Neutral Citation Number: [2012] EWHC 363 (QB)

Case No: HQ10X02354

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27th February 2012

Before :

HIS HONOUR JUDGE ROBINSON
(sitting as a Judge of the High Court)

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Between :

Ms Heather Killen	**Claimant**
- and -	
(1) Horseworld Ltd	
(2) Horseworld (UK) Ltd	
(3) Toby Vintcent	
(4) Richard Worrall	**Defendants**

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- -

The Claimant appeared in person
William McCormick QC (instructed by Tollers LLP) appeared for the First and Second Defendants

Hearing dates: 14-17 November 2011

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Judgment

His Honour Judge Robinson:

Introduction

1. This case concerns the scope of the fiduciary duties owed by directors of companies under the new statutory regime contained within Sections 170 to 181 of the Companies Act 2006, which provisions were fully in force by 1 October 2008.

2. Exactly a week before this trial began, the Claimant discontinued the claim she had commenced against the four Defendants named in this action. She also dispensed with the services of her Solicitors, Messrs Kingsley Napley. However, proceedings having been commenced, the first two Defendants brought Counterclaims. It is those Counterclaims which have formed the subject matter of the trial before me. The Defendant companies (as I shall refer collectively to the First and Second Defendants) have been represented by Mr William McCormick QC. The Claimant has appeared in person. I shall continue to refer to the parties as Claimant and Defendants, even though the trial before me has been solely concerned with the Counterclaim.

3. Both Claim and Counterclaim arise out of the relationship between the Claimant and the Defendant companies. The Claimant was and is the co-founder and partner of Hemisphere Capital LLP. As she says at paragraph 5 of her second witness statement, this is a private equity and corporate advisory firm which focuses on providing consultancy services to new media and technology companies. She has enjoyed a distinguished business career with the likes of Yahoo!, the investment bankers Salamon Brothers and has also been a non-executive director of ITV plc.

4. The Third and Fourth Defendants were at the material time directors and shareholders of the Defendant Companies. Horseworld Ltd was incorporated on 24 May 2005 and Horseworld UK Ltd on 17 January 2007.

5. I shall refer to the Third and Fourth Defendants as "Mr Vintcent" and "Mr Worrall" respectively. Mr Worrall later resigned his directorships and Mr Vintcent became the sole shareholder in both Defendant companies. Nothing turns on those matters for the purposes of the issues which I have to determine. References to documents in the trial bundles are shown in [square brackets].

Background Facts

6. I intend this section of my judgment to comprise facts which I understand to be uncontroversial. To the extent that this is not so, I make the relevant findings of fact upon consideration of all of the evidence.

7. Mr Vintcent has a lifelong association with equestrianism and, in particular, with three day eventing. He became well known within the equestrian world and held positions of responsibility with a number of bodies, including the British Equestrian Federation ("BEF"). Mr Worrall has enjoyed a career in broadcasting, advertising and media generally.

8. Messrs Vintcent and Worrall hit upon the idea of creating an equestrian theme park. It is not necessary to explain this further. However, in the course of the furtherance of

this idea, they were put in touch with the Claimant. The first meeting of Messrs Vintcent and Worrall and the Claimant appears to have been in about August 2006. At the end of October 2007 the Claimant became Chief Executive Officer of Horseworld Ltd and a director of Horseworld UK Ltd.

9. In 2007 Mr Vintcent was a director of the BEF. The then chairman was Mr Hugh Thomas. He was also the head of the team responsible for organising the Badminton Horse Trials due to take place in May 2008.

10. In November 2007 Mr Vintcent sent an e-mail to Mr Thomas [C3 p815-6] requesting a meeting to discuss the on-line marketing opportunities that might arise out of the Badminton event. The evidence in the case, which was not the subject of any dispute, is that the Badminton event is considered by equestrians to be the premier event in the world. Association with that event would clearly be beneficial to the Defendant companies.

11. The meeting took place on 21 November 2007 followed by another meeting on 13 March 2008 attended by Mr Worrall and the Claimant. As Mr Vintcent explains in his second witness statement, given his own involvement with the BEF he did not want to find himself in a situation of conflict of interest with Mr Thomas. Of interest to the Defendant companies was the idea of streaming visual coverage of the Badminton event over or via the internet – a process known as Internet Protocol Television or IPTV.

12. The upshot was that Horseworld Ltd was given the right to stream visual coverage of the event. The negotiations appear to have been somewhat complex. It is clear and I so find that the Claimant was intimately involved in the negotiations.

13. From a technical point of view the exercise was a success. However, the project ran at a loss. The idea had been to induce individual members of the public to pay to view the coverage and also to secure sponsorship by selling advertising space on the relevant web platform.

14. Again, I do not think that this evidence is the subject of dispute but to the extent it is I make these findings upon the preponderance of the evidence. Analysis of the project was undertaken. In all 20,000 persons had begun to watch the streamed coverage. However, the business model adopted required viewers to register by providing various personal details on-line. At that point, 17,000 viewers dropped out, leaving only 3,000 who actually did register, even though registration was free. The next stage in the viewing process was a period of free viewing after which the viewer was required to pay. Perhaps not surprisingly, there was a further fall off or "drop off" of viewers after the end of the free viewing period.

15. In the course of cross-examination Mr Vintcent said that this information was extremely valuable, in commercial terms, for these reasons. First, it showed that the business model adopted was flawed. Second, it showed that given the short period of time in which the project had been set up, the scale of interest was, as he put it "pretty reasonable". In particular, he said that knowledge of the rate of "drop off" and the stages at which this occurred was valuable information which would and could be used to determine how to develop this imperfect business model in the future.

16. In the course of those negotiations the Claimant was given access to information provided by the organisers of the Badminton event relating to its contract with the BBC – see the e-mail dated 12 May 2008 [C7 p1890].

17. At the same time, the development of the Horseworld business was progressing. It was decided to incorporate a company in the British Virgin Islands called Horseworld Holdings (BVI) Ltd. It was ultimately incorporated on 29 July 2008 by the Claimant. It was wholly owned by Messrs Vintcent and Worrall.

18. After Badminton, there was discussion between the Claimant and Michael Swinney, who is a business man with experience in the location based entertainment industry [B p82 para 9]. He was called to give evidence on behalf of the Claimant. At paragraph 22 of his witness statement he says that:

> "It would be true to say that Ms Killen was more focussed on pursuing the online and media sides of the [Horseworld] business. This was where her passions, expertise and experience lay … Ms Killen also saw the potential opportunities in exploring these media and online aspects as a way to generate awareness and reputation for the Horseworld business in the equine industry …"

19. There were also discussions with another business man, Bernie Uechtritz who was based in the USA and pursued his equine business interests via his company referred to in this case simply as Planet Horse. There was a proposal to merge the Planet Horse interests with those of the Defendant companies.

20. Returning to the witness statement of Mr Swinney, at paragraph 25 he spoke of the origin of what he described as the "parallel track approach". This approach involved the incorporation of a second BVI company. In cross examination he said he was not aware of the name, but it was in fact Horseworld International (BVI) Ltd. Also in cross examination he said that the parallel track idea had been his which he had proposed to the Claimant either at the end of May or beginning of June 2008. He said he had proposed it in person to the Claimant.

21. The idea appears to have been to split the business interests of the Defendant companies into the theme park business and the media business. The Claimant said that the idea was that the Planet Horse business and the Horseworld media business would be merged within Horseworld International (BVI) Ltd, whilst the theme park business would be transferred to Horseworld Holdings (BVI) Ltd.

22. Horseworld International (BVI) Ltd was incorporated, again by the Claimant, on 29 July 2008. She was the 99.98% majority shareholder. The process by which that company came to be incorporated is important.

23. The Claimant and the Defendant companies parted company in August 2008 in circumstances that have not really been explored in any detail, save that it is clear that the Claimant, putting matters neutrally, was asked to leave. Once she left she acquired a company called Horse and Country TV Ltd ("Horse and Country"). She took a controlling interest on or about 6 December 2008.

24. The Defendants' case is that whilst Ms Killen was involved with the Defendant companies, she attempted to squeeze Messrs Vintcent and Worrall out. It is alleged

that once she left the Defendant companies she sought to hijack the business interests of the Defendant companies to the detriment of them and also, inevitably, to the detriment of Messrs Vintcent and Worrall, by using her newly acquired company, Horse and Country, to compete directly with the Defendant companies. In particular, Horse and Country succeeded in securing the broadcasting rights, including IPTV rights, to the Badminton event in 2009.

25. Other allegations made in the Counterclaim concerning the exercise of reasonable skill and care, the incurring of costs in relation to the Badminton project and matters concerning a longer term relationship with the Badminton event were abandoned at the outset of this trial.

Examination of the Evidence

26. It is necessary to consider:

(1) The manner in which Horseworld International (BVI) Ltd was incorporated and in particular how it came about that the Claimant took 9,998 of the 10,000 issued shares;

(2) The Claimant's dealings with Horse and Country, both before and after her departure from the Defendant companies;

(3) The Claimant's dealings with Badminton, both before and after her departure from the Defendant companies, which ultimately led to the grant of Badminton broadcasting rights to favour of Horse and Country.

27. It is convenient at this stage to deal with my assessment of the witnesses. On behalf of the Defendants I heard oral evidence from Mr Vintcent, and I read his witness statements which were both dated 14 October 2011 [B 108 and 207].

28. Reliance was also placed upon the witness statements of Gary Langstaff dated 29 September 2011 [B 219] and Bernard Uechtritz dated 13 October 2011 [B 227]. Those witnesses are resident in the USA and their statements were put in as hearsay evidence.

29. On behalf of the Claimant I heard oral evidence from her and also read her statements dated 27 October 2010 [B 1] and 31 October 2011 [B15]. I also heard live evidence from Michael Swinney and read his witness statement dated 13 October 2011 [B80].

30. The Claimant also relied upon statements from witnesses who did not give oral evidence. The statement of Philip Vaughan dated 13 October 2011 [B 91] was put in as hearsay evidence because he too is resident in the USA. The evidence contained within the witness statement of Jonathan Coffin dated 2 November 2011 [B 96A] was admitted as agreed evidence.

31. Mr Coffin was, at the material time, director of digital content at a company called Film 38 Ltd. That company was engaged to assist in the on line streaming of Badminton coverage.

32. Mr Vaughan's evidence relates to the theme park concept, which has not proved to be of significance in this trial.

33. Mr Swinney was only able to give evidence on Tuesday 15 November 2011 and so he was called immediately after Mr Vintcent had completed his evidence. I next heard from the Claimant.

34. During the course of opening the case on behalf of the Defendant companies, Mr McCormick had indicated that he would be relying upon the evidence of Mr Hugh Thomas, who had been the Director of the Badminton event since 1989, and that he would be calling him to give evidence. However, during the course of the trial, Mr McCormick stated that he would not be relying upon that evidence and thus did not propose to call him. That came as a surprise to the Claimant, who argued strenuously that she wished to have the opportunity to cross-examine Mr Thomas. I felt it proper to direct the Claimant, as a litigant in person, to CPR 32.5(5)(b), which provides that where a party has served a witness statement but does not call the witness to give evidence at trial or put the statement in as hearsay evidence, any other party to the proceedings may put the statement in as hearsay evidence. For obvious reasons that was not attractive to the Claimant. Nor was the possibility of calling the witness herself attractive since it is unlikely that I would give permission to ask any further questions at all, never mind questions in the nature of cross-examination. In the event, no party has placed any reliance upon the evidence of Mr Thomas.

35. I did permit the Claimant to ask further questions of Mr Vintcent in cross-examination on the topic of the formation of Horseworld International (BVI) Ltd. He was re-called to the witness box during the afternoon of Wednesday 16 November 2011. I had originally indicated that I would allow 30 minutes for this purpose, but in the event Mr Vintcent was subjected to further cross-examination for 85 minutes.

36. That second session of cross-examination gave me a further opportunity to assess the honesty and accuracy of Mr Vintcent. I was re-inforced in the view I had already formed. Mr Vintcent struck me as a man who can properly be described as honest, straightforward and forthright. He impressed me as a witness.

37. The Claimant, as a witness, did not impress me nearly as much. She is undoubtedly an extremely successful business woman. I suspect that the niceties of oral communication in the business circles in which the Claimant is used to moving is rather different from that expected in the sterile atmosphere of the court room. On occasions I found her somewhat reluctant to give what I would consider to be straight answers to straight questions. That may be good business practice, particularly in the course of delicate negotiations, but it is not helpful in the context of the delivery of oral evidence. Making all relevant allowances to take into account such matters, I am still driven to conclude that where there is a conflict in evidence between Mr Vintcent and the Claimant, I prefer the evidence of Mr Vintcent.

38. As for Mr Swinney I am satisfied that he came to court prepared to give what assistance he could. He was only cross-examined for about 15 minutes.

Incorporation of Horseworld International (BVI) Ltd

39. I have given the bare outline of this process already, by reference to the evidence of Mr Swinney. Of particular interest is the extent to which the allegation of Mr Vintcent, that he and Mr Worrall were being squeezed out, is supported by the evidence.

40. I should first deal with an ancillary matter. The Defendant companies, in their Counterclaim, sought this relief by paragraphs 3 and 4 of their prayer for relief:

> "(3) A declaration that the BVI companies are held on trust for the First Defendant and that the shares on such companies be transferred to it or to its order;
>
> "(4) Delivery up of the statutory books of account of the BVI companies."

41. The Claimant, in her professionally drawn Defence to Counterclaim, denied that the Defendant companies were entitled to the claimed or any relief, although she accepted that Messrs Vintcent and Worrall "were and remain the sole shareholders in Horseworld Holdings BVI Limited". The absence of any reference to Horseworld International (BVI) Ltd appears to me to be significant.

42. However, in the course of her opening statement, and in response to questions from me, it became clear that by then the Claimant was content:

> (1) to accept that both of the BVI companies were indeed the property of the First Defendant;
>
> (2) to accept, contrary to the inference which I had drawn from her Defence to Counterclaim, that she had no interest in Horseworld International (BVI) Ltd;
>
> (3) to deliver up to the First Defendant the statutory books and books of account of both of the BVI companies.

43. I turn then to the formation of Horseworld International (BVI) Ltd. It is convenient to deal first with the evidence of Mr Swinney. He thought that it was at the end of May or beginning of June 2008 that he proposed to the Claimant the idea of forming a new BVI company. This was to be Horseworld International (BVI) Ltd but Mr Swinney said he was not aware of the name. In an interesting exchange in cross-examination he was asked this question: "did you suggest that the new BVI company was to be wholly owned by Mrs Killen" to which Mr Swinney replied "I don't remember if that was my suggestion or not".

44. The original idea appears to have been to "combine" the interests of the Defendant companies with the assets of Planet Horse via the vehicle of a BVI company. In what I understand to be the original Memorandum of Understanding, Messrs Vintcent and Worrall were to have been shareholders in the new BVI company - see the document at [C8 p2139] where, at p2142, Messrs Vintcent and Worrall are each shown as having a 10.97% interest in "the resulting Horseworld BVI".

45. By e-mail dated 20 June 2008 from the Claimant to Mr Uechtritz [C9, 2667] the Claimant wrote:

> "Here is a 'new' document which sets out what we discussed. In essence it says the following:
>
> "We create a new entity, Planet Horse (BVI); You contribute the equity and debt of Planet Horse US; I, and whoever decides to join me, contribute cash, (what is assumed is $1.5m); We get on with it."

> "I am reasonably confident I can get Toby and Richard on board with this strategy so that no relationships or political or brand capital will be lost`

46. The reference to the "new" document seems likely to refer to a Memorandum of Understanding dated 20 June 2008 [C8 2163]. That document made no reference to Messrs Vintcent and Worrall being shareholders in the new BVI company. Messrs Vintcent and Worrall were not copied into that e-mail. Indeed, Mr Vintcent says, and I accept, that he never saw it until September 2008 when Mr Uechtritz sent him a copy. Instead, later on 20 June 2008 the Claimant sent an e-mail to them [C8 2176] suggesting a meeting to discuss "parallel processing".

47. That meeting took place on 25 June 2008, probably at about 3.00pm – see the e-mail at [C8 p2174] where Mr Vintcent asked if the meeting could be moved to around 3.00pm. At that meeting, the proposal to separate off the media interests of the Defendant companies was floated.

48. There is a conflict of evidence about what occurred at that meeting. Mr Vintcent deals with it at paragraphs 285 to 289 of his first witness statement, which paragraphs should be read alongside paragraphs 301 to 316. He amplified his recollection in oral evidence when cross-examined for the second time by the Claimant. He put it graphically in this way. He referred to Mr Swinney, in his oral evidence, having referred to the meeting as being "heated". Mr Vintcent said that this was not accurate in that Mr Worrall was "incandescent" whilst Mr Vintcent described himself as feeling "incredibly vulnerable" as a result of the proposal referred to above.

49. I am satisfied that until the meeting on 25 June 2008, Messrs Vintcent and Worrall had no idea of this proposal.

50. In cross-examination the Claimant was taken to a passage in the written evidence of Mr Langstaff at paragraph 14 [B p223]: "As stated explicitly to me by Ms Killen, she had no intention of offering shares in the Horseworld media company to Mr Vintcent and Mr Worrall". She denied this and said of it that it was "not true". She denied that it was her plan to cut Messrs Vintcent and Worrall out of the media company. I bear in mind that the Claimant has not had the opportunity to cross-examine Mr Langstaff.

51. It seems clear to me, and I so find, that the Claimant must have taken the deliberate decision not to tell Messrs Vintcent and Worrall about the proposal to separate out the media interests in advance of the meeting. And she certainly never sent to them the Memorandum of Understanding that she sent Mr Uechtritz on 20 June 2008, from which it would have been clear that they were not to have any interest in the new BVI company.

52. Mr Vintcent was taken by the Claimant to an e-mail he wrote on 26 June 2008 in which he wrote "I hope we can agree all this and set up an arrangement that serves everyone's interests". Of his e-mail correspondence generally he said that everything written after 25 June 2008 had to be read in the context of him not having seen the e-mail of 20 June 2008, which he interpreted as the Claimant attempting to do a "side deal" with Mr Uechtritz. Specifically, he said that if he had received a 10.79% shareholding in the new BVI company, then he would have been content.

53. I have also been referred to later e-mails involving the lawyer who was handling the incorporation of the new BVI company. On 23 July 2008 the Claimant wrote to the lawyer, Mr Simon Thorp: "I will also get Toby and Richard to contribute H[orse]W[orld] into the topco …" which indicates, to me at least, that Messrs Vintcent and Worrall had not then agreed to do so. Mr Thorp replied and ended by saying "Just so you know, Richard raises questions with me vis-à-vis the Horseworld Holdings BVI Limited shareholders' agreement from time to time which I try to answer where I can *unless I feel, acting reasonably, it is contentious*" (emphasis added). I agree with the submission that this reads as if Mr Thorp perceived himself to be acting for the Claimant. This correspondence is found at [C p2433-4].

54. In the end, the new BVI company was incorporated. Mr Swinney said in evidence that he did not know that the Claimant had taken a 99.98% share in that company.

Horse and Country TV Limited and Badminton

55. In early August 2008 there was a meeting between Mr Vintcent, the Claimant and some officers from Horse and Country. Mr Vintcent says, at paragraph 337 of this first witness statement, that asked about her intentions towards Horse and Country she said "I have no interest in investing in your business".

56. In cross-examination she agreed with that and said "yes, and I meant it at the time". She seemed surprised at the suggestion that if anyone was going to invest in Horse and Country it would be the Defendant companies and she said she was "not sure about that". When it was pointed out to her that it could hardly have been envisaged that she would personally invest in a company which was a competitor to the Defendant companies she said "I haven't thought about it in that way before".

57. Of course, following her departure from the Defendant companies, the Claimant had, by 6 December 2008, acquired a controlling interest in Horse and Country.

58. It is perfectly clear, and I so find, that Horseworld Ltd wished to continue in 2009 the project to stream coverage of the Badminton event via the internet. It did not, because Horse and Country secured the relevant rights. The process by which this came about began on 10 December 2008 with an e-mail from the Claimant to Mr Thomas, director of the Badminton event [C9 2832]. The contract was ultimately between the BBC and Horse and Country whereby the BBC granted to Horse and Country rights relating to both television and internet broadcasting. The contract was signed after the event on 30 June 2009 [C10 2885(A)].

59. Whilst the Claimant had been with the Defendant Companies, she had access to information provided by the organisers of the Badminton event relating to its contract with the BBC. It is clear that such information was released to Horseworld on a confidential basis. Mr Thomas wrote an e-mail to the Claimant on 12 May 2008 [C7 1890] saying he would "scan and send it to you this evening on the strict understanding that none of you will reveal its contents to anyone else and you will not use your knowledge of it in any other aspects of your business". There was investigation during the trial about the extent to which the Claimant had used that information during the course of the negotiations conducted by Horse and Country with Badminton and the BBC.

60. There may never be an answer to that issue since the Claimant said in cross-examination that there were no documents evidencing the negotiations beyond e-mails in April 2009 at C9 2874(A) and (B).

61. That Horse and Country and Horseworld Ltd were in competition with each other is clear from an e-mail from Mr Thomas to Mr Vintcent dated 17 March 2009 [C10 2873]. Mr Thomas speaks of linking up with "another TV broadcaster" observing that Mr Vintcent "can probably guess the identity of the channel …" and concluding that "the deal will preclude us from exploiting the broadband options with anyone else".

62. What is clear is that the Claimant was able to use the vehicle of Horse and Country to utilise information she had gained whilst with the Defendant companies to obtain access to Mr Thomas and ultimately to secure the Badminton broadcast rights for Horse and Country.

Legal Framework

63. Sections 170 to 181 of the Companies Act 2006 introduced a new statutory code regulating the duties owed to a company by its directors. On 1 October 2007 the code, with the exception of sections 175 to 177, came into force: see The Companies Act 2006 (Commencement No. 3 etc.) Order 2007, SI 2007/2194. Sections 175 to 177 came into force on 1 October 2008: see The Companies Act 2006 (Commencement No. 5 etc) Order 2007, SI 2007/3495. The "general duties" owed to a company by its directors are specified in sections 171 to 177. Although the new code is expressed to be "in place of" the existing non-statutory regime, that regime remains of more than merely historical significance by virtue of Section 170(3) and (4):

"(3) The general duties are based on certain common law rules and equitable principles as they apply in relation to directors and have effect in place of those rules and principles as regards the duties owed to a company by a director.

"(4) The general duties shall be interpreted and applied in the same way as common law rules or equitable principles, and regard shall be had to the corresponding common laws rules and equitable principles in interpreting and applying the general duties."

64. Section 175 provides that a director of a company must avoid conflicts of interest between himself and the company. Section 170(2)(a) contains this provision:

"(2) a person who ceases to be a director continues to be subject –

> "(a) to the duty in section 175 (duty to avoid conflicts of interest) as regards the exploitation of any property, information or opportunity of which he became aware at a time when he was a director …"
>
> "(b) …
>
> "To that extent those duties apply to a former director as to a director, subject to any necessary adaptations."

65. Section 170(5) makes it clear that the general duties also apply to shadow directors "where, and to the extent that, the corresponding common law rules or equitable principles apply".

66. Section 178 provides:

> "(1) The consequences of breach (or threatened breach) of sections 171 to 177 are the same as would apply if the corresponding common law rule or principle applied.
>
> "(2) The duties in those sections (with the exception of section 174 (duty to exercise reasonable care, skill and diligence)) are, accordingly enforceable in the same way as any other fiduciary duty owed to a company by its directors".

67. In the context of the issues which I must determine, it is the provisions of Section 175 (1), (2), (4) and (7) which are applicable:

> "(1) A director of a company must avoid a situation in which he has, or can have, a direct or indirect interest that conflicts, or may possibly conflict, with the interests of the company.
>
> "(2) This applies in particular to the exploitation of any property information or opportunity (and it is immaterial whether the company could take advantage of the property, information or opportunity).
>
> "(4) This duty is not infringed –
>
> (a) if the situation cannot reasonably be regarded as likely to give rise to a conflict of interest; or
>
> (b) if the matter has been authorised by the directors.
>
> "(7) Any reference in this section to a conflict of interest includes a conflict of interest and duty and a conflict of duties."

68. It is thus clear that the duties with which I am concerned are fiduciary duties.

69. I agree with the editors of Palmer's Company Law that the provision in Section 170(2), whereby it is made clear that "a person who ceases to be a director will continue to be subject to the duty to avoid conflicts of interest as regards the exploitation of any property, information or opportunity of which he became aware at a time when he was a director" amounts to a statutory change to the equitable rules – see paragraph 8.2904. In this case it means that the conduct of the Claimant after she left the Defendant companies and acquired Horse and Country falls to be scrutinised closely.

Discussion

70. The Claimant, in her capacity of CEO of Horseworld Ltd and a director of Horseworld UK Ltd is clearly a person who is subject to the general duties and there is no dispute about that.

71. The Claimant provided a helpful document containing her written arguments which she supplemented orally.

72. I deal first with the incorporation of Horseworld International (BVI) Ltd. The case of the Defendant companies is that the Claimant was intending to transfer the media interests in the Defendant companies to this BVI company for substantially her own benefit.

73. The Claimant says that, first, her motive for incorporating the new BVI company was to facilitate a sensible business structure. Second, she says that in any event, after the meeting on 25 June 2008, she had the blessing of Messrs Vintcent and Worrall to proceed. That second submission is made by reference to Section 175(4)(b) of the 2006 Act, which provides that the duty to avoid a conflict of interest is not infringed if the matter has been authorised by the directors. In fact, that section did not come into force until 1 October 2008, but I nevertheless take the general proposition into account.

74. I have no difficulty in finding that the Claimant deliberately chose to exclude Messrs Vintcent and Worrall from her e-mail exchange with Mr Uechtritz on 20 June 2008. She must have known that her proposal to set up a new BVI company in which they had no interest would not have been approved by them. Moreover, I am satisfied that they would not have authorised the Claimant to proceed with the incorporation of the new BVI company had they known either of these facts, namely:

    (1) The contents of the e-mail of 20 June 2008; or

    (2) That the Claimant was to take a 99.98% share in the new BVI company.

75. That Mr Langstaff largely confirms these matters is, of course, relevant, but I would have made these findings even without his evidence.

76. The written evidence of Mr Uechtritz does not really contain any more factual information than has been available to me in this trial from other sources. The real significance of his evidence is that it provides no support for the proposition of the Claimant that she had been entirely open with Messrs Vintcent and Worrall. On the contrary it is clear to me, and I so find, that she had sought to conceal her plans from them.

77. It thus follows that Section 175(4)(b) of the 2006 Act would not have assisted the Claimant in any event since any apparent authorisation of the directors was vitiated by lack of knowledge of relevant facts. Put shortly, Messrs Vintcent and Worrall were tricked into giving any authorisation that they may have given.

78. As to the motive of the Claimant, it seems to me that what happened after the time she and the Defendant companies parted company is of relevance. In essence she took steps that were certainly swift if not immediate to acquire Horse and Country and, having done so, within days began to pitch for broadcast rights which included those which she knew Horseworld Ltd wished to acquire.

79. On consideration of the whole of the evidence I find myself driven to conclude that the Claimant had indeed intended to conclude a “side deal” with Mr Uechtritz to the

detriment of the Defendant companies and Messrs Vintcent and Worrall in relation to the media interests of the Defendant companies, which interests included the Badminton project. There is, in my judgment, no other rational explanation having regard to the following facts, as I find them:

(1) She conducted secret negotiations with Mr Uechtritz, via the e-mail of 20 June 2008 and the Memorandum of Understanding sent with it;

(2) She failed at any time to show to Messrs Vintcent and Worrall a copy of that Memorandum of Understanding;

(3) On 29 July 2008 the new BVI company was incorporated with the Claimant holding 9,998 of the 10,000 shares [C11 3285] – a fact kept secret until disclosure in this action, even though the documents showing this share allocation had been sent to her on 6 August 2008 [C11 3301].

80. Because she left the Defendant companies shortly afterwards, she could not complete her scheme of acquiring for herself the media interests of the Defendant companies and so, as I find, she used the vehicle of Horse and Country to compete directly and successfully for the internet broadcast rights that she knew Horseworld Ltd wished to acquire.

81. Does the attempt to hive off the Horseworld media interests to a company owned by the Claimant, and does the acquisition of the Badminton broadcast rights in 2009 amount to breaches of fiduciary duties owed by the Claimant to the Defendant companies?

82. In my judgment, the attempt to divert the Horseworld media interests to the new BVI company amounts to a plain breach of fiduciary duty. Media interests owned by Horseworld Ltd would have become the property of a BVI company owned (as to 99.98%) by the Claimant herself. That represents a clear conflict of interest.

83. However, the attempt was unsuccessful. That the attempt was made, as I find it was, does, however inform the answer to the second question.

84. The Claimant's case is that once she parted company with the Defendant companies in August 2008, she no longer owed any fiduciary duties to them. She referred me to *Foster Bryant Surveying Ltd v Bryant* [2007] EWCA Civ 200, [2007] Bus LR 1565. At paragraphs 68 and 69 Rix LJ considered the judgment of Lawrence Collins J (as he then was) in *CMS Dolphin Ltd v Simonet* [2001] 2 BCLC 704. In that case, as Rix LJ observed at paragraph 66, the director had resigned without notice in order to profit from the Claimant company's business. The case made for the Claimant and accepted by Lawrence Collins J was that the director had been prompted or influenced to resign by a wish to acquire for himself or his company the business opportunities which he had previously obtained or was actively pursuing with the Claimant's clients and had now actually diverted to his own profit.

85. In the instant case, the Claimant directed my attention to a passage in paragraph 68 of the judgment of Rix LJ where he cited a passage from paragraph 95 from the judgement of Lawrence Collins J where he said:

"So also in English law, at least in general, a fiduciary obligation does not continue after the determination of the relationship which gave rise to it …"

86. I can understand why the Claimant should rely upon that and similar passages elsewhere. However, in my judgment the law has changed. Before the introduction of the new code contained within the Companies Act 2006, issues concerning relations between a director and his former company were subject to a complex raft of considerations. Whilst it must still be true that all cases involving allegations of breach of fiduciary duty are acutely "fact-sensitive" or "fact-specific" as it was put by Moses LJ in the *Foster Bryant* case at paragraph 97, there is now the clear provision in Section 170(2)(a) of the 2006 Act that:

> "A person who ceases to be a director continues to be subject –
>
> "(a) to the duty in section 175 (duty to avoid conflicts of interest) as regards the exploitation of any property, information or opportunity of which he became aware when he was a director."

87. In the instant case, the Claimant only became aware of the media broadcasting opportunity arising out of the Badminton event in her capacity as a director of Horseworld Ltd. She tried to separate out that part of the business into the new BVI company. When she left the Defendant companies she exploited the opportunity via Horse and Country. Frankly it is difficult to imagine a clearer case of conflict of interest.

88. The Claimant argued that sufficient time had passed that she ought no longer to be subject to any relevant fiduciary duty. It was conceded on behalf of the Defendant Companies that any conflict situation will inevitably fade over time. It is true that in this case, having left the Defendant companies in August 2008, it was not until December 2008, after the new statutory code was fully in force, that she contacted Mr Thomas and not until March 2009 that negotiations were fruitful. But the fact remains that the Claimant, via Horse and Country, in fact went head to head with Horseworld Ltd in the battle for media rights at the very next possible opportunity.

89. The Claimant argued that she was not, via Horse and Country, in conflict with Horseworld Ltd over the Badminton rights, because Horse and Country was seeking a different package of rights. Horseworld Ltd sought only internet broadcast rights, whereas Horse and Country sought and secured terrestrial broadcast rights as well.

90. In my judgment, there is nothing in that. If anything, the fact that the Claimant saw an opportunity to trump Horseworld Ltd by bidding for a package of rights larger than that previously secured by Horseworld Ltd which included the very rights in which Horseworld Ltd was interested makes the conflict all the more stark. In the course of argument, the Claimant was unable to see that if as a director of A Ltd she had secured the franchise to sell hamburgers at an event and then as a director of B Ltd she secured to the detriment of A Ltd the franchise to sell *all* food at the same event the following year, this might amount to a conflict. In her mind, the rights were entirely separate. I have to disagree.

91. The reality, in my judgment, is this. Whilst with the Defendant companies she gained access to all of the people who mattered who were concerned with broadcasting the

Badminton event. She had the benefit of the analysis of the internet broadcast project, which must certainly have been of benefit in negotiating the package ultimately obtained by Horse and Country. She knew that Horseworld Ltd wanted the very broadcast rights that were included in the package obtained by Horse and Country. In thus competing, on behalf of Horse and Country, directly with Horseworld Ltd she placed herself in precisely the position of conflict of interest prohibited by the new statutory code. It is important to remember that Section 175(1) requires a director to avoid a situation where there is even the possibility of a conflict of interest, and Section 175(2) makes particular reference to the exploitation of an opportunity.

92. I am very conscious that I have made findings of fact which may have reputational significance to the Claimant. I have sought to limit my findings only to those necessary to dispose of the issues still live in this case. Whilst recognising that the standard of proof is the balance of probabilities, the more serious the finding, the more cogent must be the evidence in support of it. I have had that principle very much in mind in making my findings of fact.

93. In the circumstances it seems clear to me that the Defendant companies are entitled to the outstanding relief sought namely an account of profits. Unless the parties can agree on the appropriate form of order I will hear submissions in due course.
