the approval of the business plan of the LLP, including the marketing strategy of the LLP, the annual budget of the LLP and any subsequent increases in the annual budget of the LLP in excess of 10%; 18.1.3 the draw-down of

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working capital for the LLP from the corporate member; 18.1.4 the creation of, or entering into of management agreements with, any fund vehicles, accounts or investment products; 18.1.5 the service of a notice of removal on any member in accordance with clause 26.1; . . . 18.1.10 the making of any change in the location of the registered office or the office from which the business is principally carried on; . . . 18 1.13 the entering into of agreements with service providers where the total price payable under any such agreement is in excess of £50,000 and the termination of any such agreement; 18 1.14 any decision to sell or transfer the business, any part of the business or any asset of the LLP . . .

"18.2 The initial members of the board shall be the founder members [defendants] and such other persons, being not more than three in number, who are appointed by the corporate member as its board representatives. The board may at any time resolve to remove any person from the board or appoint any person to the board and such removal or appointment shall be effective on the date falling one month after the passing of such board resolution. The corporate member shall be responsible for appointing the chairman of the board . . .

"18.3 The board shall meet at least once every two months in the first year from the commencement date and at least once every three months thereafter. The corporate member shall be responsible for calling meetings of the board. At least one day's notice of a meeting of the board is required to be given to all board members and a meeting of the board shall be quorate if at least three members, including the chairman (or an alternate person designated by the chairman) and at least one of the founder members [defendants], are present, either in person or by video or telephone conference call. Subject to clause 18.4, all decisions of the board may be reached by a simple majority and each member present, whether in person or by video or telephone conference call, shall have a single vote. In the event of a tied vote, the chairman of the board shall have a casting vote. The chairman may appoint an alternate for any meeting and any member of the board may appoint the chairman, or the chairman's alternate, as its proxy. Unless otherwise notified, the chairman will be deemed to be the proxy for any board member who is not a founder member where such member is not present in person or by video or telephone conference and has not appointed another person as proxy.

18.4 Notwithstanding clause 18.3 or any other provisions of this agreement, the unanimous agreement of all members of the board (whether or not each such member is present at a particular meeting of the board) shall be required for the following matters: 18.4.1 any increase in the annual budget of the LLP in excess of 25%; 18.4.2 the service of a notice of removal on any member in accordance with clause 26.1 (provided that the agreement of the member on whom the notice of removal is to be served, if such member is a member of the board, shall not be required); . . . 18.4.7 the removal of a founder member [a defendant] from the board, management committee or compensation committee at a time when he remains a member . . . 18.4.11 variations to the monthly drawings of the founder members [the defendants] as per clause 11.1 . . ."

Mr Ribeiro was the designated chairman of the LLP board.

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A 51 At this stage attention should be drawn to two features of clause 18. First, an issue arises between the parties regarding the proper role and duties of members of the LLP board appointed by the corporate member as its "representatives" under clause 18.2. Pursuant to this provision, Holdings appointed Mr Ribeiro, Mr Patrick Johns ("Mr Johns") and Mr Peter Cole ("Mr Cole") as members of the LLP board. I address this issue at paras 204ff below. Secondly, clause 18.4 sets out important B protections for the members of the LLP and, in particular, for the defendants. By virtue of clause 18.4.2, neither Mr Culligan nor Mr Barthelemy could be removed as a member by notice served under clause 26.1 if the other did not consent to such a step. By virtue of clause 18.4.7, neither of them could be removed from the LLP board, mancom or compensation committee. By virtue of clause 18.4.11 their C existing monthly advance drawings of £12,500 each could not be varied without their consent. Clause 18.4.11 is an important provision for the analysis of the position when Mr Ribeiro stopped the payment of the defendants' advance drawings on 25 February 2009.

52 Clause 19 of the agreement set out restrictions on the powers of the LLP board in relation to certain matters for which the prior written consent of the corporate member would be required. These restrictions are D principally directed to protecting the value for F & C of its investment in the LLP and protecting the integrity of any consolidated audited accounts to be produced by the F & C group, which would include the accounts of the LLP as an F & C subsidiary. The restrictions included the following:

> "19.1.5 The adoption of the audited accounts in so far as the audited E accounts are the accounts of the LLP and the approval of the audited accounts by any other LLP group entity in so far as the audited accounts are the accounts of such other LLP group entity . . . 19 1.10 The sale of any LLP group entity [a term which included the LLP] or any material part of the business of any LLP group entity . . ."

53 Clause 20 of the agreement made provision for the compensation F committee to deal with remuneration for employees of the LLP. The members of the compensation committee comprised the defendants, Mr Ribeiro and Mr Cole (as "the head of the human resources department of the corporate member", i e, in practice, of the F & C group). Mr Cole was the chairman of this committee, but clause 20.3 of the agreement provided that Mr Ribeiro as chairman of the LLP board would have the casting vote on the compensation committee as well as on the LLP board and the G mancom.

54 Clause 21.1 is headed "Exculpation". It provides:

> "The members of the management committee, the board and the compensation committee shall not be liable, responsible or accountable in damages or otherwise to the LLP or to any of the members, their successors, or assigns, except by reason of acts or omissions due to bad H faith, negligence or wilful default, or for not having acted in good faith in the reasonable belief that its or their actions were in, or not opposed to, the best interests of the LLP."

55 Clause 22 makes provision for "meetings of members" in these terms:

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"22.1 All decisions which are required by [the LLPA] to be reached by a meeting of members shall be determined at a meeting of the members held in accordance with the provisions of this clause 22.

"22.2 Meetings of the members shall be convened by the board as and when it believes such a meeting to be necessary in accordance with the requirements of [the LLPA] or any other statutory provision.

"22.3 Not less than 15 calendar days notice of any such meeting shall be given to all members, provided that any resolution passed at a meeting of which shorter notice or no notice has been given shall be deemed to have been duly passed if it is afterwards ratified by the required majority of the members at a meeting of members which has been duly convened.

"22.4 Meetings of the members shall be chaired by such member as shall be appointed for the purpose by those present at the meeting.

"22.5 The quorum for a meeting of members shall be three members, provided the corporate member is represented, present in person or by video or telephone conferencing at the time the relevant business is transacted, provided that any resolution passed at an inquorate meeting shall be deemed to have been duly passed if it is afterwards ratified by the required majority of the members at a quorate meeting of members duly convened.

"22.6 Each member shall be entitled to cast the percentage of the voting rights as shall be set against their name in the first schedule (as amended from time to time) and votes shall not be cast on the basis of a show of hands.

"22.7 Save as required by law, all decisions at a meeting of members shall be taken by a simple majority."

56 Clause 22.6 refers to the respective voting rights for Holdings (60%), Mr Barthelemy (20%) and Mr Culligan (20%) set out in the first schedule to the agreement. It indicates that members in a members' meeting are entitled to vote on the basis of the extent of their respective interests in the LLP (the same division of interests between the defendants and Holdings in the first schedule also governs profit entitlements under clause 9.3.5 and capital entitlements under clause 10.1). In my view, the parties to the agreement intended a meeting of members under clause 22 to operate in a way similar to a general meeting of members of a Companies Act company, where votes may be cast according to the extent of the shareholdings of the respective shareholders in the company: see paras 207–216 below. I was informed by Miss Newman in her closing oral submissions that it may be that there is no statutory requirement which makes a meeting of members "necessary", to use the language of clause 22.2. No one had raised this question previously in the trial; nothing appeared to turn on this point so far as her submissions were concerned; and in light of the way in which events developed I do not think this is a significant matter.

57 Clause 26 deals with the removal of members. It provides in relevant part as follows:

"26.1 Subject to the provisions of clause 18.4, the board shall have the absolute right to remove any member from the LLP by serving a notice of removal on that member if that member: . . . 26.1.2 by his actions or omissions brings the name or reputation of the LLP into serious dispute or seriously prejudices the interests of the business; . . . 26.1.4 fails to

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A comply with the rules, regulations or decisions of any appropriate regulatory or self regulating organisation to whose requirements the LLP is for the time being subject; 26.1.5 ceases to be approved by the Financial Services Authority as a person who can undertake any controlled function; . . . 26.1.7 commits any serious breach of the LLP's compliance and procedures manual or any policies or procedures adopted or amended from time to time by the LLP; 26.1.8 misuses any confidential information relating to the LLP or any customer or client thereof; 26.1.9 fails to comply with the principles and code of practice for approved persons and the rules of the Financial Services Authority; 26.1.10 otherwise acts in contravention of any law relating to the conduct by the LLP of the business which has a materially adverse or prejudicial impact on the affairs or prospects of the business or the reputation of the LLP; . . . 26.1.12 commits any serious breach, or continues to commit any repeated or continual breach after having been warned in respect thereof, of any of his obligations under this agreement.

"26.2 Subject to clause 27.2, a notice of removal shall be of immediate effect and the member in question shall immediately cease to be a member of the LLP."

The opening words of clause 26.1 should be noted. The LLP board may not remove one of the defendants as a member if the other defendant votes against that course: see clause 18.4.2.

58 Clauses 27 and 28 contain provisions governing the situation which arises upon death, incapacitation, resignation or removal of a member. Clause 29 governs the winding up of the LLP. Clause 33 provides that the agreement is governed by English law and that the courts of England are to have exclusive jurisdiction in relation to any dispute arising out of or in connection with the agreement. Clause 34.1 sets out an "entire agreement" provision, as follows:

"This agreement constitutes the entire understanding between the parties relating to the LLP and supersedes all prior understandings, arrangements, representations, proposals or communications between the parties, whether written or oral. Both parties [sic] acknowledge and accept that they have not relied on any such understandings, arrangements, representations, proposals or communications in entering into this agreement."

59 The fourth schedule to the agreement ("the fourth schedule") contains a "put and call option agreement". The fourth schedule sets out elaborate provisions for options as between the members for them to sell their interests in the LLP to other members or to buy the interests of other members. The principal features of the option regime may be summarised as follows.

60 Para 1.1 of the fourth schedule provides:

"1.1 The corporate member will grant each of Francois Barthelemy and Anthony Culligan an option (the 'put option'), exercisable, subject to clause 1.6 below, in each case at any time within the period of three months from the fifth anniversary of the commencement date and within each period of three months following every second subsequent anniversary of the commencement date (in each case, a 'put option

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period'), to sell the whole (but not part only) of his interest in the LLP to the corporate member for a consideration calculated in accordance with clause 1.2 below (the 'put option price'). The corporate member's obligation to pay the put option price in accordance with this option agreement shall be guaranteed by [F & C plc]."

61 Para 1.2 sets out the formula for the calculation of the put option price. The relevant parameters in the calculation under that formula (subject to certain other factors) are that the price should be calculated by applying a multiplier to an amount

"that is calculated by dividing by two the sum of the income profit from each of the two years in which the income profits were the greatest, from the periods comprising the accounting year in which the put option is exercised, the two preceding accounting years and the following accounting year."

The multiplier in the case of the put option defined in para 1.1—which arises without fault on the part of any party—is six.

62 Under para 1.5, upon exercise of a put option under para 1.1, the corporate member has the right to notify the other members within 60 days that it intends to seek a purchaser for the LLP's business. If such a contract of sale is then entered into within 12 months (with completion to take place within a further 12-month period), the exercise of the put option lapses and the members are remitted to their rights to share in the capital realisation upon sale of the business. This provision does not apply, however, where the defendants have a right to exercise a put option under para 1.7 of the fourth schedule.

63 According to para 1.6, if there is a change of control of the corporate member it may declare that as a trigger event which can have the effect of postponing the right of the individual members to exercise their put option for a period. In fact, such an event occurred in July 2009, which led Holdings to serve a notice on the defendants to postpone their put option rights for a period. Nothing in this judgment turns on this having occurred.

64 Para 1.7 of the fourth schedule is of central importance in this case. It provides:

"Francois Barthelemy and Anthony Culligan shall also each have the right to exercise the put option at any time within the period of three months following a discovery by either of them that the corporate member is in breach of any provision of this agreement in a manner that amounts to gross negligence or gross misconduct (and where such breach does not arise from an administrative error) and which has a materially adverse effect upon the LLP or upon either of them, and in the event of an exercise of the put option in these circumstances the provisions of clauses 1.1 and 1.2 shall apply, provided that applying the provisions of those clauses in these circumstances M [the multiplier, M] shall be eight (and not six) and, for the avoidance of doubt, the provisions of clauses 1.3, 1.4 and 1.5 shall not apply."

65 This provision confers a right upon the defendants, where there has been a breach of the agreement by Holdings of the specified character, to require Holdings to buy out their respective interests in the LLP at a preferential profit multiplier of eight, rather than a multiplier of six as in

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A relation to the five-year put option contained in para 1.1. The multiplier of eight corresponds to that provided for in relation to the exercise by Holdings of a call option under paras 1.9 and 1.10 of the fourth schedule, according to which Holdings is entitled at any time to require the defendants to sell their interests in the LLP to it at that preferential price formula.

66 In the course of the dispute between the parties, the defendants gave notice to exercise put options under para 1.7 of the fourth schedule on three B occasions: on 25 February 2009 (after non-payment by the LLP of their monthly drawings due at that time, and referring to clause 11.1 and clause 13.6 of the agreement); on 22 May 2009 (relying in addition on further complaints of breach by Holdings of clause 13.6 of the agreement, of failure to have accounts drawn up as required by clauses 6.1 and 6.3 of the agreement and of failure to provide general marketing support as required C by clause 13.7 of the agreement); and on 24 December 2009 (relying in addition on complaints regarding Holdings' conduct in sending a report to the FSA regarding alleged misconduct by the defendants relating to their regulatory responsibilities).

The legislative framework

D **67** The LLPA introduced the limited liability partnership as a new form of legal entity with corporate personality. Section 1 provides, in relevant part, as follows:

> "(1) There shall be a new form of legal entity to be known as a limited liability partnership.
> "(2) A limited liability partnership is a body corporate (with legal E personality separate from that of its members) which is formed by being incorporated under this Act . . .
> "(3) A limited liability partnership has unlimited capacity.
> "(4) The members of a limited liability partnership have such liability to contribute to its assets in the event of its being wound up as is provided for by virtue of this Act.
> "(5) Accordingly, except as far as otherwise provided by this Act or any F other enactment, the law relating to partnerships does not apply to a limited liability partnership."

68 Section 2(1) provides, inter alia, that for a limited liability partnership to be incorporated "two or more persons associated for carrying on a lawful business with a view to profit must have subscribed their names to an incorporation document". On the incorporation of a limited liability G partnership those persons are its members: section 4(1).

69 Section 5(1) provides:

> "5 *Relationship of members etc*
> "(1) Except as far as otherwise provided by this Act or any other enactment, the mutual rights and duties of the members of a limited liability partnership, and the mutual rights and duties of a limited liability H partnership and its members, shall be governed— (a) by agreement between the members, or between the limited liability partnership and its members, or (b) in the absence of agreement as to any matter, by any provision made in relation to that matter by regulations under section 15(c)."

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70 Section 6 provides in relevant part as follows: A

"6 *Members as agents*

"(1) Every member of a limited liability partnership is the agent of the limited liability partnership.

"(2) But a limited liability partnership is not bound by anything done by a member in dealing with a person if— (a) the member in fact has no authority to act for the limited liability partnership by doing that thing, B and (b) the person knows that he has no authority or does not know or believe him to be a member of the limited liability partnership."

71 Sections 14 and 15 provide that regulations may be made so as, inter alia, to apply to limited liability partnerships any law relating to companies or the insolvency thereof with appropriate modifications. Section 16(1) provides: "Regulations may make in any enactment such amendments or C repeals as appear appropriate in consequence of this Act or regulations made under it." Section 17 makes general provision for the making of regulations, including regulations to make "any appropriate consequential, incidental, supplementary or transitional provisions or savings": section 17(3)(a).

72 The Limited Liability Partnerships Regulations 2001 (SI 2001/1090) ("the 2001 Regulations") were made on 19 March 2001 under these provisions. They came into effect on 6 April 2001. D

73 Regulation 5 of the 2001 Regulations makes provision for the application to limited liability partnerships of various parts of the Insolvency Act 1986, including section 122(1)(g) (so that a limited liability partnership may be wound up if the court is of the opinion that it is "just and equitable" that it should be wound up).

74 Regulation 7 provides: E

"7 *Default provision for limited liability partnerships*

"The mutual rights and duties of the members and the mutual rights and duties of the limited liability partnership and the members shall be determined, subject to the provisions of the general law and to the terms of any limited liability partnership agreement, by the following rules:

"(1) All the members of a limited liability partnership are entitled to F share equally in the capital and profits of the limited liability partnership.

"(2) The limited liability partnership must indemnify each member in respect of payments made and personal liabilities incurred by him— (a) in the ordinary and proper conduct of the business of the limited liability partnership; or (b) in or about anything necessarily done for the preservation of the business or property of the limited liability partnership. G

"(3) Every member may take part in the management of the limited liability partnership.

"(4) No member shall be entitled to remuneration for acting in the business or management of the limited liability partnership.

"(5) No person may be introduced as a member or voluntarily assign an interest in a limited liability partnership without the consent of all H existing members.

"(6) Any difference arising as to ordinary matters connected with the business of the limited liability partnership may be decided by a majority of the members, but no change may be made in the nature of the business of the limited liability partnership without the consent of all the members.

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A "(7) The books and records of the limited liability partnership are to be made available for inspection at the registered office of the limited liability partnership or at such other place as the members think fit and every member of the limited liability partnership may when he thinks fit have access to and inspect and copy any of them.

"(8) Each member shall render true accounts and full information of all things affecting the limited liability partnership to any member or his B legal representatives.

"(9) If a member, without the consent of the limited liability partnership, carries on any business of the same nature as and competing with the limited liability partnership, he must account for and pay over to the limited liability partnership all profits made by him in that business.

"(10) Every member must account to the limited liability partnership C for any benefit derived by him without the consent of the limited liability partnership from any transaction concerning the limited liability partnership, or from any use by him of the property of the limited liability partnership, name or business connection."

75 Section 994(1) of the Companies Act 2006 provides:

D "*Petition by company member*

"(1) A member of a company may apply to the court by petition for an order under this Part on the ground— (a) that the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or of some part of its members (including at least himself), or (b) that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or E would be so prejudicial."

76 If a complaint under section 994 is made out, the court has wide remedial powers under section 996. Regulation 4 of and Schedule 2 to the 2001 Regulations made provision for the application to limited liability partnerships of provisions of the Companies Act 1985, including sections 459 to 461 (now sections 994 to 996 of the Companies Act 2006) with F certain amendments. By virtue of Regulation 4 of and Schedule 2 to the 2001 Regulations the parties to an agreement creating a limited liability partnership were entitled to agree to opt out of the Companies Act unfair prejudice provisions, but the parties to the agreement did not do this. Accordingly, sections 994 to 996 apply to the LLP in the same way as they would to a company. This result is now, as from 1 October 2009, achieved by regulation 48 of the Limited Liability Partnerships (Application of G Companies Act 2006) Regulations 2009 (SI 2009/1804), which have in this respect replaced the 2001 Regulations.

77 The defendants and Holdings, in the petition and the cross-petition respectively, each seek to rely on section 994(1) as it has effect in relation to the LLP as a limited liability partnership. The approach to be adopted by the court in assessing the respective claims of unfair prejudice under H section 994(1) was broadly agreed. The leading authority is *O'Neill v Phillips* [1999] 1 WLR 1092, particularly the speech of Lord Hoffmann at pp 1098–1102. Lord Hoffmann said, at pp 1098–1099:

"Although fairness is a notion which can be applied to all kinds of activities, its content will depend upon the context in which it is being

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used. Conduct which is perfectly fair between competing businessmen may not be fair between members of a family. In some sports it may require, at best, observance of the rules, in others ('it's not cricket') it may be unfair in some circumstances to take advantage of them. All is said to be fair in love and war. So the context and background are very important.

"In the case of section 459, the background has the following two features. First, a company is an association of persons for an economic purpose, usually entered into with legal advice and some degree of formality. The terms of the association are contained in the articles of association and sometimes in collateral agreements between the shareholders. Thus the manner in which the affairs of the company may be conducted is closely regulated by rules to which the shareholders have agreed. Secondly, company law has developed seamlessly from the law of partnership, which was treated by equity, like the Roman societas, as a contract of good faith. One of the traditional roles of equity, as a separate jurisdiction, was to restrain the exercise of strict legal rights in certain relationships in which it considered that this would be contrary to good faith. These principles have, with appropriate modification, been carried over into company law.

"The first of these two features leads to the conclusion that a member of a company will not ordinarily be entitled to complain of unfairness unless there has been some breach of the terms on which he agreed that the affairs of the company should be conducted. But the second leads to the conclusion that there will be cases in which equitable considerations make it unfair for those conducting the affairs of the company to rely upon their strict legal powers. Thus unfairness may consist in a breach of the rules or in using the rules in a manner which equity would regard as contrary to good faith."

78 The primary focus, accordingly, is on whether the affairs of the LLP have been conducted in the manner agreed between the parties, or not. In this case, the defendants' complaints under section 994 are directed against both Holdings and F & C plc. F & C plc was not a party to the agreement and played no direct role in the management of the LLP. Even if the affairs of the LLP had been conducted in a manner unfairly prejudicial to the interests of the defendants, F & C plc denied that it was responsible for such conduct and denied that it could be held liable to them under section 994(1). I address this issue of the responsibility of F & C plc at paras 1094ff below.

79 At this point in the judgment it is also convenient to set out section 1(1) of the Computer Misuse Act 1990 and section 55 of the Data Protection Act 1998, which are of relevance to the dispute. Section 1(1) of the Computer Misuse Act 1990, as amended by section 35 of the Police and Justice Act 2006, provides:

"A person is guilty of an offence if— (a) he causes a computer to perform any function with intent to secure access to any program or data held in any computer, [or to enable any such access to be secured]; (b) the access he intends to secure, [or to enable to be secured,] is unauthorised; and (c) he knows at the time when he causes the computer to perform the function that that is the case."

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A **80** Section 55 of the Data Protection Act 1998 provides in relevant part as follows:

> "(1) A person must not knowingly or recklessly, without the consent of the data controller— (a) obtain or disclose personal data or the information contained in personal data . . .
>
> "(2) Subsection (1) does not apply to a person who shows . . . (b) that B he acted in the reasonable belief that he had in law the right to obtain or disclose the data or information . . ."

Section 1(1) of the 1998 Act defines "data controller" to mean "a person who (either alone or jointly or in common with other persons) determines the purposes for which and the manner in which any personal data are, or are to be, processed".

C

[In paras 81–158 his Lordship considered the service agreement entered into between the parties, the F & C group IT policies, the Financial Services Authority regulatory content and the funds managed by the LLP. He continued:]

Market disruption in 2008/09, the reaction of the partners in the LLP to the D threat to the LLP's business and the development of the dispute: general overview

159 In late 2008 and 2009, global equity and bond markets suffered huge losses as investors panicked in reaction to a major "credit crunch", particularly after Lehman Brothers went into administration on 15 September 2008.

E **160** The great majority of hedge funds and FoHFs sustained severe losses over the same period. The LLP's funds were no exception. They struggled to show positive returns from about mid-2007 onwards and suffered major losses in 2008.

161 The US dollar denominated balanced fund showed modest gains in 2008 in terms of net asset value ("NAV") per share in February, April and May and significant losses in January, March and June to December as F follows: January −2·01%, February +0·84%, March −3·12%, April +0·85%, May +1·26%, June −2·72%, July −1·53%, August −0·4%, September −8%, October −5·9%, November −2·87%, December −1·35%. The performance of the US dollar denominated select fund in terms of NAV per share in 2008 showed a similar pattern, with the losses and gains magnified by virtue of the effect of the leveraging of the select fund, as follows: January −4·74%, G February +1·25%, March −5·57%, April +1·25%, May +2%, June −5·06%, July −3·02%, August −0·98%, September −16·66%, October −13·66%, November −7·58%, December −2·52%.

162 The total reduction in NAV per share for the US dollar denominated balanced fund in the course of 2008 was −22·61%. The total reduction in NAV per share for the US dollar denominated select fund for that year was −44·42%. The total reduction for the Euro denominated select H fund in 2008 (the version of the select fund in which many of the Dutch clients had invested) was even worse, at −50·9%. These results were produced by funds which were supposed to be absolute return funds with an objective of generating positive returns of between 5% and 13%. Investors in the funds became dissatisfied with their performance and placed redemption

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notices to withdraw their funds from them, sharply reducing the AUM of the funds.

163 This is the important backdrop to the dispute between the parties. A major part of the dispute stemmed from the different views of the defendants and F & C about how the LLP should react to the LLP's deteriorating performance in terms of the losses sustained by its hedge fund portfolio, the reduction in its AUM and, consequent upon both of these, its loss of fee income (both management fees and performance fees), such that it faced the prospect of potentially losing money for the first time in 2009.

164 F & C, represented in particular by Mr Ribeiro on the LLP board and mancom, wished to see significant cuts in the budget of the LLP for 2009, including several redundancies. F & C regarded the LLP's funds as practically unsellable in the extreme market conditions in late 2008 and early 2009, both because of a shift in general sentiment among its clients (which switched at this time to becoming markedly more averse to risk and with a heightened appetite for liquidity and cash which made hedge fund investments unattractive for them) and because of the poor performance figures for the LLP's funds. F & C's attitude was that the appropriate approach for the LLP was for it to hunker down while the economic storm passed, spend time rebuilding its investment track record by securing positive returns for its FoHF products over a period and then, on the basis of that restored track record and an eventual return of markets to something approaching normality, to return to marketing the products in an active way so as to build the AUM up once again.

165 On this strategy, since fee income would be down for a period and activity by the LLP would (F & C thought) be comparatively reduced, F & C considered it made sense for the LLP to budget to cut its costs significantly for 2009, including in particular by reducing the number of staff. In an asset management business such as the LLP staff costs are typically one of the greatest cost elements, so to F & C's way of thinking it seemed that staff reductions should be a natural way of reducing the LLP's costs for a period while it took steps to rebuild its investment performance.

166 In my view, F & C's attitude was also influenced by the fact that under the terms of the agreement, if the LLP sustained losses, it would be F & C which would bear the brunt of that economic cost. This was because the defendants' drawings in respect of the LLP's profits were protected as to £150,000 per annum each under clauses 9.3.2 and 11.1 of the agreement (even if the LLP made a loss), and where losses were sustained by the LLP, they would, in the first instance, be drawn down against the capital of the LLP (the bulk of which had been provided by F & C and which F & C was obliged to maintain at a satisfactory level for regulatory purposes under clause 8.3 of the agreement). The cost to F & C might be recouped against profits in later years by virtue of the operation of the provisions on the allocation of profits set out in clause 9.3 of the agreement, but that would, of course, depend on sufficient profits being made in those later years.

167 However, in my judgment, the business strategy favoured by Mr Ribeiro and F & C was a reasonable and legitimate one, proposed by F & C in good faith. The way in which Mr Ribeiro and F & C were influenced in forming their views by F & C's financial interests was something which the agreement contemplated could properly happen: Mr Ribeiro and the F & C representatives on the LLP board were not to be

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A disqualified from acting by reason of the fact that F & C's commercial interests were engaged by a wide range of business judgments which would have to be made by the LLP board and mancom from time to time. The fact that they favoured a strategy which tended to accord with F & C's own commercial interests in relation to the operation of the agreement does not undermine the assessment that it was a reasonable and legitimate strategy for them to press for. Businessmen's views as to what it is best for a business B to do quite often naturally reflect what they think is in their own best interests. Their interests colour the way they see the world, but that does not necessarily mean that their assessment of what is the best way forward is not a genuine, bona fide assessment.

168 Similar points can be made in relation to the defendants' reaction to the considerable stresses to which the business of the LLP was subject in late C 2008 and 2009. They genuinely and strongly believed that it would be detrimental to the business of the LLP to cut staff. They considered that the LLP still had marketable products which (although they had performed very badly in absolute terms in 2008) had not performed particularly badly when compared with other F & C investment funds, nor when compared with other hedge fund or FoHF businesses (whose results had also generally been D very poor during the extreme market circumstances from late 2008). They believed that they needed to retain staff to ensure that they had a credible fund management team to attract business when markets recovered, as they felt they would do. They were prepared to look at other ways of saving costs in the LLP's business (which, for various reasons, were not attractive to F & C) and wished to expand the LLP's business to generate revenue by developing new products (which F & C regarded as too costly and E speculative to launch).

169 It informed the defendants' assessment on these points that any losses which their preferred approach might create would be borne primarily by F & C, given the way in which the agreement operated. This made them more willing than Mr Ribeiro and F & C to speculate that there would be an upswing in F & C's revenues in 2009 and to think that the LLP should take the risk that that might not prove to be the case.

F 170 As with F & C's proposed approach, this was a reasonable and legitimate strategy for the defendants to seek to promote. In a way similar to Mr Ribeiro and F & C, their views about the best way forward for the LLP in difficult circumstances were naturally influenced by their own commercial interests so far as concerned the operation of the agreement, but this was something which the agreement contemplated could properly happen. Like G Mr Ribeiro and the F & C representatives in relation to the financial interests of F & C, they were not disqualified from participating in decision-making by the LLP board and mancom by the fact that their personal financial interests were engaged from time to time in relation to such decision-making. As with Mr Ribeiro and the F & C representatives, that did not prevent their views from from being genuine and honest views about the best way forward for the LLP. As with F & C and its representatives, H I find that the business strategy of the defendants for the LLP was proposed by them in good faith, genuinely believing it to be in the best interests of the LLP.

171 Unfortunately, although both sides held their respective views in good faith and for genuine and legitimate reasons, each side became

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increasingly frustrated by the other and—informed by an acute consciousness of how the business strategy proposed by the other appeared to favour that other's own best commercial interests under the agreement—increasingly distrustful of the motives and good faith of the other. F & C felt that the defendants (who, F & C emphasised, were part owners of the business) were unreasonable in refusing to face up to the need for significant cost savings at the LLP which, in F & C's view, realistically meant that staff should be cut. The defendants felt that F & C was unreasonable in pressing for such a course (which they believed would be profoundly damaging to the LLP's business prospects) and in blocking their proposals for new products for the LLP. They became deeply suspicious that F & C had decided upon a strategy of driving the LLP out of business (so as to avoid having to buy out their interests under the call option provisions in paras 1.9 and 1.10 of the fourth schedule), pursued by means which included arranging for F & C clients to withdraw their funds from the LLP's FoHF products and failing to market those products to persuade those clients to stay in the funds or to attract new investors.

172 The defendants also came to believe that there was a particular reluctance by F & C to market the LLP's products to its client base because F & C's marketing team in F & C Netherlands BV ("F & C Netherlands"), which had promoted the LLP's funds to clients of F & C in the Netherlands and persuaded them to invest in them, felt that to market the products actively in 2008 would or might expose them to complaints from clients that the products had been sold to them in the first place on the basis of misleading information about their risk and return profile.

173 I find that the defendants' suspicions in this regard were misplaced. F & C Netherlands had not mis-sold the LLP's products to clients. There was no belief or concern on the part of the marketing team at F & C Netherlands that there had been any mis-selling of the products by them and the fact that they did not, in late 2008 and early 2009, feel able to press F & C's clients in the Netherlands to invest or remain invested in the LLP's products was due wholly to their clients' distraught reactions to the general extreme fall in the values of all their investments, leading to a strong desire at the time to get out of risky products and a strong desire (backed up by domestic regulatory requirements) to invest in liquid assets. The marketing team at F & C Netherlands were in the middle of a storm of client anguish and recrimination as a result of the massive failure of investments to match their expectations and the catastrophic fall in the value of those investments, where their investments in the LLP's select fund had done particularly badly against an expectation that the fund would provide absolute returns. For entirely legitimate reasons, the F & C Netherlands marketing team did not consider it an opportune time at which to try to persuade clients to invest or remain invested in a comparatively unfamiliar, illiquid and risky set of FoHF products on offer from the LLP.

174 I also find that the defendants' belief that F & C decided on a strategy to destroy or undermine the LLP's business and to close it down was misplaced. F & C did not wish to see the LLP destroyed. It wanted it to hunker down while the storm passed, cut its costs and then re-emerge to profitability at some point in the future when it was once again possible to market its products successfully. Contrary to the defendants' assertions,

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A F & C did not illegitimately block the development of new business ideas by the LLP.

175 The dispute between the parties arose out of the mutual distrust and suspicion on each side which grew and came increasingly to poison relations between them. F & C began to look at ways in which it could exert pressure on the defendants in order to force them to see sense (as F & C looked at it) and conform to the business strategy favoured by F & C. It was B as a result of efforts by F & C to do this, in particular by threatening to cut off the defendants' income to which they were entitled under the agreement, which led the defendants to serve the first put option notices on 25 February 2009, as I set out in detail below. I find that in acting as it did, F & C breached the agreement in important respects such that the defendants were entitled to serve those notices.

C 176 For their part, their trust in F & C severely undermined by its actions and their suspicions fuelled by its breach of the agreement, the defendants accused F & C of deliberately seeking to damage or destroy the LLP's business. From the end of February 2009, relations between the partners in the LLP were very tense indeed.

177 The defendants make further complaints about the conduct of Holdings in the period after February 2009, and maintain that their later put D option notices served on 22 May 2009 ("the second put option notices") and 24 December 2009 ("the third put option notices") were also valid notices under the terms of the agreement. I find that second put option notices were valid and justified by further breaches of the agreement by Holdings after February 2009, but there was no further distinct breach of the agreement after 22 May 2009 to provide discrete justification for the third put option E notices.

178 The defendants also complain that F & C plc and Holdings were responsible for the conduct of the affairs of the LLP in a manner unfairly prejudicial to them, contrary to section 994. I find that this complaint is made out by the defendants. As part of this complaint, alongside matters referred to above, the defendants complain about an investigation carried out from mid-2009 by Mr Mackay in relation to their having covert access F to staff e-mails and setting up a new, discrete IT network for the LLP in December 2008, and a report produced by him which was critical of them which was used as a basis for expelling them from their executive roles in the management of the LLP's business in late 2009 and was sent to the FSA. The defendants say that Mr Mackay's investigation and report were inadequate and unfair to them, and that the report was acted upon and sent to the FSA G without them having a fair opportunity to respond to it first. I have come to the conclusion that this part of the defendants' case is made out. Although Mr Mackay was entitled to commence an investigation as he did, it was not conducted fairly and the LLP should not have treated his report as final, but rather as a statement of case against the defendants to which they should have been permitted to respond before it was acted on and sent to the FSA. The defendants did in fact have good answers to the criticisms of them in the H report.

179 It may be that the defendants' success in their claim under section 994 does not ultimately assist them, as it is open to question whether they would be entitled to or could achieve a higher price for their interests to be purchased by F & C under sections 994 to 996 than the enhanced price

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payable as a result of the successful exercise of their put options. But these are matters for debate at a further hearing.

180 The cross-petition was issued by F & C on 28 April 2010. In it, F & C put forward its own complaints that the defendants had conducted the affairs of the LLP in such a way as to cause unfair prejudice to Holdings, as co-owner of the business, contrary to section 994. The main contentions of F & C in the cross-petition are that the LLP was set up on the basis of a relationship of mutual trust and confidence between the defendants and Holdings and on the basis of certain understandings between them. F & C contends that Mr Culligan and Mr Barthelemy became antagonistic and confrontational and refused to accept decisions of the LLP board and mancom in breach of that relationship and such undertakings; that they caused the LLP to change to an external e-mail service provider without properly informing or getting approval from the LLP Board; that they caused the LLP to set up a new IT infrastructure in December 2008, creating a serious security risk to F & C and the LLP, and did not adopt an adequate BCP arrangement; that they served put option notices without proper justification which made the business of the LLP unviable; that they covertly accessed the e-mails of Mr Tilson and Nicholas Sparks ("Mr Sparks", the risk manager of the LLP) to further their own interests in the litigation and without proper justification; that Mr Culligan improperly obstructed the work of Mr Mackay, as compliance officer for the LLP, in investigating and reporting on the covert monitoring of staff e-mails and the LLP's adoption of new IT arrangements; and that Mr Culligan and Mr Barthelemy avoided board meetings of the LLP and so impeded the conduct of its affairs.

181 For the most part I do not accept F & C's contentions in the cross-petition. The respective rights and obligations of the parties in relation to the LLP were set out in the agreement. The agreement is a carefully negotiated contract setting out an elaborate regime for the governance of the LLP. In my judgment, there is no indication that the parties intended to accept any extra obligations towards each other by way of addition to the terms of that agreement such as to treat the foundation of their relationship as one of mutual trust and confidence in the sense pleaded by F & C.

182 In late 2008 and 2009, the conduct of the affairs of the LLP did become far more confrontational and antagonistic, but that did not involve any breach of duty by the defendants. It was the natural consequence of each side adopting different views of the appropriate strategy for the LLP to adopt in the conditions of considerable market dislocation and stress on the LLP's business at that time and seeking forcefully to promote their competing views, and also of F & C engaging in conduct which breached the agreement (particularly by taking steps to close off income for the defendants), to which the defendants legitimately reacted with anger and distrust. Responsibility for the antagonism and confrontation in the management of the LLP lies primarily with F & C rather than with the defendants.

183 The adoption of an external e-mail service provider for the LLP was within the authority of Mr Culligan, as managing partner of the LLP, was not concealed from the LLP Board or mancom and, in any event, occasioned no significant relevant prejudice to F & C, Holdings or the LLP.

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A 184 The defendants had proper justification for serving their first and second put option notices, and the service of their third put option notices had no relevant impact on events.

185 They had proper authority and sufficient justification to engage in covert monitoring of the e-mails of Mr Sparks and Mr Tilson. They acted out of genuine concern for the interests of the LLP and not out of a misplaced selfish desire to further their own interests in the litigation. Although they B were uncooperative in their attitude to Mr Mackay in his investigation, there was good reason for that: he made exorbitant claims regarding his own authority to investigate, gave no clear explanation and justification for what he was doing in his investigation, and produced a report which was seriously defective and unfair to them. Moreover, the defendants' attitude did not cause significant prejudice to F & C or the LLP.

C 186 The defendants had legitimate reason to avoid board meetings of the LLP at which F & C proposed to remove them as partners of the LLP, and they made it clear they would attend to deal with other matters and would cooperate in the proper management of the LLP, which in fact they did.

187 There is force in F & C's complaints about the setting up of a separate IT infrastructure for the LLP in December 2008 which bypassed F & C's IT network security measures and thereby created risk for both the D LLP's and F & C's IT systems. So far as concerned the LLP's own business, the risk created was within acceptable and legitimate bounds. However, the risk created for F & C's IT system was, through inadvertence, outside what was acceptable—but this involved placing the LLP in breach of its obligations to F & C under article 3.1 of the service agreement rather than conduct of the LLP's own affairs in a manner unfairly prejudicial to the E interests of its members. By virtue of article 3.5 of the service agreement, this breach of article 3.1 did not expose the LLP to any damages claim by F & C and the change in the LLP's IT arrangements did not cause any significant prejudice to Holdings in the conduct of the affairs of the LLP. The fault in setting up such a system was Mr Culligan's alone (Mr Barthelemy had no IT knowledge or expertise and was entitled to rely on the combined F knowledge and expertise in that area of Mr Culligan and Nicholas Pennington—"Mr Pennington"—the LLP's IT manager), and merely constituted a failure to fulfil his management responsibilities to a satisfactory standard in this one limited respect. Mr Culligan acted from proper motives and without intention to harm the LLP or F & C. This isolated lapse below the standard of proper diligence to be expected of someone in Mr Culligan's position is not sufficient to qualify as conduct occasioning significant G prejudice to Holdings in relation to the conduct of the affairs of the LLP and does not justify the grant of any relief under section 994.

188 The net result of the claims and counterclaims, therefore, is that the defendants succeed in the Part 7 proceedings and are entitled to have their interests in the LLP bought out by F & C, pursuant to their valid exercise of the put options under para 1.7 of the fourth schedule; the defendants fail in H their wider claim under the petition that F & C conspired to close the LLP, but succeed in other parts of their complaint in the petition; and Holdings fails in its claims under the cross-petition.

[In paras 189–202 his Lordship assessed the evidence given by the witnesses. He continued:]

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203 I turn now to examine some legal issues where the parties made opposing submissions. Aspects of these issues are relevant to the question whether Holdings acted in breach of the agreement so as to give rise to an entitlement on the part of the defendants to serve put option notices under para 1.7 of the fourth schedule and also to the question whether there was a departure from the standards of behaviour which Holdings and the defendants were entitled to expect in the conduct of the affairs of the LLP such as to satisfy the requirements of section 994.

Were the representatives of Holdings on the LLP board agents of Holdings?

204 The defendants submitted that the three "representatives" of Holdings appointed under clause 18.2 of the agreement to sit on the LLP Board (Mr Ribeiro, Mr Cole and Mr Johns) were, by virtue of their appointment under that provision, the agents of Holdings when acting in their capacity as LLP board members. The main object of this submission was to enable the defendants to hold Holdings directly responsible for all actions of its three "representatives", in particular when they (according to the defendants) acted in breach of fiduciary duties owed to Holdings and hence (so it might be said) caused Holdings to be in breach of its obligation of utmost good faith to the LLP under clause 13.6 of the agreement.

205 I do not accept this submission of the defendants. In my judgment, when Mr Ribeiro, Mr Cole and Mr Johns sat on the LLP board they did so not as agents for Holdings, but as its "representatives" in a looser sense of that term.

(i) By accepting their appointment, they each undertook personal fiduciary obligations owed to the LLP in a manner similar to the way in which a director of a company undertakes such obligations. Clause 18 of the agreement established a board for the LLP with responsibility for taking decisions for it across a range of important areas. Since they had the power of managing the LLP's affairs in these areas, on ordinary principles the members of the board would owe personal fiduciary duties to the LLP in relation to the exercise of their functions as board members: see e g *White v Jones* [1995] 2 AC 207, 271E–G (Lord Browne-Wilkinson). Clause 21 of the agreement indicated that the parties understood that the individual members of the board and mancom owed personal obligations to the LLP, including an obligation to act "in good faith in . . . the best interests of the LLP". Since they owed personal fiduciary duties to the LLP in relation to decision-making in the course of conducting the LLP's business, they could not reasonably be expected to owe Holdings the duties which an agent would owe his principal. For example, if one of the "representatives" of Holdings on the LLP board formed the view that a particular action should be taken in the interests of the LLP he could not—in light of the fiduciary duty owed by him to the LLP—obey an instruction to him from Holdings to vote against it.

(ii) It would require very clear language in the terms of an appointment or a very clear inference from the circumstances of such appointment to relieve a person appointed to have the power and responsibility to make important business decisions for a corporate entity from a basic duty of loyalty to that entity and to authorise him to act at the behest of another person without reference to the interests of the entity. Clause 18.2 does not contain any such language. It does not say that the three "representatives" are to be agents of Holdings. The use of the word "representatives" does not necessarily

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A connote an agency relationship, and particularly does not do so in this context. The use of that word is explicable by reference to the intention of the parties that the three board members appointed by Holdings should not be disabled from deliberating and deciding on matters affecting both the LLP and F & C by virtue of any potential conflict of interest involved because of their relationship with F & C. The fact that according to clause 18.2 they are appointed to the LLP board as F & C's representatives is one of a number B of indicators that they are not intended, in this respect, to be subject to the usual, very strict no conflict rule which may apply in other fiduciary contexts. By contrast, where Holdings wished to retain its own control over particular decisions of the LLP, it negotiated for a direct right to that effect for itself: see clause 19 of the agreement.

(iii) If an agency relationship had been intended to be created between C Holdings and any "representative" on the LLP board, it is difficult to see why clause 18.2 should make provision for three such "representatives" to be appointed. One natural person armed with three votes and required to act on instructions from Holdings would have been sufficient. Indeed, provision could have been made for Holdings itself to be appointed as a corporate board member with three votes, and it would then have been entitled to send its agent along to each LLP board meeting to act for it. In my view, the clear D commercial objective in providing for Holdings to appoint three natural persons to the board was that each should bring his own judgment to bear in taking decisions in the best interests of the LLP, albeit that in doing so each could be expected to assess the interests of the LLP from an F & C perspective (of course, the judgments of the "representatives" might not coincide, in which case the differences might have to be resolved, like all E differences between board members, by a vote of the board).

(iv) Under the terms of the agreement, the corporate member itself has no management tasks to perform for the LLP. On the face of the agreement, therefore, there is no natural foundation for the imposition of fiduciary duties on Holdings as corporate member here: contrast Lord Browne-Wilkinson's description in *White v Jones* [1995] AC 207, 271 of the circumstances in which fiduciary obligations are typically found to arise and F see paras 221ff below. Moreover, the inclusion in clause 13.6 of an express contractual duty of utmost good faith owed by Holdings (as the corporate member) to the LLP tends to support the view that it was not intended that the corporate member should owe, in addition, fiduciary duties to the LLP in relation to its management. This in turn suggests that the fiduciary duties that one would expect to be owed by persons exercising powers of G management in relation to the LLP's affairs are owed by those natural persons who are members of the LLP Board, to the exclusion of any agency relationship between them and the corporate member.

(v) The defendants sought to gain support for their submission from the fact that clause 18 of the agreement has the heading, "The board of members". Since the individual representatives of Holdings on the board are not members of the LLP, so the argument ran, the intention must have been H that they should act as agents for Holdings, which was the corporate member. A flaw in this argument is that clause 1.6 of the agreement provides that "The headings in this document are inserted for convenience only and shall not affect the construction or interpretation of this agreement" (another difficulty with the argument is that the heading to clause 18

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involves a clear misnomer, since Holdings is not a member of the board even though in principle it could be, since a corporate person may be a director of a company or a member of the board of a limited liability partnership). Where the "board" is defined in the body of the agreement, in clause 1.1, it is simply said to mean "the board of the LLP, constituted in accordance with clause 18". That definition supports an interpretation of the agreement in which board members are expected to owe duties and act in a way analogous to the way in which members on the board of a company would act, owing their primary fiduciary duties to the company to the exclusion of any agency relationship with the person who appointed them. The same point may be made by reference to the operative part of clause 18, which simply states that the LLP "shall have a board" (not a "board of members") which shall be responsible for certain business decisions in relation to the LLP, and appears to invoke and rely upon the (obvious) analogy of a company's board of directors.

(vi) Clause 18 may be contrasted with clause 22 of the agreement, which makes provision for "meetings of members". A meeting of members is clearly contemplated as being something distinct from a meeting of the board of the LLP. But on the defendants' argument, the board would in substance operate as a meeting of members (the defendants and Holdings, by its three agents). This would distort the intended scheme of the agreement.

(vii) It is also relevant that before the dispute came to be formulated in technical legal terms, the defendants, Mr Ribeiro, Mr Cole and Mr Johns all thought in terms of the latter three owing personal fiduciary duties to the LLP when sitting on the board of the LLP (which would not be consistent with them acting as agents for Holdings when so sitting), and did not regard them as mere agents for Holdings. In particular, the logic for the defendants making a presentation of their grievances against F & C at the LLP board meeting on 21 January 2009 (para 664 below) was that they wished to bring matters to the attention of Mr Cole and Mr Johns precisely so that they could form and act on their own personal judgment about what was in the interests of the LLP, in accordance with the personal fiduciary obligations which the defendants believed they owed the LLP. In a novel legal context, where the question is how the conscience of an individual might be affected in relation to some matter, I think it is material to have regard to what the persons involved on the ground at the time believed or expected the position to be.

206 Although when acting as members of the LLP board the three "representatives" of the corporate member did not act as agents for it, questions still arise for the purposes of section 994 as to the wider responsibility of both Holdings and F & C plc for their actions. I address that issue at paras 1094ff below.

Did the members of the LLP owe fiduciary duties to each other?

207 The defendants submitted that, in addition to the contractual obligations set out in the agreement, the corporate member and the defendants (as the individual members) each owed the others fiduciary duties as co-partners in the LLP. I do not accept this submission.

208 A limited liability partnership is not a partnership in the traditional sense, in which the individual partners owe fiduciary duties to each other in relation to the management of the affairs of the partnership and when acting

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A as agents for the partners. The LLPA has established a new form of entity, with its own separate legal personality: section 1(1)(2). Such an entity may be expected to have its own corporate governance structures. Except to the limited extent that it is preserved by the new legislation, the general law relating to partnerships does not apply to it: section 1(5). The LLPA and the associated regulations do not provide for the members in a limited liability B partnership to owe each other fiduciary duties. They lay down a minimal legal framework for the operation of a limited liability partnership, leaving most of the detailed rules for the operation of such an entity to be worked out by the parties to the agreement which establishes it, with a considerable degree of freedom of contract.

209 When the legislation was being considered, the Department for Trade and Industry issued a consultation paper in February 2000 *Limited* C *Liability Partnerships: Regulatory provisions governing relations between members* (URN 00/617) on what should be the regulatory default provisions governing the relationship between members of a limited liability partnership. The question was asked whether provision should be made for the members to owe a duty of good faith to each other. A possible objection to this was stated to be that individual members could face parallel fiduciary D duties (to the limited liability partnership and to each other) with no mechanism to provide for which should prevail. The department published a summary of responses to the consultation in May 2000 (URN 00/865). The responses on this issue had been split virtually 50/50. The department stated that it was "unconvinced that a general duty of good faith should be included" as between members. The result was that no such duty was E included in the LLPA or the regulations.

210 Notwithstanding the deliberate decision to omit provision for a general duty of good faith between members, some commentators have expressed the view that members in a limited liability partnership will owe a duty to the limited liability partnership to act in good faith in relation to the conduct of its affairs alongside certain duties owed between members between themselves, including a duty to act in good faith in partnership F relations: see *Palmer's Limited Liability Partnership Law,* 1st ed (2002), paras A5-37 to A5-39. Mr Thompson relied upon the discussion in *Palmer* in support of his submissions on this point.

211 In my view, the discussion in *Palmer* proceeds a little too quickly here, and does not take fully into account section 1(5) of the LLPA, the fact that a limited liability partnership (unlike a traditional partnership) has G corporate personality, the stipulation in section 5(1) of the LLPA that the mutual rights and duties of members of a limited liability partnership "shall be governed" primarily by agreement between the members, the extent to which the parties are left free under the legislative regime to fashion a range of different forms of governance arrangements in relation to a limited liability partnership and the underlying legal principles according to which a fiduciary duty to act in good faith towards another person will be found to H arise. In view of the wide range of governance structures which parties are free to contract for, it is difficult to make generalisations about the circumstances in which a duty of good faith or other fiduciary duties as between the members in a limited liability partnership may arise. It is necessary to refer back to basic equitable principles in order to decide

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whether and what fiduciary obligations arise in the context of a limited liability partnership. A

212 Fiduciary obligations arise from particular circumstances, where a person assumes responsibility for the management of another's property or affairs. Lord Browne-Wilkinson gave a helpful general description in *White v Jones* [1995] 2 AC 207, 271D–G as follows:

> "The paradigm of the circumstances in which equity will find a fiduciary relationship is where one party, A, has assumed to act in relation to the property or affairs of another, B. A, having assumed responsibility, pro tanto, for B's affairs, is taken to have assumed certain duties in relation to the conduct of those affairs, including normally a duty of care. Thus, a trustee assumes responsibility for the management of the property of the beneficiary, a company director for the affairs of the company and an agent for those of his principal. By so assuming to act in B's affairs, A comes under fiduciary duties to B. Although the extent of those fiduciary duties (including duties of care) will vary from case to case some duties (including a duty of care) arise in each case. The importance of these considerations for present purposes is that the special relationship (i e a fiduciary relationship) giving rise to the assumption of responsibility held to exist in *Nocton v Lord Ashburton* [1914] AC 932 does not depend on any mutual dealing between A and B, let alone on any relationship akin to contract. Although such factors may be present, equity imposes the obligation because A has assumed to act in B's affairs. Thus, a trustee is under a duty of care to his beneficiary whether or not he has had any dealing with him: indeed he may be as yet unborn or unascertained and therefore any direct dealing would be impossible."

B C D E

213 In the present case, under the agreement the corporate member did not undertake responsibility to act as agent for the LLP, let alone for the individual members. Nor did it undertake responsibility for the management of the LLP's affairs (see in particular clause 17.1.8—that was primarily the responsibility of the mancom, subject to a degree of supervision and decision-making power on the part of the LLP board), let alone for management of the affairs of the individual members. Therefore, neither by operation of statute (see section 1(5) of the LLPA) nor by operation of general principles of law was there any basis on which a fiduciary obligation of good faith arose between the members themselves in relation to the conduct of the LLP's affairs.

F

214 There was also no basis on which the corporate member could be found to owe a fiduciary duty of good faith to the LLP, save that the agreement made express provision for such a contractual duty in clause 13.6. As regards the relationship between the members, clause 13.8 of the agreement made express provision for the corporate member to provide to the individual members only a very limited class of information out of the range of information which an ordinary fiduciary might be required to provide to his beneficiary or principal. The fact that express provision was made for there to be such duties is a further indicator that the parties did not intend that there should be a general duty of good faith applying as between the members.

G H

215 A comparison of the governance structures for the LLP created under the agreement with those which are familiar from company law also

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A indicates that the parties did not intend that the members should owe a duty of good faith between themselves. The role of the corporate member in running the affairs of the LLP was limited to its ability to veto certain actions of the board under clause 19 of the agreement (according to which the prior written consent of the corporate member was required for certain actions to be taken) and its participation in members' meetings under clause 22. The drafting and subject matter of clause 19 indicates that it was intended to be a B provision according rights to the corporate member for the safeguarding of its own private interests, which suggests that it was not intended that the corporate member should owe any duty of good faith in relation to its exercise of such rights (save the duty expressly stipulated in clause 13.6).

216 According to clause 22 of and the first schedule to the agreement, at a members' meeting the corporate member would have the right to cast votes C equivalent to its 60% stake in the LLP (reflecting its right to a 60% share in the profit stream to be generated by the LLP). The natural analogy here is with the position which applies in relation to the general meeting of a company, at which (subject to certain narrow exceptions to prevent oppressive abuse of rights by the majority) the members owe no general duty of good faith towards each other but are entitled to exercise their voting rights according to their perception of their own private interests.

D

Fiduciary duties owed by the members to the LLP

217 Mr Thompson submitted that the members of the LLP, in particular Holdings, owed fiduciary duties to the LLP, including a fiduciary duty of good faith (abeit he accepted that this might add little to the contractual duty contained in clause 13.6). I do not think the full width of this submission is E correct. In the context of the agreement and the running of the LLP's business, Holdings does not have direct control over the affairs or property of the LLP, and so there is missing the usual basis on which the law would impose a fiduciary duty.

218 Mr Thompson submitted that the LLP was a joint venture between the members, and that for that reason the law would impose fiduciary F obligations owed both by them to the LLP and between themselves. However, the phrase "joint venture" is not in my view a precise term of art which in itself has any particular significance for an analysis of the existence and content of fiduciary obligations. Rather, it is necessary to look at the specific roles and responsibilities arising in the particular context in question in order to assess whether and what fiduciary obligations might arise. Neither Holdings nor the defendants in their capacity as individual members G (as distinct from in their capacity as senior managers of the LLP's business and as members of the LLP board, mancom and compensation committee) had direct control over the affairs or property of the LLP (or of each other) in a manner which could lead to the imposition in law of any general set of fiduciary obligations.

219 That would still leave open the possibility of imposition of more limited fiduciary obligations in relation to actions taken by them in H particular situations. In particular, section 6(1) of the LLPA provides that every member of a limited liability partnership is its agent, and there is nothing in the Act to qualify the usual fiduciary obligations which an agent owes his principal in relation to the transactions which the agent enters into on the principal's behalf. But Holdings did not purport to do anything of

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relevance as agent for the LLP, so section 6(1) does not take the defendants anywhere in terms of their complaints. A

220 Mr Thompson also submitted that regulation 7 of the 2001 Regulations (set out at para 74 above)—in particular, regulation 7(9)(10)—supported the view that a general fiduciary duty of good faith is owed by members of a limited liability partnership to the partnership. I do not accept this. Regulation 7 does not provide expressly for there to be such a duty owed by members nor can such a duty be spelled out from it by implication. B Regulation 7(9)(10) implies that there are specific duties owed by members to the limited liability partnership (respectively, not to compete, unless the partnership gives its consent; and not to take benefits from transactions concerning the partnership, unless the partnership gives its consent), and does not imply that there is any more general duty of good faith as contended for by Mr Thompson. C

Content of the fiduciary obligations of LLP board members, mancom members and compensation committee members

221 I turn, then, to consider the content of fiduciary obligations owed by the members of the LLP board and the members of the LLP's mancom and compensation committee to the LLP. D

222 In some contexts, for instance in the paradigm cases described by Lord Browne-Wilkinson, the content of the fiduciary obligations which arise will be reasonably standard and well known, having been worked out in the cases over decades if not centuries. Where a person agrees to be appointed as a company director in ordinary circumstances, for example, the fiduciary obligations which are attached to that role are known, at least in general terms. E However, there has always been scope for fiduciary duties to be found to arise in a range of other contexts which have important similarities to the paradigm cases, but also significant differences. In those contexts, it is necessary to examine with some care what is the precise content of the particular fiduciary obligations arising in the specific circumstances of the individual case.

223 F Fiduciary obligations may arise in a wide range of business relationships, where a substantial degree of control over the property or affairs of one person is given to another person. Very often, of course, a contract may lie at the heart of such a business relationship, and then a question arises about the way in which fiduciary obligations may be imposed alongside the obligations spelled out in the contract. In making their contract, the parties will have bargained for a distribution of risk and for the G main standards of conduct to be applied between them. In commercial contexts, care has to be taken in identifying any fiduciary obligations which may arise that the court does not distort the bargain made by the parties: see the observation by Lord Neuberger of Abbotsbury writing extra-judicially in "The Stuffing of Minerva's Owl? Taxonomy and Taxidermy in Equity" [2009] CLJ 537, 543 and *Vercoe v Rutland Fund Management Ltd* H [2010] EWHC 424 (Ch) at [351]–[352]. The touchstone is to ask what obligations of a fiduciary character may reasonably be expected to apply in the particular context, where the contract between the parties will usually provide the major part of the contextual framework in which that question arises.

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A **224** Lord Browne-Wilkinson, delivering the judgment of the Privy Council in *Kelly v Cooper* [1993] AC 205 (a case concerning the relationship between an estate agent and their client), explained the approach in this way, at pp 214–215:

"In a case where a principal instructs as selling agent for his property or goods a person who to his knowledge acts and intends to act for other B principals selling property or goods of the same description, the terms to be implied into such agency contract must differ from those to be implied where an agent is not carrying on such general agency business. In the case of estate agents, it is their business to act for numerous principals: where properties are of a similar description, there will be a conflict of interest between the principals each of whom will be concerned to attract potential purchasers to their property rather than that of another. Yet, C despite this conflict of interest, estate agents must be free to act for several competing principals otherwise they will be unable to perform their function. Yet it is normally said that it is a breach of an agent's duty to act for competing principals. In the course of acting for each of their principals, estate agents will acquire information confidential to that principal. It cannot be sensibly suggested that an estate agent is D contractually bound to disclose to any one of his principals information which is confidential to another of his principals. The position as to confidentiality is even clearer in the case of stockbrokers who cannot be contractually bound to disclose to their private clients inside information disclosed to the brokers in confidence by a company for which they also act. Accordingly in such cases there must be an implied term of the contract with such an agent that he is entitled to act for other principals E selling competing properties and to keep confidential the information obtained from each of his principals.

"Similar considerations apply to the fiduciary duties of agents. The existence and scope of these duties depends upon the terms on which they are acting. In *New Zealand Netherlands Society 'Oranje' Inc v Kuys* [1973] 1 WLR 1126, 1129–1130, Lord Wilberforce, in giving the F judgment of this Board, said: 'The obligation not to profit from a position of trust, or, as it is sometimes relevant to put it, not to allow a conflict to arise between duty and interest, is one of strictness. The strength, and indeed the severity, of the rule has recently been emphasised by the House of Lords: *Phipps v Boardman* [1967] 2 AC 46. It retains its vigour in all jurisdictions where the principles of equity are applied. Naturally it has different applications in different contexts. It applies, in principle, G whether the case is one of a trust, express or implied, of partnership, of directorship of a limited company, of principal and agent, or master and servant, but the precise scope of it must be moulded according to the nature of the relationship. As Lord Upjohn said in *Phipps v Boardman*, at p 123: "Rules of equity have to be applied to such a great diversity of circumstances that they can be stated only in the most general H terms and applied with particular attention to the exact circumstances of each case." '

"In *Hospital Products Ltd v United States Surgical Corpn* (1984) 156 CLR 41, 97, Mason J in the High Court of Australia said: 'That contractual and fiduciary relationships may co-exist between the same parties has never been doubted. Indeed, the existence of a basic

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contractual relationship has in many situations provided a foundation for the erection of a fiduciary relationship. In these situations it is the contractual foundation which is all important because it is the contract that regulates the basic rights and liabilities of the parties. The fiduciary relationship, if it is to exist at all, must accommodate itself to the terms of the contract so that it is consistent with, and conforms to, them. The fiduciary relationship cannot be superimposed upon the contract in such a way as to alter the operation which the contract was intended to have according to its true construction.'

"Thus, in the present case, the scope of the fiduciary duties owed by the defendants to the plaintiff (and in particular the alleged duty not to put themselves in a position where their duty and their interest conflicted) are to be defined by the terms of the contract of agency.

"Applying those considerations to the present case, their Lordships are of the view that since the plaintiff was well aware that the defendants would be acting also for other vendors of comparable properties and in doing so would receive confidential information from those other vendors, the agency contract between the plaintiff and the defendants cannot have included either (a) a term requiring the defendants to disclose such confidential information to the plaintiff or (b) a term precluding the defendants acting for rival vendors or (c) a term precluding the defendants from seeking to earn commission on the sale of the property of a rival vendor."

225 As Lord Walker of Gestingthorpe put it in *Hilton v Barker Booth & Eastwood* [2005] 1 WLR 567, para 30, obligations of a fiduciary type "may have to be moulded and informed by the terms of the contractual relationship" (and see *Hawkes v Cuddy (No 2)* [2009] 2 BCLC 427, para 44). There are similarities between the reasoning by which terms may be implied into a contract and the way in which fiduciary obligations may be found to arise in a contractual context, and it may be that with the new, unified approach to the question of implication of contract terms set out in *Attorney General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988 the law is moving towards some assimilation of the relevant tests (see the discussion by James Edelman in "When Do Fiduciary Duties Arise?" (2010) 126 LQR 302), albeit the two processes have traditionally been conceptualised as different. Fiduciary duties are obligations imposed by law as a reaction to particular circumstances of responsibility assumed by one person in respect of the conduct of the affairs of another. As between the parties to a contract, the existence of express or implied contractual terms may be directly inconsistent with the imposition of such duties, and hence exclude them; and that may also be true where a person who is not a party to the relevant contract (as, here, the F & C representatives on the LLP board were not parties to the agreement) accepts appointment to carry out functions defined by the contract and on the basis of the terms set out in the contract. It may also be the case that the overall contextual framework created by the contract simply means that it is not appropriate for the law to impose the whole range of possible fiduciary duties or fiduciary duties of particular types in that specific context—in other words, it may be found that the parties could not reasonably expect that some particular duty of a fiduciary character should apply in the context of their particular

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A relationship or in the context of their relationship with a person accepting appointment as a manager or board member.

226 In the present case, a number of features of the contractual and business context are prominent, which are relevant to an analysis of the precise content of the fiduciary obligations to be identified as applicable to the members of the LLP board, mancom and compensation committee.

B (i) The primary commercial objective of the parties in setting up the LLP was to marry together the expertise of the defendants in running a FoHF portfolio with the F & C reputation and established client base.

(ii) F & C provided the great bulk of the capital needed for the business. The defendants had a priority call to be paid out of its funds each year a basic advanced withdrawal of profits of £150,000 each, effectively in lieu of salary.

C (iii) There was a careful working out in the terms of the agreement of the governance structures within the LLP, whereby a certain balance of power between the defendants, representatives of F & C and (at the mancom level) other managers would apply in relation to decisions how to carry forward the business of the LLP.

(iv) Some tension between the interests of F & C and those of the defendants was inherent in the structure of the LLP as created by the D agreement. There were bound to be circumstances in which the interests of the defendants would tend to pull in one direction and those of F & C might pull in another. The governance structures set out in the agreement were intended to be the way in which those tensions would be debated and resolved. This is not a case in which the concept of "the interests of the LLP" as a distinct entity is always easy to disentangle from the balance to be struck E via those governance structures between the underlying interests of the defendants and F & C.

(v) The parties to the agreement contemplated that the defendants and F & C's representatives would be entitled to be involved in decision-making for the LLP at the various levels contemplated by the agreement (including on the board, mancom and compensation committee, as well as at ordinary executive manager level in the case of the defendants) notwithstanding that F (in the case of the defendants) their own personal financial interests might be affected by the decisions to be taken and that (in the case of F & C's representatives) the financial and other commercial interests of F & C might be affected by such decisions. The parties expected the F & C representatives to wear, so to speak, both an LLP hat and an F & C hat when participating in business decisions for the LLP, and that they would not be G disqualified by that fact from participating in those decisions: cf *Hawkes v Cuddy (No 2)* [2009] 2 BCLC 427, para 33, referring to Australian authorities referred to in the judgment of Lewison J at first instance at [2008] BCC 390, paras 189–190: *In re News Corpn Ltd* (1987) 70 ALR 419, 437; *In re Broadcasting Station 2GB Pty Ltd* [1964–1965] NSWR 1648, 1663; *Canwest Global Communications Corpn v Australian Broadcasting Authority* (1997) 24 ACSR 405. The parties to the agreement wished to H have F & C executives involved in the running of the LLP, because of the considerable benefits that would bring for the LLP in providing a close link with the client base which the LLP would seek to tap into and a close link with the various marketing and other services to be provided to it by F & C, as well as (from F & C's point of view, and accepted by the defendants,

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since F & C was providing almost all the capital for the venture) to ensure that F & C's interests were not forgotten.

(vi) It was known that the price for involving F & C representatives in this way was that they would have loyalties and responsibilities divided between the LLP and F & C. For example, where those representatives were party to decisions by F & C about how to conduct its relationship with the LLP, whether in terms of deciding what strategic direction F & C would prefer for the business, how and what marketing services should be provided under clause 13.7 of the agreement or how and what administrative and other services should be provided under the service agreement, some practical accommodation between their loyalties and responsibilities would be called for. For such aspects of F & C's relationship with the LLP which concerned arm's length dealings between them as between investor and corporate entity, or as between service provider and service recipient, it could not reasonably be thought that the F & C representatives would have an obligation to inform the LLP about all of F & C's own internal discussions and decision-making processes in deciding what position to adopt in relation to the LLP; nor that they would have an obligation when participating in the deliberations of F & C to try to ensure that F & C would take decisions favourable to the LLP.

227 I turn from these basic features of the context in which the LLP was established and carried on its affairs to consider the content of the obligations of a fiduciary character which arose in relation to members of the LLP board, mancom and compensation committee in that context. In usual circumstances:

(i) A fiduciary must not put himself in a position of a conflict of interest (whether a conflict by way of a duty to promote the interests of another or a conflict with his own self-interest) without informed consent. In this case, it was known to all parties from the outset that the defendants would have a personal financial interest in the LLP and the business decisions taken by it and also that the F & C representatives could be expected to have in mind the interests of the F & C group, in a similar way, when participating in business decisions to be taken by the LLP. There was informed consent on all sides that this should be the case: cf *Kelly v Cooper* [1993] AC 205; *Bristol and West Building Society v Mothew* [1998] Ch 1, 18H–19B; *Hawkes v Cuddy (No 2)* [2009] 2 BCLC 427, para 44. I have already referred to the way in which the defendants and the F & C representatives could naturally be expected to assess the interests of the LLP through the prism of their own self-interest and the interest of F & C respectively without any breach of fiduciary obligation: see paras 166–170 above.

(ii) A fiduciary must not make a profit from his position without informed consent. To the extent that the defendants and F & C hoped to make profits from the operations of the LLP, to be distributed in accordance with the terms of the agreement, there was informed consent on all sides that this should be the case. Conversely, had either defendant or any of the F & C representatives sought to make some personal, undeclared profit from their management positions outside the operation of the agreement, that would not have been something which was agreed and would have been contrary to the reasonable expectations regarding the behaviour of persons holding such positions (it may be observed in passing that, so far as concerns the defendants, they would also have been subject to an obligation to account in

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A relation to any such unagreed benefit by virtue of regulation 7(10) of the 2001 Regulations).

(iii) A fiduciary is required to act in the best interests of his beneficiary: Millett LJ in *Mothew's* case [1998] Ch 1, 19D–E called this "the duty of good faith". It is in relation to this requirement that I have found the practical working through of the accommodation to be achieved between the defendants' self-interest and the interests of the LLP, on the one hand, and B the F & C representatives' role to promote and protect the interests of F & C and the interests of the LLP, on the other, more difficult. The precise content of this duty in this particular context requires careful assessment. I discuss this further at paras 228ff below.

(iv) A fiduciary must act in good faith. This can be regarded as a compendious expression of duty, comprehending each of (i) to (iii) above. C It may also be taken to add a general obligation of openness and fair dealing as between fiduciary and beneficiary. But, again, the precise content of that obligation will vary depending on the particular circumstances and what is reasonably to be expected of the person acting in those circumstances. In the context of the LLP, I do not consider that the F & C representatives on the board had a simple fiduciary obligation to inform the LLP about all the D decision-making processes within F & C which might have an impact at some point on the LLP: see paras 241ff below.

228 Part of the difficulty in relation to (iii) arises from considering the statement by Millett LJ in *Mothew's* case at p 19D–H about the strictness of the obligation upon a fiduciary who acts for two principals not to allow the performance of his obligations to one principal to be influenced by his relationship with the other, and the consequent obligation to cease acting for E one or both principals if an actual conflict of interest arises. That statement is readily understandable in the context with which Millett LJ was dealing in that case, namely a solicitor acting for two clients. The solicitor/client relationship involves a particularly strong degree of confidence and trust, and the content of the fiduciary duties associated with it is well established and demanding. It is also relevant that there is a ready supply of alternative F solicitors who are able to act and can readily be substituted if an actual conflict of interest is perceived to arise. But in my view, read on its own, Millett LJ's statement does not take full account of the wide and varied range of circumstances in which fiduciary obligations of different types and of greater or lesser force may arise. The paradigm cases of fiduciary relationships, such as those between solicitors and their clients, are at the centre of a family of such relationships sharing some but not necessarily all G characteristics, where the force of the obligations to be identified as inhering in those relationships (what is reasonably to be expected of the person who has taken on the task of acting for another in those relationships) may vary and become weaker the further one moves from the those central cases.

229 As Lord Nicholls of Birkenhead has suggested, writing extra-judicially, a trustee's duty to act in the best interests of his beneficiary may H best be analysed as an obligation to act for the proper purposes for which the trustee has agreed to act ("Trustees and Their Broader Community: Where Duty, Morality and Ethics Converge" [1995] TLI 71, 74; Edelman, 126 LQR 302, 322–323; and see *Vatcher v Paull* [1915] AC 372, 378, per Lord Parker of Waddington—the court will intervene if a power in a trust instrument is "exercised for a purpose, or with an intention, beyond the

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scope of or not justified by the instrument creating the power"). This is a formulation which I think is particularly appropriate for application in the context of this case, where it is difficult to regard the interests of the LLP as an entity as wholly distinct from those of its members. It is a formulation which allows for a degree of variation in the content of the duty depending on the particular circumstances which give rise to the duty, as one would expect.

230 In that regard, it should also be noted that there are established exceptions to the strict operation of the actual conflict rule outlined by Millett LJ in *Bristol and West Building Society v Mothew* [1998] Ch 1, even in relation to fiduciaries falling within the paradigm categories of fiduciary relationship. The fact that circumstances arise which inevitably mean that a trustee has a personal financial or other interest in some decision to be taken may not disqualify him from acting as trustee, where he is not responsible for creating those circumstances: *Edge v Pensions Ombudsman* [1998] Ch 512, 538F–541F per Sir Richard Scott VC, and the authorities cited by him, and [2000] Ch 602, CA; *Dore v Leicestershire County Council* [2010] EWHC 1387 (Ch) at [239]–[241]. Depending on the circumstances, the trustee may legitimately consider that his primary responsibility is to continue to act, as the settlor intended he should, rather than to step down to allow someone else, less well-qualified than him, to take over. If that is the case, the trustee's conscience in continuing to act as trustee will not be affected by the fact that an actual conflict of interest has arisen, provided he seeks in good faith to take proper account of the interests to be promoted by the trust alongside his own interests.

231 This approach to assessing the content of the fiduciary obligations of the members of the LLP board to act in the best interests of the LLP (where the LLP is itself the embodiment or bundling together of the sectional interests of the defendants and F & C, which may be in tension with each other) is also supported by a line of authority which considers the content of the fiduciary obligations of directors of a company or those exercising fiduciary powers to act in good faith for the benefit of the company as a whole, where the issue of balancing underlying sectional interests of shareholders is in the foreground, including in particular *Peters' American Delicacy Co Ltd v Heath* (1939) 61 CLR 457, *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821 and *Redwood Master Fund Ltd v TD Bank Europe Ltd* [2006] 1 BCLC 149.

232 The decision of the High Court of Australia in the *Peters' American Delicacy Co* case concerned the articles of association of a company which gave rise to a conflict of interest between different classes of shareholder and an amendment to the articles to resolve that conflict (but inevitably favouring one class of shareholders) which was carried by a majority of the shareholders by way of a special resolution. The resolution was challenged on the grounds that, it was argued, it was not passed for the benefit of the company as a whole as required by law. The High Court overturned the decision at first instance and dismissed the challenge. Dixon J said 61 CLR 457, 511–513:

> "The chief reason for denying an unlimited effect to widely expressed powers such as that of altering a company's articles is the fear or knowledge that an apparently regular exercise of the power may in truth be but a means of securing some personal or particular gain, whether

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A pecuniary or otherwise, which does not fairly arise out of the subjects dealt with by the power and is outside and even inconsistent with the contemplated objects of the power. It is to exclude the purpose of securing such ulterior special and particular advantages that Lord Lindley [in *Allen v Gold Reefs of West Africa Ltd* [1900] 1 Ch 656, 671] used the phrase 'bona fide for the benefit of the company as a whole'. The reference to 'benefit as a whole' is but a very general expression B negativing purposes foreign to the company's operations, affairs and organisations. But unfortunately, as appears from the foregoing discussion, the use of the phrase has tended to cause misapprehension. If the challenged alteration relates to an article which does or may affect an individual, as, for instance, a director appointed for life or a shareholder whom it is desired to expropriate, or to an article affecting C the mutual rights and liabilities inter se of shareholders or different classes or descriptions of shareholders, the very subject matter involves a conflict of interests and advantages. To say that the shareholders forming the majority must consider the advantage of the company as a whole in relation to such a question seems inappropriate, if not meaningless, and at all events starts an impossible inquiry. The 'company as a whole' is a corporate entity consisting of all the shareholders. If the proposal put D forward is for a revision of any of the articles regulating the rights inter se of shareholders or classes of shareholders, the primary question must be how conflicting interests are to be adjusted, and the adjustment is left by law to the determination of those whose interests conflict, subject, however, to the condition that the existing provision can be altered only by a three-fourths majority. Whether the matter be voting rights, the E basis of distributing profits, the basis of dividing surplus assets on a winding up, preferential rights in relation to profits or to surplus assets, or any other question affecting mutual interests, it is apparent that though the subject matter is among the most conspicuous of those governed by articles and therefore of those to which the statutory power is directed, yet it involves little if anything more than the redetermination of the rights and interests of those to whom the power is committed. No-one F supposes that in voting each shareholder is to assume an inhuman altruism and consider only the intangible notion of the benefit of the vague abstraction called by Lord Robertson in *Baily's Case* ([1906] AC 35, 39), 'the company as an institution'. An investigation of the thoughts and motives of each shareholder voting with the majority would be an impossible proceeding. When the purpose of a resolution is spoken G of, a phrase is used which refers rather to some characteristic implicit in the resolution in virtue of the circumstances or of some larger transaction of which it formed a part or step. It is not far removed from what Lord Sumner called 'one of those so-called intentions which the law imputes . . . the legal construction put on something done in fact' (*Inland Revenue Comrs v Blott* [1921] 2 AC 171, 218). But, when the very H question to be determined is a conflict of interests, unless the subject matter is held outside the power, the purpose of the resolution, as distinguished from the motives of the individuals, often must be to resolve the conflict in favour of one and against the other interest.

"In my opinion it was within the scope and purpose of the power of alteration for a three-fourths majority to decide the basis of distributing

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shares issued for the purpose of capitalizing accumulated profits or profits arising from the sale of goodwill, and in voting for the resolution shareholders were not bound to disregard their own interests . . . In these circumstances it appears to me that the resolution involved no oppression, no appropriation of an unjust or reprehensible nature and did not imply any purpose outside the scope of the power."

233 Although the case was concerned with the exercise of a power conferred on the shareholders in a company rather than the directors, I consider that it provides useful guidance for the approach I should adopt to the content of the fiduciary obligations of the members of the LLP board, mancom and compensation committee in the present case to act in the interests of the LLP. This is because the interests of the members of the LLP were brought so directly into consideration by those bodies by virtue of the fact that they were made up of people who either were the individual members (the defendants) or were "representatives" of the corporate member (so that there was no radical separation of roles as between directors and shareholders as there may be in a company situation) and because the case was focused on the problem which arises here, of how to assess the content of fiduciary obligations owed to a notionally distinct corporate entity but where in reality one can see that behind that distinct entity a decision balancing the competing interests amalgamated in that entity is called for.

234 The Privy Council in *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821 adopted a similar approach, this time in respect of the exercise of powers of directors of a company (rather than the shareholders), in relation to which they owed a fiduciary obligation to act bona fide in the interests of the company as a whole, but where again the reality was that the exercise of the power involved having to make a choice between the competing sectional interests of different shareholders. The judgment was delivered by Lord Wilberforce. He observed, at pp 834–835:

"the directors' power under this article is a fiduciary power: and it remains the case that an exercise of such a power though formally valid, may be attacked on the ground that it was not exercised for the purpose for which it was granted . . . To define in advance exact limits beyond which directors must not pass is, in their Lordships' view, impossible. This clearly cannot be done by enumeration, since the variety of situations facing directors of different types of company in different situations cannot be anticipated. No more, in their Lordships' view, can this be done by the use of a phrase—such as 'bona fide in the interest of the company as a whole' or 'for some corporate purpose'. Such phrases, if they do anything more than restate the general principle applicable to fiduciary powers, at best serve, negatively, to exclude from the area of validity cases where the directors are acting sectionally, or partially: i e improperly favouring one section of the shareholders against another. Of such cases it has been said: 'The question which arises is sometimes not a question of the interest of the company at all, but a question of what is fair as between different classes of shareholders. Where such a case arises some other test than that of the "interests of the company" must be applied, . . . (*Mills v Mills* (1938) 60 CLR 150, 164, per Latham CJ) . . .' "

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A **235** These authorities were helpfully reviewed by Rimer J in *Redwood Master Fund Ltd v TD Bank Europe Ltd* [2006] 1 BCLC 149, paras 99–104. In that case, lenders under a loan facility agreement were divided into three separate classes with potentially differing interests. A term of the agreement provided that it could be amended by the vote of a two-thirds majority of the lenders by value. An amendment was voted through against the objections of certain minority lenders, who complained that it discriminated against B them as a class by exposing them to an unfair degree of risk in relation to recovery of the lending. The court found that the power of amendment had been properly exercised. Rimer J said, at para 105:

> "I derive from these two authorities that, at least in a case such as the present, where there is a clear potential for conflicting interests between C the three classes of lenders, an assessment of the validity of a majority decision exclusively by reference to whether or not it is 'for the benefit of the lenders as a whole' is, at any rate if those words are applied according to their literal meaning, a misplaced one. The vice against which control on the exercise of majority power is directed is the potential for a dishonest abuse of that power. The starting point in assessing the validity of its exercise in any case must be to assess, by reference to all available D evidence, whether the power is being exercised in good faith for the purpose for which it was conferred. If it is, then the mere fact that it can be shown that a minority of those affected by it have been relatively disadvantaged by it as compared with the majority cannot automatically mean it has been exercised improperly. Of course, if it can be shown that the power has been exercised for the purpose of conferring special collateral benefits on the majority, or if the obtaining of such collateral E benefits can be shown to have been the motive for the exercise of the power, that will be likely to lead to a conclusion that the exercise has been bad. It would not have been exercised for the purpose for which it was conferred, and its exercise in those circumstances would or might amount to a fraud on the minority. Equally, if the exercise of the power can be shown to have been motivated by a malicious wish to damage or oppress F the interests of the minority adversely affected by it, then that too will vitiate the exercise, since that too will clearly amount to the commission of fraud on the minority, which is also obviously outside the scope and purpose of the power."

236 In the case of the LLP, it was known and intended that F & C should have its "representatives" on the board and other governance organs G of the LLP to balance out the defendants' membership of those organs, and that the defendants and those representatives should not be disabled from acting by the fact that there might at times be an actual conflict of interest nor disabled from having regard to some degree to their own interests and F & C's interests respectively. Given the interests which the LLP was intended to serve and the way in which the parties intended those interests to be balanced within the governance structures of the LLP, there was no ready H set of alternative board members whose judgment of what the LLP should do would be uncontaminated by consideration of either self-interest or the interests of F & C (so, for example, although in relation to the decision in early 2009 how a balance should be struck between salary and bonuses in the remuneration packages of LLP employees each side accused the other of

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having improper regard to their own self-interest, neither side suggested that the other should not play any part in taking the decision, knowing full well that the same objection could be levelled against their own involvement in taking it: see paras 745–750, 771–772 and 783–787 below).

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237 On the formulation set out in the paragraph above, the difficulty lies in identifying the degree to which it was legitimate for the LLP board members to have regard either to their own self-interest (in the case of the defendants) or ' interests (in the case of the F & C representatives). This is highly dependent on the particular factual circumstances in which the question what to do might arise. Whilst not being able to specify precisely in advance what they could or could not do is somewhat frustrating, that is simply a function of the blurring of roles which the parties intended should occur within the LLP and the usual flexibility of equitable standards of conscionable behaviour once one moves away from the clear paradigm fiduciary relationships, especially where those standards fall to be applied in relation to the management of a business in a relationship which was intended to continue over a substantial period of time and which would have to adapt to meeting a wide range of often unforeseen business situations.

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238 One can take the operation of clauses 8.3 and 8.4 of the agreement as a particular example of the problems which could, in principle, arise. Both provisions required the corporate member to make additional capital contributions to the LLP "upon the request of the board" where "in the reasonable opinion of the board" certain circumstances had arisen. On one view, since F & C was underwriting the capital of the LLP in this way, it might be said that LLP board members should always have been willing to take adventurous business decisions, knowing that if they went wrong F & C would have to provide a safety net and ensure that the LLP could continue to operate by calling for additional capital. If it came to a decision of the LLP board under these provisions, it might be said that from the point of view of the LLP it would always be in the interests of the LLP to have more of F & C's money. But I do not consider that these provisions were intended to create a form of blank cheque for the LLP to call for funds; rather, the parties contemplated that in making the assessment whether a demand for more funds should be made, the F & C representatives on the LLP board would be entitled to give weight to the interests of F & C as a major interest holder in and the primary funder of the LLP so as, for example, to vote against making a demand for funds if they considered that they were likely to be wasted on loss making activities. A similar point could also be made about the marketing fees payable by the LLP to Holdings in relation to the marketing services provided by F & C: clause 13.7 of the agreement provided that the fees could be amended by unanimous decision of the LLP board, and the parties could not sensibly have thought that the F & C representatives on the board would be obliged to vote in favour of reducing or eliminating those fees (as exclusive reference to the interests of the LLP might suggest should happen), without having regard to the countervailing interest of F & C that it should be paid for the marketing services it provided as the parties had agreed should happen.

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239 A similar issue arises, in somewhat less acute form, in relation to a range of other decisions to be taken by the LLP board, mancom and compensation committee. In my view, following on from the discussion above, the F & C representatives on those bodies were entitled to take the

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A interests of F & C into account alongside those of the LLP as a distinct entity, but not so as wholly to subordinate the interests of the LLP to those of F & C. In practical terms this means that they were obliged to strive to maintain a fair balance between the distinct interests of the defendants and F & C bundled up collectively in the LLP. They were also entitled to give weight to the interests of the LLP in being linked to the F & C group, such that the LLP could be expected to benefit from being closely allied to a strong F & C. In B light of that, the view could legitimately be taken that sometimes a degree of restraint by the LLP in pursuing its interests, so as to assist F & C in the pursuit of its wider interests, might overall be in the interests of the LLP.

240 Of course, the fact that this departure from the ordinary requirement that a fiduciary avoid all conflicts of interest was intended to create a business vehicle within which the tensions associated with such C conflicts would in practice be mediated and regulated through the governance structures within the LLP made it important that those structures should be carefully adhered to, if the whole set of relationships established by the agreement was to work properly.

241 In the context of the LLP, the F & C representatives had to reconcile in a practical way the interests of the LLP (as a corporate entity which itself represented the interests of the defendants and F & C) and F & C. D Mr Thompson's submission was that the F & C representatives owed the LLP the usual type of fiduciary obligations that would be owed by a fiduciary in a paradigm case. So, for example, he submitted that the F & C representatives had an obligation to inform the LLP about information derived from their positions within the F & C group which might have an impact upon the business of the LLP. I do not accept these broad E submissions.

242 The defendants sought particularly to rely upon *Scottish Co-operative Wholesale Society Ltd v Meyer* [1959] AC 324. In that case, in 1946 the appellant society, in conjunction with the respondents on the appeal, established a subsidiary company to carry on the manufacture and sale of rayon cloth. The involvement of the respondents was critical to the success of the business at that time, since it enabled the subsidiary to obtain F licences for the production of rayon cloth when the industry was tightly and restrictively regulated. The respondents had a minority shareholding in the subsidiary company. The society appointed three directors of the company as its nominee directors. The business was a success, and as regulation of the industry was relaxed came to depend less on the involvement of the respondents. The society sought to buy out their interest in the company at a G low value, which offer was refused. The society then decided on a policy to transfer the company's business to a department of its own. The three nominee directors were aware of this policy, but did not inform the respondents about it and took steps to promote it. As a result, the business of the company came to a virtual standstill. This was held to be conduct by the society of the affairs of the company in a manner oppressive to part of the members, contrary to section 210 of the Companies Act 1948, and the H society was therefore ordered to buy out the interest of the respondents in the company.

243 This is an authority which would have had particular relevance if the defendants had been able to sustain their contention that F & C decided to take steps to close the LLP's business. But I have found that that

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contention is not made out on the facts. It is an authority which would also have been significant if the defendants had been able to sustain their contention that F & C sought to divert business opportunities which were properly to be regarded as opportunities of the LLP to itself. But again I have found that the evidence does not support that case. So far as concerns indications in the *Scottish Co-operative Wholesale Society* case about the obligation of the nominee directors to provide information to the company, I consider that the legal and factual context in the present case is significantly different and requires more specific analysis as set out in this judgment. Where I have found the authority more helpful is in relation to the question of the attribution of responsibility to F & C plc for unfairly prejudicial conduct of the affairs of the LLP by the representatives of Holdings, as supporting the wider approach to that question contended for by the defendants. I address that issue in detail at paras 1094ff below.

244 Miss Newman, in her written submissions, suggested that the set of obligations owed by each member of the LLP board, mancom and compensation committee was the following: (i) a duty to act bona fide in what he considered to be the best interests of the LLP; (ii) a duty to exercise powers for proper purposes; (iii) a duty to exercise reasonable skill and care in the discharge of his duties and performance of his functions; and (iv) in any circumstances where the person is acting as agent for the LLP, an obligation to comply with "a fiduciary's standard of disclosure and fair dealing towards the LLP and the normal avoidance of conflicts of interest". This formulation appeared to suggest that obligations of disclosure were confined to (iv), but it is not difficult to see that it might also be argued that some obligation of disclosure of information could arise under the obligation at (i). At one point in her oral submissions, Miss Newman appeared to say that there could be an obligation of disclosure wider than that involved in proposition (iv), and that, by analogy with *Kelly v Cooper* [1993] AC 205, the limit upon the obligation of disclosure would be any duty of confidence owed by F & C's representatives to F & C or third parties (according to this approach, she said that it was possible that the duty of disclosure upon Mr Johns might have expanded after April 2008 when he ceased to be an executive director of any F & C company).

245 In my judgment, the extent of the fiduciary obligations of disclosure resting upon the F & C representatives has to be assessed having regard to the specific context created by the factual background and the contractual framework constituted by the agreement and the service agreement. Assessed in that context, the obligations of disclosure of information material to the LLP resting upon them fall between the extreme obligation of disclosure argued for by Mr Thompson and the very narrow obligation proposed by Miss Newman in her written submissions. I consider that the obligations of disclosure which did arise were also somewhat narrower than might be suggested by Miss Newman's wider formulation offered on her feet under questioning from me.

246 The proper analysis here is to ask what obligations of disclosure the F & C representatives can reasonably be expected to have assumed in this particular context. The question is of practical significance, for example, in relation to consideration of the extent of the obligation of the F & C representatives to inform the LLP acting by its board or mancom about matters bearing on the marketing of its products. A lot of information

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A passed across Mr Ribeiro's desk pertaining to the marketing of all F & C branded products (including those of the LLP), such as reports by F & C's distribution personnel about discussions with clients about their investment plans and so forth. This information could have a bearing on the LLP, even when the LLP had not been discussed (since that would tend to indicate that no investments in LLP products might be forthcoming from particular B clients). Apart from this, but still bearing on the marketing of the LLP's products along with other F & C branded products, was the policy decision taken by F & C on 20 August 2008 to move to an "open architecture" distribution model: paras 422ff below.

247 According to the logic of Mr Thompson's wide formulation of the duty of disclosure in relation to F & C's representatives in the LLP, all this material should have been disclosed by Mr Ribeiro to the LLP. The difficulty C with this submission is that it does not take proper account of the context against which the content of the fiduciary obligations in this case falls to be assessed and it is out of touch with practical reality, as the parties understood the agreement and how the LLP should operate from its inception. The defendants never suggested during their involvement with the LLP from 2004 that they should be given a detailed account of F & C's dealings with D its clients, for example by having all reports on client contacts copied to them (nor did they plead any such case). This is a relevant factor to be taken into account in gauging what was the reasonable expectation of the parties of the extent to which the conscience of the F & C representatives would be engaged in terms of any requirement of disclosure of information. The defendants did not bargain for themselves or the LLP to have a specific general right of disclosure of such information (contrast the right to E information contained in clause 13.8 of the agreement with the absence of any specific right to information relating to F & C's exercise of discretion in the marketing of the LLP's products in clause 13.7). The contractually stipulated protection for the LLP was that Holdings would "show the utmost good faith" (clause 13.6), but this did not extend to include an obligation to provide a detailed account of F & C's dealings with its clients: F see paras 255–259 below. The marketing of the LLP's products was a matter left to the discretion of F & C (clause 13.7), rather than requiring decisions to be made by the LLP, and was not an area where F & C or the F & C representatives acted as agents or on behalf of the LLP (so as to be expected to give a detailed account to the LLP of what was being done with each client).

248 The point may be spelled out in this way in relation to Mr Ribeiro, G by way of example. He was involved in the management of the LLP only because he was appointed as a representative of Holdings, and not by reason of any distinct personal capacity. His knowledge of matters affecting the LLP may properly be regarded as the knowledge of Holdings in its dealings with the LLP. The extent of Holdings' relevant obligation to the LLP regarding disclosure of information (along with other matters) is the H obligation of utmost good faith contained in clause 13.6 of the agreement. It would be an adventitious addition to the LLP's rights of disclosure of information if in this context Mr Ribeiro were found to have imposed upon him an obligation to disclose wider categories of information relating to F & C than Holdings was obliged to disclose under clause 13.6. As regards the marketing of its products, the LLP's reasonable expectations regarding

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disclosure of information were primarily framed by its rights under clause 13.6. It could expect to look to Holdings for disclosure of appropriate information under that provision, supplied usually via Mr Ribeiro, and could not reasonably expect him to be subject to a further obligation to supply more information than that. Since the LLP had been accorded suitable express contractual rights governing such matters, Mr Ribeiro could not reasonably be regarded as having a wider fiduciary role to account to it for information regarding such matters.

249 Therefore, in my judgment, to impose a fiduciary obligation of disclosure of the sort of detailed marketing information referred to above upon the F & C representatives would amount to distorting the bargain contained in the agreement in a way which is not sufficiently justified by reference to the roles which the F & C representatives were expected to fulfil within the LLP. The same process of reasoning also indicates that Mr Ribeiro owed no fiduciary duty to inform the LLP of the detail of the internal debates within F & C regarding how it might conduct its relationship with the LLP. I consider that the error in Mr Thompson's approach is to assume at the start of the analysis that there is a fixed standard of disclosure required of all fiduciaries, and then to say that there is no basis for finding any implied term to cut down that standard; whereas in my opinion the proper approach here is to analyse what precise fiduciary obligations could reasonably be expected to apply in the particular context created by the agreement, without making any assumption at the outset what they should be.

250 The correct approach leads, in this context, to a rather narrower fiduciary obligation of disclosure than might be suggested by Miss Newman's approach in oral submissions. Mr Ribeiro may or may not have owed F & C or its clients relevant obligations of confidentiality in relation to the detail of F & C's marketing efforts, but even if he did not I think he did not owe an obligation to make disclosure in relation to such matters. (There was virtually no analysis in the submissions or evidence relevant to the question of what obligations of confidentiality might have been owed in relation to any item of information; the relevant assessment of the confidentiality position could be complex in a multi-partite context, where the interests of the LLP, Holdings, the F & C group generally and its clients might all be relevant to working out the reasonable expectations of each party about what could be disclosed and to whom.)

251 However, Mr Thompson maintained a narrower alternative case, that even if Mr Ribeiro did not have a general fiduciary obligation to disclose all details of F & C's marketing efforts he did have an obligation to disclose the decision taken on 20 August 2009. I found this submission more persuasive. In my view Mr Ribeiro did have a fiduciary obligation as a member of the LLP board and mancom to inform the LLP acting by its board and mancom about the policy decision on 20 August 2008 to move to an "open architecture" distribution model. This was a policy decision with wide implications and of potentially profound significance for the LLP which went well beyond the ordinary day-to-day running of marketing to clients referred to above. It was recognised within F & C and by Mr Ribeiro as a major change in F & C's approach to marketing F & C branded products. In my judgment, such a decision going to the heart of the general marketing approach which the LLP could henceforth expect to be applied by

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A F & C in the exercise of its discretion under clause 13.7 of the agreement, and which might have a general and substantial effect on the likelihood that investments would be made in the LLP's products, was a matter which Mr Ribeiro could reasonably be expected to disclose to the LLP. By virtue of clause 13.6 of the agreement there was also an obligation upon Holdings (acting by Mr Ribeiro) to disclose such information, with no expectation that it could be regarded by F & C as confidential as against the LLP.

B **252** The parties themselves defined a principal obligation of the corporate member owed to the LLP as being an obligation of utmost good faith: clause 13.6 of the agreement. This was a contractual duty analogous to a fiduciary duty, owed by Holdings as, in effect, representative of the F & C group. It is a form of contractual duty which requires the obligor to have regard to the interests of the obligee, while also being entitled to C have regard to its own self-interest when acting: *Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service* [2010] NSWCA 268 at [13], [147]. Clause 13.6 represented the parties' own statement of how the competing interests of F & C and the LLP should be reconciled, and in my view provides a sound guide for the court in working out the practical content of the fiduciary obligation to be imposed on the F & C representatives on the LLP board so far as concerns the provision of D information available to them from their involvement with F & C and its decision-making processes. The defendants did not bargain for and the agreement did not provide for any obligation that specific categories of information should be provided by F & C to the LLP (e g in the form of a running account of all marketing efforts with clients under clause 13.7 of the agreement). The defendants could not reasonably expect that the F & C E representatives would disclose to the LLP every item of information about F & C's actions or decision-making which might affect the LLP. On the contrary, it was to be expected that F & C should have some private space to consider its own interests internally before acting. What the defendants could reasonably expect was that the F & C representatives would disclose the sort of matters which the F & C group (represented by Holdings) was itself required to provide under clause 13.6. This expectation was also F reinforced by the fact that everyone expected Mr Ribeiro, the main representative of F & C on the LLP board, to act as the agent for Holdings in its dealings with the LLP, so that his fiduciary obligation to the LLP in relation to provision of information could be expected to conform to the obligation of Holdings under clause 13.6 in that regard: see paras 255–259 below.

G **253** Another aspect of characterising the obligations of fiduciaries as being obligations of good faith, loyalty and fidelity is that they operate by reference to the conscience of the fiduciary and his subjective good faith in acting rather than an objective standard of competence: *Bristol and West Building Society v Mothew* [1998] Ch 1, 18E–F and *In re Smith & Fawcett Ltd* [1942] Ch 304, 306. In particular, in assessing the business decisions of LLP board members, it should be emphasised that the courts will have H regard to what they genuinely believed to be in the best interests of the LLP (subject to their obligations, set out above, not to act for improper purposes).

254 The LLP board members also owed duties of reasonable care to the LLP in conducting its business. Mismanagement of a business may be relied

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upon for the purposes of a claim under section 994, but will only found such a claim if the mismanagement is serious, and the court will be astute not to "second guess" legitimate management decisions taken upon reasonable grounds at the time, albeit as events transpired they may not have been the best decisions in the interests of the business: *In re Macro (Ipswich) Ltd* [1994] 2 BCLC 354, 404–406, per Arden J; *Fisher v Cadman* [2006] 1 BCLC 499, para 95. In my view, no mismanagement of the LLP's business according to these standards has been made out.

Clause 13.6—Holdings' duty of utmost good faith

255 As with the fiduciary obligations considered above, the precise content of the duty of utmost good faith which Holdings owed to the LLP under clause 13.6 of the agreement is informed by the particular factual and contractual context in which it is located. The decision of the New South Wales Court of Appeal in *Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service* [2010] NSWCA 268 provides helpful guidance as to the approach to be adopted. The case concerned the operation of heads of agreement ("HOA") between Macquarie and its holding company ("MHC") and the respondent ("Area Health") which related to the development of a private hospital on land owned by Area Health. The HOA contained contractual obligations for the parties to act with utmost good faith in their dealings with each other. Regarding the content of those obligations, Hodgson JA said, at paras 146–148:

> "146. Writing extra-curially, Sir Anthony Mason has argued that a contractual obligation of good faith embraces no less than three related notions: (1) An obligation on the parties to co-operate in achieving the contractual objects; (2) Compliance with honest standards of conduct; and (3) Compliance with standards of conduct that are reasonable having regard to the interests of the parties. See A F Mason 'Contract, Good Faith and Equitable Standards in Fair Dealing' (2000) 116 LQR 66, 69. That the obligation has these three elements is consistent with Australian authority: *Alcatel Australia Ltd v Scarcella* (1998) 44 NSWLR 349, 369 (Sheller JA, with Powell and Beazley JJA agreeing), *Burger King Corpn v Hungry Jack's Pty Ltd* [2001] NSWCA 187; 69 NSWLR 558, para 171 (Sheller, Beazley and Stein JJA).
>
> "147. However, a contractual obligation of good faith does not require a party to act in the interests of the other party or to subordinate its own legitimate interest to the interests of the other party; although it does require it to have due regard to the legitimate interests of both parties: cf *Overlook v Foxtel* [2002] NSWSC 17 at [65]–[67] (Barrett J).
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> "148. Applying that approach to the HOA, in my opinion the obligation of utmost good faith did not go so far as to require Area Health to defer to the interests of MHC and/or Macquarie in developing its own plans for [the hospital], or to include MHC and/or Macquarie in its own planning processes. But in my opinion, when Area Health's planning processes would make a substantial difference to what MHC and/or Macquarie could reasonably expect concerning the flow of persons between the hospitals or the creation of a campus concept, the obligation of utmost good faith would require that MHC and/or Macquarie be informed of this, at least to enable them to take account of it in the design

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A and construction of the works contemplated by the HOA." (See also the concurring judgment of Allsop P, at paras 12–14.)

256 Other formulations in the cases of the content of such an obligation are in line with this guidance. For example, in *Berkeley Community Villages Ltd v Pullen* [2007] 3 EGLR 101, paras 86–97, Morgan J construed a contractual obligation on the parties to "act with the utmost good faith B towards one another" (see para 33 of the relevant schedule to the agreement, set out at para 33) as "imposing on the defendants a contractual obligation to observe reasonable commercial standards of fair dealing in accordance with their actions which related to the agreement and also requiring faithfulness to the agreed common purpose and consistency with the justified expectations of the first claimant": para 97.

257 The balance of interests established by a contractual duty of utmost C good faith in the context of a commercial joint venture, which permits Holdings to have regard to F & C's own commercial interests while also imposing an obligation upon it to have due regard to the legitimate interests of the other parties to the agreement, represented the parties' considered reconciliation of the interests of F & C and the LLP and the defendants under the agreement. This was the essence of the bargain which they made, and it D is appropriate that it should inform the content of the fiduciary obligations assumed by the F & C representatives on the LLP board, mancom and compensation committee as set out above. The adoption of such a standard of conduct made sense in the context of an arrangement which sought to marry together the disparate strengths of the defendants and F & C through the vehicle of the LLP in a relationship intended to last a long time (and which therefore required considerable flexibility of application to cope with E the wide range of unforeseeable business challenges which might arise), where they were each required to have regard to the legitimate interests of the other parties to the agreement while at the same time being entitled to take into account their own self-interest.

258 The dividing line set out in the *Macquarie International Health Clinic* case, at para 148, as regards the extent of the obligation of disclosure F inherent in the obligation of utmost good faith provides broad support for the dividing line which I find applies in the present case, between information relating to the routine marketing operations of F & C and information about the decision in relation to marketing strategy taken on 20 August 2008: see paras 251ff above. The decision of 20 August 2008 was a major strategic decision which had the potential to make a substantial difference to what the LLP could reasonably expect concerning the flow of G business to it, and so fell into a category of information which ought to have been disclosed by Holdings under clause 13.6 of the agreement and by Mr Ribeiro under his fiduciary obligation of disclosure.

259 Having made that point, however, I find that it leads nowhere on the facts of the case. As regards the defendants' claim based on their put option notices and the fourth schedule, the breach of obligation by Holdings was not of the requisite character: see para 729 below. As regards the H defendants' claim under section 994, the breach of fiduciary duty by Mr Ribeiro was inadvertent and not particularly serious; it had no practical impact on the business or business decisions of the LLP (the LLP had no right to prevent the move to "open architecture" relationships with clients, which fell within F & C's marketing discretion contained in clause 13.7, and the

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breach of duty by Mr Ribeiro was swiftly overtaken by events, as redemption notices were received from most of the LLP's clients and any marketing opportunities, whether under "open architecture" arrangements or otherwise, were undermined by market conditions in late 2008, particularly as the markets went into free-fall after the collapse of Lehman Brothers on 15 September); the defendants were already forewarned by Mr Niven in March and July 2008 that some such change was likely to be forthcoming and had been given an early opportunity to adapt to it; and if it had become relevant to the LLP's position as marketing opportunities for its products revived, there is no doubt that the LLP would have had the position explained to it. Therefore, I consider that this aspect of the case adds nothing to the defendants' unfair prejudice claim.

Clause 11.1 and an implied term in the agreement

260 By a late amendment which, after argument, I permitted to be made, the defendants pleaded a distinct term which they contend should be implied into the agreement, to the effect that Holdings was obliged not to take steps to procure the LLP not to pay the defendants their monthly drawings due under clause 11.1 of the agreement; and they pleaded that Holdings, acting by Mr Ribeiro, breached that implied term by arranging for the monthly drawings to be stopped on 25 February 2009. The issue is of significance because, in order to establish a right to serve a put option notice under para 1.7 of the fourth schedule, the defendants have to show that Holdings acted in breach of the agreement. Despite amending their pleadings as a precautionary measure, it was and remained the defendants' submission that they did not need to plead this implied term, since they had pleaded the relevant express terms of the agreement (in particular, clause 11.1 itself) and it was open to them to argue that the agreement gave rise to such an implied obligation as a matter of law (they referred to *Barque Quilpué Ltd v Brown* [1904] 2 KB 264, 271–272, per Vaughan Williams LJ and *Southern Foundries (1926) Ltd v Shirlaw* [1940] AC 701, 717, per Lord Atkin).

261 I do not accept that submission. In my view, it is incumbent on a party who wishes to rely upon an implied term in a contract or an obligation said to arise in relation to the contract actually to plead that term or obligation. The basic function of a pleading is to inform the other side to litigation what case they have to meet in sufficient detail to enable that party to prepare to answer it: see e g *British Airways Pension Trustees Ltd v Sir Robert McAlpine & Sons Ltd* (1994) 45 Con LR 1 and the *Report and Recommendations of the Commercial Court Long Trials Working Party*, December 2007, paras 44–49, especially at para 44: "It is obviously imperative that in any litigation a claimant sets out the case it wishes to make so that the other parties to the litigation can see what issues they have to meet and defendants can set out their defences and counterclaims to the claimant's points." It is not consistent with that purpose for a party to leave an alleged implied term or any other obligation to be relied upon off the face of the pleadings only to bring forth an argument based upon such a term or obligation in closing submissions. It is nothing to the point that it may be contended that the term is to be implied or the obligation is said to arise as a matter of law (as distinct from by reference to the particular factual context in which the contract was made). The opposing party still needs to know

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A that a case based on such a term or obligation is to be advanced, so as to be in a position to marshal any case it may have to dispute that such a term is to be implied or such obligation arises, to argue about its precise formulation and, as appropriate, to call evidence designed to meet the case being made as to how it may have been breached. I do not read *Attorney General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988 nor any of the other authorities referred to by Mr Thompson as diluting this basic function of pleadings B where alleged implied terms or other specific obligations are to be relied upon. An express contractual term to be relied upon in proceedings needs to be pleaded; so does a duty of care in a claim in negligence; an implied contractual term or similar obligation to be relied upon should likewise be pleaded.

262 I allowed the late amendment to the defendants' pleadings by C reference to the usual principles which govern late applications to amend, and gave the parties permission to adduce further written submissions.

263 In their further written submissions, the defendants put their case against Holdings in relation to the non-payment of drawings by the LLP on 25 February 2009, contrary to clause 11.1 of the agreement, in four different ways: (i) on the true construction of clause 11.1, Holdings was in breach of that provision itself simply as a result of the non-payment D of the drawings by the LLP; alternatively, (ii) on the true construction of clause 11.1, Holdings was in breach of that provision itself because (acting by Mr Ribeiro) it procured the non-payment of the drawings by the LLP; alternatively, (iii) Holdings (acting by Mr Ribeiro) breached the implied term referred to above by procuring the LLP not to pay the drawings; alternatively, (iv) as a result of a positive rule of law (see *Southern* E *Foundries (1926) Ltd v Shirlaw* [1940] AC 701, 717 per Lord Atkin) Holdings was in breach of the agreement by procuring the non-payment of the drawings by the LLP.

264 The difference in the formulations at (i) and (ii) turns on whether a degree of linkage between activity by Holdings and the non-payment of the drawings by the LLP is required in order to show that Holdings is itself directly in breach of clause 11.1. I do not think that such a degree of linkage F is required and I accept Mr Thompson's primary submission at (i).

265 Clause 11.1 is expressed in the passive voice ("There shall be paid to each member"), which in a multi-party contract of this kind is significant. The obligation in that provision was not expressed to be solely the obligation of the LLP—if that had been intended, it would have been a simple matter to say, "The LLP shall be under an obligation to pay [etc]". G This basic linguistic point is reinforced by consideration of the context surrounding clause 11.1. It appears in an agreement which provides for Holdings and its representatives to have a great deal of practical power in relation to how the LLP behaves; where the LLP was created as a corporate vehicle to carry on a joint venture between Holdings and the defendants directed to providing each of them with the benefits stipulated in the Agreement; where it was contemplated that F & C would in practical H terms organise payments under clause 11.1 by virtue of its provision of payroll services to the LLP under the service agreement; and where, although the payments were stated to be drawings in anticipation of payment of income profits, they were still to be made even if there might be no expectation of such profits (cf clauses 9.3.2 and 11.6), if necessary out

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of the capital provided by Holdings (or to be provided by Holdings, under clauses 8.3 or 8.4). The affairs of the LLP were so bound up with the conduct of Holdings and funding provided by it that on an objective interpretation of clause 11.1 it falls to be construed as an obligation binding on all parties to the agreement (including Holdings). It should be noted that on this wider interpretation of clause 11.1 for which the defendants contend, the terms of para 1.7 of the fourth schedule (requiring there to be a breach of contract involving gross misconduct or gross negligence) would afford Holdings a distinct degree of protection against being found liable to buy out the defendants' interests in the LLP under put option notices served under that provision.

266 But on the facts of the case the distinction between the formulations at (i) and (ii) is not critical, since there was a direct link between action taken by Mr Ribeiro as agent for Holdings in arranging to stop the payments due to the defendants and the breach of clause 11.1 on 25 February 2009. Mr Ribeiro took this step to put into effect a strategy he had devised on behalf of Holdings, to put pressure on the defendants for the benefit of Holdings. In my view, Holdings was in breach of clause 11.1 of the agreement when Mr Ribeiro arranged for the drawings to be withheld on that date. It then becomes relevant to examine the circumstances surrounding that breach in order to determine whether it was of a quality which entitled the defendants to serve their first put option notices on that date: see paras 721ff below.

267 It is therefore not necessary for the defendants to rely upon the way in which they put their case at (iii) and (iv) above. But in case I am in error in my view regarding breach of clause 11.1, I will deal with those formulations as well. The formulations at (iii) and (iv) are based on the submission that the principle relevant to a situation in which there are two parties at an agreement (to the effect that one party may not take steps to prevent the performance of the contract by the other, as illustrated by *Stirling v Maitland* (1864) 5 B & S 840, *Barque Quilpué Ltd v Brown* [1904] 2 KB 264 and *Southern Foundries (1926) Ltd v Shirlaw* [1940] AC 701) is also applicable, by extension, to a three party situation: one party to a contract may not take steps to prevent performance by a second party to the same contract of an obligation owed to a third party to the contract. In my view, the relevant principle does extend to a three party situation as Mr Thompson contends.

268 In both the two party and the three party situations the parties to the contract are taken to contract on the footing that they wish the contract to be performed, and on an objective interpretation of their agreement have therefore impliedly agreed that they will not actively prevent performance (adapting the way in which the position is summarised in *Lewison*, *The Interpretation of Contracts*, 4th ed (2007), para 6.12). It was an implied term of the agreement that Holdings would not take steps to prevent the LLP from fulfilling its obligation to pay the defendants advanced drawings under clause 11.1 (or, putting the same obligation in different language, that Holdings would not procure the non-performance by the LLP of what it was required to do by clause 11.1 of the agreement).

269 I also consider that the implication of such a term in the present context is supported by reference to the well-known statement of Lord Blackburn in *Mackay v Dick* (1881) 6 App Cas 251, 263:

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A "I think I may safely say, as a general rule, that where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect."

B **270** In the present case, all the parties to the agreement agreed that the advance drawings should be paid by the LLP to the defendants under clause 11.1. Holdings, acting by Mr Ribeiro, was in a position to prevent that from happening. In my view, a fortiori, the natural conclusion here is that the reasonable expectation of the parties was that Holdings should be bound by an obligation not to take active steps to prevent that thing being done (i e a negative form of obligation of a kind that may more readily be C found to be implied than an obligation to take positive steps to bring about the doing of a particular thing, as contemplated by Lord Blackburn)—that is to say, by an obligation not to procure the non-performance by the LLP of its obligation under clause 11.1.

271 In my view, the term in question is properly to be implied into the agreement on the basis of the principles governing implication of terms set D out in *Attorney General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988, in particular at para 21: this is what the agreement, read as a whole against the relevant background, would reasonably be understood to mean. It can equally be said that this term is necessary to make the contract work (using the language of Lord Clarke of Stone-Cum-Ebony MR in summarising the effect of *Attorney General of Belize's* case and other authorities in *Mediterranean Salvage and Towage Ltd v Seamar Trading and Commerce* E *Inc* [2010] 1 All ER (Comm) 1, para 15). Where Holdings was in a position to prevent the defendants having the benefit of a payment which Holdings had agreed they should have, it was obviously incumbent on Holdings not to take positive action to prevent such a payment being made and by those means stopping the contract from working in the way it was intended to.

272 I think that, in so far as it has been suggested in some judgments F (such as in the speech of Lord Atkin in *Shirlaw's* case [1940] AC 701, 717) that the implication of such a term operates by virtue of some free-standing principle of law, the better view now is that the implication arises on the basis of the general principles set out in *Attorney General of Belize's* case. There will, of course, usually be no difficulty about implying such a term by reference to those principles, and if the implication sought to be relied upon cannot be justified by reference to those principles it is difficult to see why the G general law should be found to supply some obligation equivalent to an implied term affecting the operation of a contract but which would not reasonably be understood to be what the contract means.

273 F & C submitted that if such a term is to be implied in the agreement, it should be on the basis of a formulation requiring a significant degree of mens rea on the part of Holdings in relation to the prevention of H performance, informed by an analogy with the tort of inducing breach of contract: see *Lumley v Gye* (1853) 2 E & B 216; *OBG Ltd v Allan* [2008] 1 AC 1, paras 39–41, per Lord Hoffmann, and paras 192 and 202, per Lord Nicholls. I do not think that is right. The authorities referred to above do not suggest that the implied term is to be formulated in this way. It is unusual for breach of contract to require a subjective mental element of this

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kind, since the law of contract generally involves adoption of an objective approach to the formation and interpretation of contracts, rather than a subjective approach, and that objective approach informs the meaning to be given to and content of contractual obligations. It is not an answer to an allegation of breach of contract for a party to say that he did not know he was acting in breach. These considerations all point against the limited formulation of the implied term proposed by F & C. Judged on an objective basis, a party to a contract is reasonably entitled to expect that another party to the contract will not actively prevent performance of the contract, whether or not that other party knew that its actions would involve a breach of obligation.

274 In other contexts it might be relevant to debate further what is meant by active prevention of performance or procuring non-performance, but it would serve no purpose here. Holdings, acting by Mr Ribeiro, took a deliberate step to stop the LLP performing as it should have done under clause 11.1 of the agreement, and so clearly did actively prevent performance of the agreement (or, putting the same point in different language, did procure its non-performance) in breach of the implied term.

[In paras 275–1093 his Lordship considered in more detail the principal factual matters which required explanation and determination in order to decide on the proper outcome of the proceedings. He continued:]

The petition: the defendants' unfair prejudice claim

1094 The defendants' claim under section 994 is brought against both Holdings and F & C plc. It was common ground between the parties that in order to make out a claim under section 994 that the affairs of a company or limited liability partnership have been conducted in a way which is unfairly prejudicial to the interests of members in the entity, it is not necessary to show that the conduct was carried out by agents of the person or persons against who the claim is brought. It was also common ground that there is jurisdiction in appropriate cases to grant a remedy under section 996 against non-members in a company or limited liability partnership: see, e g, *In re Little Olympian Each-Ways Ltd* [1994] 2 BCLC 420, 429; *In re A Company (No 005287 of 1985)* [1986] 1 WLR 281. But the parties were not in agreement as to what the relevant test of attribution of unfairly prejudicial conduct to a defendant in a section 994 claim should be. In particular, Miss Newman submitted that, if I were of the view that the F & C representatives had conducted the affairs of the LLP in a manner which was unfairly prejudicial to the defendants, I should limit any liability and remedy under sections 994 to 996 to Holdings, and should find that F & C plc is not liable in respect of that conduct. Mr Thompson submitted that both Holdings and F & C plc should be found liable under section 994 and that relief should be granted against both of them under section 996.

1095 Where relevant conduct is carried out by a person himself or by his agent, there is no difficulty of attribution of responsibility for that conduct for the purposes of section 994, since the ordinary (and strict) standards of attribution of responsibility applicable under the general law will have been satisfied. At certain points (in particular, at the LLP board meeting on 21 January 2009, the members' meeting on 18 February 2009 and in stopping payment of the advance drawings of the defendants on

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A 25 February 2009) Mr Ribeiro engaged in conduct prejudicial to the interests of the defendants in the LLP in circumstances where he acted as agent of Holdings. The analysis above relating to breach of clause 13.6 of the agreement by Holdings in relation to such conduct is also applicable to support the conclusion that such conduct was unfairly prejudicial to the interests of the defendants for the purposes of their unfair prejudice claim.

B **1096** What is the relevant test of attribution of responsibility beyond the narrow class of case where an agency relationship exists? In my judgment, the test is whether the defendant in a section 994 claim is so connected to the unfairly prejudicial conduct in question that it would be just, in the context of the statutory regime contained in sections 994 to 996, to grant a remedy against that defendant in relation to that conduct. The standard of justice to be applied reflects the requirements of fair commercial C dealing inherent in the statutory regime. This is to state the test at a high level of abstraction. In practice, everything will depend upon the facts of a particular case and the court's assessment whether what was done involved unfairness in which the relevant defendant was sufficiently implicated to warrant relief being granted against him.

1097 I turn to consider the extent of the unfairly prejudicial conduct for D which, in my judgment, Holdings may be held responsible:

(i) Although the defendants complained that F & C sought to undermine or destroy the business of the LLP by actions such as causing clients to redeem their investments in the LLP's funds, imposing improper cuts on the LLP and improperly blocking the development of its business, I have rejected these complaints. I have also rejected a range of other complaints made by the defendants. However, I have accepted other significant complaints by E them, in particular as summarised below.

(ii) Holdings is responsible for the attempt by Mr Ribeiro in January and February 2009 to shift decision-making for the LLP from the proper organs of the LLP board and mancom to the members' meeting, where Holdings could dictate policy. This did constitute unfairly prejudicial conduct. In early March 2009, however, well before the petition was issued, F Mr Ribeiro sought to reverse that approach. Can these earlier matters therefore be ignored, on the grounds that by the time the petition was issued they had been rectified? I do not consider that they can be ignored. These actions of Mr Ribeiro and Holdings had a lasting prejudicial effect upon the defendants' interests in the LLP, since they severely undermined trust between those involved in the management of the LLP in a way which was unlikely to be, and in fact was not, restored thereafter, and hence severely G undermined the ability of the LLP to operate effectively as a business facing the severe challenges it faced in 2009. The actions of Mr Ribeiro and Holdings also, as a reasonable and legitimate reaction by the defendants, caused them to serve the first put option notices and led to the litigation between the members. That had a major and lasting detrimental effect on the business of the LLP: see, in particular, para 814 above. The letters of H 26 February and 2 March 2009 written by Mr Ribeiro and Mr Logan, respectively, on behalf of Holdings (paras 720 and 742 above) were not straightforward and gave grounds for the defendants to think that they had not really undergone a complete change of heart. The way in which F & C secretly commenced the Part 7 proceedings (para 767 above) reinforced that impression. Moreover, the change of approach by Mr Ribeiro from

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March 2009 was not complete, and his actions in January and February 2009 provide an important context for evaluating his conduct after that time, as referred to below. His actions in early 2009 therefore continue to be relevant, weighty matters to be taken into account in evaluating the defendants' claims under section 994. From March 2009 Mr Ribeiro continued to take action which unfairly removed control of important aspects of the LLP's affairs from the defendants and the LLP's organs of government, as follows.

(iii) In about mid-March 2009, Mr Ribeiro took legal advice regarding the obligations of the LLP to write to the two remaining investors in the balanced fund, but failed to share or discuss that advice with the defendants or mancom as he should have done. He then wrote to those investors on behalf of the LLP on 25 March 2009 without giving the defendants or mancom a fair opportunity to discuss or comment on what he was doing, as he should have done. In effect, he took this important matter relating to the conduct of the LLP's affairs out of the hands of the executive management of the LLP without proper justification: see paras 788ff above. When called upon later to give an account of the legal advice he had received on behalf of the LLP, he again failed to give a proper account: para 833 above.

(iv) Both before and after February 2009 Mr Ribeiro acquiesced in, and implicitly encouraged, acts of disloyalty by Mr Tilson which tended to undermine the ability of the defendants (as the senior executive managers of the LLP) and the mancom to run its affairs: see e g para 678 above.

(v) On 23 June 2009, Mr Ribeiro caused Mr Tilson to send out a notice regarding the dispute on behalf of the LLP to the event driven fund on his own initiative, without first discussing it with the defendants or mancom: paras 902–903 above.

(vi) On about 16 June 2009 Mr Ribeiro agreed on behalf of the LLP, again without reference to the defendants or mancom, to Achmea's very unusual and commercially sensitive request that it should conduct an audit of the fees charged by the LLP and he privately gave instructions to Mr Tilson to provide LLP information to Achmea: paras 907–908. When the defendants found out about this, Mr Ribeiro continued to try to limit their ability (as the senior executive managers) to control the handling of this difficult situation: paras 952–953 and 957.

(vii) F & C attempted unilaterally to remove Mr Culligan as the IT administrator for the LLP, without attempting to address the question by going through the proper channel of the mancom under clause 17 of the agreement: para 970.

(viii) On 4 August 2009, Mr Ribeiro caused the LLP (acting by a majority vote by the F & C representatives on LLP board) to send information about the dispute to the auditors of the balanced fund, whereas that should have been a decision for the mancom: para 954 above.

(ix) On 27 July 2009, Mr Mackay informed the FSA about the dispute without reference to the defendants or mancom and without keeping a good record of what was said: para 943 above. Mr Ribeiro and the F & C representatives did not seek to reprimand him or call him to account in any way.

(x) The defendants were subjected to undue pressure in their roles in the day-to-day management of the affairs of the LLP on the basis of the Mackay draft report and then improperly removed from those roles on the basis of

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A the Mackay final report (both of which reports were produced as the result of an unfair and inadequate investigation), and without being afforded a fair opportunity to respond to the allegations contained in them. The F & C representatives on the LLP board and mancom were on notice about the defects in the investigation and reports but nonetheless used the reports as a lever with which to oust the defendants from their proper involvement in the management of the LLP's business.

B (xi) The Mackay investigation and reports were predicated on a view, strongly urged by Mr Ribeiro and F & C, that F & C group policies bound the LLP, which contention and the investigation and reports by Mr Mackay to enforce that view in turn involved the illegitimate application of pressure on the defendants for the benefit of F & C, and improperly undermined the management powers of the defendants and the mancom in running the C business of the LLP: see paras 115–146 above.

(xii) All the matters at (ii) to (xi) above are properly to be regarded as part of a pattern of conduct by F & C, the F & C representatives and Mr Mackay (acting at least in part for the F & C Group as its compliance officer) which continuously over an extended period of time undermined the position of the defendants in the LLP, where there is a sufficient connection between what was done and Holdings such that it is fair to conclude that Holdings should D be regarded as responsible under section 994 for such unfairly prejudicial conduct. In acting as they did, the various individuals referred to did not sufficiently respect the terms of the agreement and the rights of the defendants in relation to the management of the LLP. This occurred in the context of an overarching dispute between F & C and the defendants, where to disregard the defendants' rights involved favouring F & C in that dispute. E They acted as they did at least in part because they thought it was in the interests of F & C to take the various steps referred to (e g in order to protect its relations with its clients) and with a consciousness that F & C did not like or trust the business judgment of the defendants and had a strong interest (which they did little or nothing to resist when it came for them to take action) to try to undermine the defendants' influence on the conduct of the business.

F 1098 In the light of this pattern of behaviour, I have no hesitation in concluding that Holdings should be held liable under section 994 for unfairly prejudicial conduct of the affairs of the LLP.

1099 Although F & C plc may perhaps be said to be at one further remove from the active conduct of the affairs of the LLP (in that it was not a party to the agreement), I also have no hesitation in concluding that it also G should be held liable under section 994 for the same pattern of unfairly prejudicial conduct of the affairs of the LLP.

1100 In truth, there is no clear distinction to be drawn between Holdings and F & C plc in this regard. Holdings was in reality a cipher for the F & C group, and F & C plc in particular. There were no board meetings of Holdings. Mr Ribeiro was authorised by its directors (Mr Grisay and F & C plc) to conduct its affairs, reporting back to Mr Grisay and F & C plc H as he thought appropriate. F & C plc, acting by Execom, was informed about Mr Ribeiro's strategy of trying to remove decision-making in the LLP to the members' meeting and in substance endorsed his approach and authorised him to proceed: see, in particular, para 674 above. Thereafter, F & C plc continued to be happy to leave Mr Ribeiro to handle the detailed

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conduct of the dispute, trusting him to promote F & C's interests, without making any attempt to intervene to control his actions. There was thus, in a broad sense, authorisation from F & C plc to Mr Ribeiro and the F & C representatives to proceed in acting as they did; and see para 200 above.

1101 In addition, the same points as in para 1097(x) to (xii) above apply with equal force in relation to F & C plc as in relation to Holdings. Indeed, in my view, they apply with greater force, since (because of the cipher-like nature of Holdings) when thinking about the interests of F & C and in understanding how they might be advanced by action against the interests of the defendants, the individuals concerned tended in reality to think about F & C plc (and the F & C group, of which F & C plc was the head company) rather than Holdings. The practical benefits for F & C derived from the pattern of unfairly prejudicial conduct also flowed, in reality, to F & C plc, which (rather than Holdings) had the ultimate commercial interest in controlling the LLP's affairs.

1102 On this issue, my view as to the responsibility of F & C plc for the unfairly prejudicial conduct of the LLP's affairs is also, I think, supported by *Scottish Co-operative Wholesale Society Ltd v Meyer* [1959] AC 324. That case concerned section 210 of the Companies Act 1948, which was held to require the court to look at "the business realities of a situation" rather than taking a narrow legalistic view: p 343. I consider that the same is true of what is now section 994. In the present case, F & C plc assigned Mr Ribeiro to formulate strategy and tactics for the F & C Group in dealing with the dispute with the defendants and endorsed his approach. F & C plc looked to take the benefit from that approach. As a matter of business reality, F & C plc did not stand aloof from the conduct of the affairs of the LLP, but actively intervened in them. Although the involvement of F & C plc was achieved at some points in a different way from the involvement of the appellant society in the *Scottish Co-operative Wholesale Society* case in the affairs of its subsidiary, it was all of a character with sufficient similarities to the conduct in that case as to indicate that it is fair to hold F & C plc responsible for it for the purposes of section 994. In the *Scottish Co-operative Wholesale Society* case the appellant society stood behind the nominee directors, who were supine in the face of the policy of the society to destroy the company so that it was appropriate, when looking at the business reality, to hold the society responsible to a material degree for the conduct of the business of the company: see in particular [1959] AC 324, 341–342, per Viscount Simonds, pp 362–363, per Lord Keith of Avonholm, and p 366, per Lord Denning. In the present case, F & C plc's interests were promoted by Mr Ribeiro seeking to divert material parts of the conduct of the LLP's affairs outside the proper governance structures of the LLP. This was involvement by F & C plc in the conduct of the affairs of the LLP which was at least as direct as in the *Scottish Co-operative Wholesale Society* case—indeed, it was, in a certain sense, more direct, in that the implementation of F & C plc's policy did not depend upon passive inaction and breach of fiduciary duty by the F & C representatives on the LLP board and mancom, but often operated by means of by-passing the executive managers of the LLP and the LLP board and mancom altogether in important respects.

1103 So far as concerns the defendants' complaints under section 994 regarding the investigation and reports by Mr Mackay, culminating in their removal from executive management of the LLP's business, I consider that

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A the legal standards of fairness to be observed by a compliance officer when conducting an investigation of the kind in question in these proceedings supply a sufficiently concrete and determinate standard of just behaviour to fall within the guidance given by Lord Hoffmann in *O'Neill v Phillips* [1999] 1 WLR 1092: para 77 above. Where someone in the position of compliance officer or equivalent (e g a disciplinary tribunal within a firm dealing with a complaint against an employee) acts in accordance with what B they believe in good faith to be their duty, it will be rare for an unfair prejudice case based on their conduct to be made out: cf *Hawkes v Cuddy (No 2)* [2009] 2 BCLC 427, para 54 (a director may take action which is prejudicial to a claimant, but it will not be *unfairly* prejudicial if taken in the genuine belief it is in the company's interests). However, as with a situation where a director conducts the business of a company in a manner which C departs in a serious way from the standards of reasonable management to be expected of him (*In re Macro (Ipswich) Ltd* [1994] 2 BCLC 354, para 254 above), in a case of a serious departure from the relevant standards of fairness to be expected in a particular context, where removal from involvement in the executive management of the business is a foreseen result, the relevant breach of the applicable standards of fairness will be capable of D constituting unfairly prejudicial conduct for the purposes of section 994. In my judgment, that is the position in relation to Mr Mackay's investigation and report, and the LLP's actions taken on the basis of his report, in the present case.

1104 I consider that there is a sufficient connection with Holdings and F & C plc to justify the grant of relief against them in relation to this aspect of the case, arising from the fact that Mr Mackay maintained that he acted in E his capacity as compliance officer for the F & C group as well as for the LLP (in which capacity his services were also provided by F & C to the LLP under the terms of the service agreement); the fact that his investigation and reports sought to enforce F & C group policies which did not apply to the LLP; and also from the fact that the F & C representatives on the mancom who took action on the Mackay final report (though acting in good faith) F were on notice of its defects and ought in fairness to have postponed action on it until the defendants had had a proper opportunity to answer it—but pressed on, partly out of a concern to limit the prejudice to Holdings and F & C plc arising out of the dispute and the conflict within the LLP.

1105 However, I emphasise that I would still have found Holdings and F & C plc liable to the defendants under section 994 even if one left the issues in relation to the Mackay investigation and reports to one side.

G 1106 I should also mention that as part of its case under section 994, F & C sought to rely on certain observations by me in *Fisher v Cadman* [2006] 1 BCLC 499, paras 90–93, regarding the relevance of acquiescence by a party complaining under section 994 in informality or non-compliance with the articles of association in the way in which the affairs of a company (or, as the case may be, a limited liability partnership) have been run. Such H acquiescence may be material to the question whether conduct involving running the affairs of the company in breach of the articles is to be regarded as unfairly prejudicial conduct for the purposes of the statute.

1107 In my judgment, this part of the judgment in *Fisher's* case falls to be distinguished on the facts of the present case. The LLP was not run on informal lines, nor with regular departures from the terms of the agreement

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on the part of F & C and its representatives, acquiesced in by the defendants. In any event, by late 2008, when the parties appreciated that they had different views about the way forward for the business, it was clear that their differences would have to be addressed by reference to the terms of the agreement (this is illustrated, for example, by the way in which Mr Ribeiro warned the defendants at their meeting on 17 December 2008 that they should read the agreement carefully: para 518 above).

The cross-petition

1108 The main issues raised in the cross-petition are that:

(i) The agreement was qualified by certain understandings and was to operate on the basis of a relationship of mutual trust and confidence. I reject these contentions.

(ii) The LLP and the defendants were required to comply fully with F & C group policies, including by abdicating particular decisions to F & C entities in accordance with the literal terms of those policies. I also reject these contentions.

(iii) From about late 2008 or early 2009, the defendants changed their approach to the affairs of the LLP and, without justification, became antagonistic and confrontational towards F & C and its representatives. I reject these contentions. The defendants' attitude to F & C and its representatives was conditioned by, and changed in reaction to, their behaviour. Over this period, the defendants did become more confrontational, but they had good reason to do so because of the way in which they were treated by F & C and Mr Ribeiro.

(iv) From December 2008, Mr Culligan (with Mr Barthelemy's knowledge and consent) arranged an external e-mail service for the LLP and created a new IT infrastructure for the LLP which created a serious security risk for both F & C and the LLP, without proper authority by the LLP and in breach of F & C group policies. I address this complaint in more detail in paras 1109–1111 below, where I conclude that it falls to be rejected.

(v) The defendants were aware that the resolutions which Holdings proposed at the members' meeting of 18 February 2009 were put forward, voted on and then were sought to be implemented by Mr Ribeiro and Holdings on the basis of a mistake by Mr Ribeiro and Holdings about the powers of that meeting, and then sought to exploit that mistake by serving their first put option notices. I reject these contentions.

(vi) The defendants' service of their second put option notices was unjustified and their pleaded case presented at about the same time was extravagant and unjustified. I reject these contentions. I have found that the defendants had justification in serving the second put option notices and that those notices were valid. I have rejected some, but not all, of the defendants' pleaded complaints against F & C. Even in relation to the complaints I have rejected (see e g para 1097(i) above), I consider that there was a sufficient basis for the complaints to be put forward by the defendants in their pleaded case (and later, in their witness statements) and that their acting in that way cannot properly be characterised as unfairly prejudicial conduct.

(vii) Mr Culligan's covert review of LLP staff e-mails was unauthorised, constituted criminal offences contrary to section 1 of the Computer Misuse Act 1990 and section 55 of the Data Protection Act 1998 and was taken to

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A promote the private interests of the defendants in the litigation. I reject these contentions.

(viii) The defendants acted in an intimidating and inappropriate manner towards Mr Tilson. I reject the substance of these contentions.

(ix) The defendants have refused to accept that the withdrawal of their FSA approved person status pursuant to Mr Mackay's investigation and reports was valid and in good faith. I do not consider that the behaviour of B the defendants in relation to Mr Mackay's investigation and reports and the steps taken by the mancom in reliance upon those reports is open to criticism under section 994. The defendants had valid reasons for considering that they had been treated unfairly and for reacting accordingly.

(x) By January 2010, there were grounds for removing the defendants as members of the LLP board and the only proper course for members of the C LLP board, including as appropriate the defendants, was to vote in favour of removal of the defendants, but the defendants improperly avoided and obstructed the calling of any board meeting which would be able to vote upon a resolution to that effect. I reject these contentions. The defendants had good grounds to object to their removal from the LLP board and were justified in taking defensive action to prevent Holdings and the F & C D representatives from harassing them with attempts to vote on such a resolution.

1109 I say a few more words here about F & C's complaints in relation to the setting up by Mr Culligan and Mr Pennington of an external e-mail system for the LLP and of a new IT system for the LLP. So far as the external e-mail system is concerned, this was action taken by Mr Culligan with authority from the relevant organ within the LLP (the mancom, under E clause 17 of the agreement) and with the actual knowledge of all the mancom members. It was action taken by Mr Culligan in the genuine belief (shared by all the other mancom members involved in the day-to-day running of the LLP, including Mr Tilson and Mr Sparks) that it was in the best interests of the LLP. In the circumstances, I do not consider that this is conduct which can be characterised as unfairly prejudicial conduct for the F purposes of section 994.

1110 As I have made clear in the judgment, the setting up of the LLP's IT system, with its link to the F & C IT system via the dual-homed computers, is a matter of greater concern. But here, also, I reject F & C's submission that it or Mr Culligan's behaviour in relation to it constitute unfairly prejudicial conduct by Mr Culligan of the LLP's affairs, contrary to section 994.

G (i) The mancom had authorised Mr Culligan and Mr Pennington over many years to deal with the technical aspects of the LLP's IT arrangements without having to explain them in detail to the mancom or get clearance from the mancom when implementing any changes. The measures taken by Mr Culligan and Mr Pennington in creating the LLP's new IT network in December 2008 and January 2009 were in line with and covered by that H authorisation.

(ii) That Mr Culligan and Mr Pennington had set up a new IT network for the LLP was known to all the LLP's mancom members in January 2009; none of them questioned this at the time or sought to bring the matter before the mancom to ask them to give a detailed technical account of what had been done. So far as its internal management was concerned, this was in line

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with the way in which the LLP had always run its affairs. Mr Culligan did not, and did not seek to, subvert the LLP's management structures set out in the agreement in proceeding as he did. A

(iii) The setting up of the new IT network was action taken by Mr Culligan in the genuine belief (shared by Mr Pennington and—certainly so far as Mr Culligan could see—all the other mancom members involved in the day-to-day running of the LLP, including Mr Tilson and Mr Sparks) that it was in the best interests of the LLP. B

(iv) So far as the LLP's own electronic data were concerned, Mr Culligan was entitled to assess that the new IT system did not create any unjustified risk for the LLP: paras 585–587 above. That was his genuine view, shared by Mr Pennington.

(v) So far as F & C's IT network was concerned, the creation of the LLP IT network with the dual-homed computers linking to the F & C network did give rise to an unjustified risk to F & C's system and electronic data. The creation of this unjustified risk was inadvertent on the part of Mr Culligan and Mr Pennington, and in any event did not constitute unfairly prejudical conduct of the affairs of the LLP in a manner which could justify the grant of relief under sections 994 to 996: see paras 588–598 above. It did not expose the LLP to any significant business risk: para 598 above. C D

(vi) The omission of Mr Culligan to tell the mancom or LLP board about the dual-homed computers and the creation of a risk for the F & C IT network also did not constitute unfairly prejudicial conduct of the affairs of the LLP, since he acted in line with the usual approach of not referring detailed technical matters (such as the use of a wireless router and dual-homed computers) to the mancom or board (see (i) and (ii) above) and he had not and did not think that he had done anything which created any unusual or potentially unacceptable risk for the LLP which might call for a report to the mancom or board (a view shared by Mr Pennington). E

(vii) Mr Culligan's description of the new IT system as part of a continuing BCP test stretched that notion very far and was inappropriate, but—in relation to the management of the LLP's affairs—the members of the mancom were all aware from January 2009 that in substance the LLP was operating with its own stand-alone IT network. Mr Culligan did not deceive the mancom or the LLP board, nor did he subvert, or seek to subvert, the proper ability of the mancom to control the IT arrangements of the LLP in the normal way. F

(viii) The new IT system was the LLP's primary IT system. The LLP did not keep its data and run its operating systems in parallel on the F & C IT system. Accordingly, the LLP did not have a back-up system in operation which would take over if the LLP's IT system were affected by some disaster. However, this was a relatively minor matter. If the IT infrastructure at the LLP's office were knocked out, Mr Culligan and Mr Pennington would readily have been able to set up a new back-up system at another location, with access to the LLP's data stored on the archives provided by its external IT service providers. This was the same sort of BCP arrangement which the LLP relied on at other times. The proper functioning of its business was not put in jeopardy to any significant degree. G H

1111 Mr Barthelemy was not involved in setting up the LLP's IT system and had no awareness of any of the security or technical ramifications of this, or of the use of the dual-homed computers. Accordingly, the case

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A against him under section 994 in relation to this particular issue is unfounded.

1112 Finally, in relation to the cross-petition, I would add that even if some part of F & C's complaints against the defendants had been established, so that it would be necessary to weigh up the competing unfair prejudice claims of F & C and the defendants to see who should succeed overall under section 994, I would have had no hesitation in concluding that B by far the most unfairly prejudicial conduct of the LLP's affairs was by F & C and that the greatest responsibility for the damage to the LLP's business arising out of the dispute lies with F & C.

Conclusions

1113 For the reasons set out at length in this judgment, I conclude as C follows:

(i) The first put option notices were validly served. Pursuant to those notices, the defendants are entitled to insist that Holdings purchases their interests in the LLP in accordance with the price formula under para 1.7 of the fourth schedule. (F & C plc has guaranteed performance of Holdings' obligations in this regard.)

D (ii) The second put option notices were also validly served.

(iii) The third put option notices were not validly served, and add nothing to the defendants' claims. But in view of the conclusion at (i) above, they do not need to rely on them.

(iv) The defendants succeed in their unfair prejudice claim under section 994.

(v) F & C's unfair prejudice claim contained in the cross-petition is E dismissed.

1114 The parties should now seek to agree the issues to be considered by the court at the next stage of the liability hearing and the terms of any order to be made. Where there is disagreement, they should seek to identify clearly for the court the points in contention and the respective positions adopted by them on those points.

F *Judgment for defendants.*
Petition allowed.
Cross-petition dismissed.

CELIA FOX, Barrister

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