Re Ravinder Rohini Pty Ltd and Janak Raj Sharma v Ivan Krizaic [1991] FCA 318; 30 FCR 300 105 ALR 593 (19 July 1991)

FEDERAL COURT OF AUSTRALIA

Re: RAVINDER ROHINI PTY LTD and JANAK RAJ SHARMA
And: IVAN KRIZAIC
No. ACT G63 of 1990
FED No. 430
Contract - Equity - Practice and Procedure - Relief
[1991] FCA 318; 30 FCR 300
105 ALR 593

COURT

IN THE FEDERAL COURT OF AUSTRALIA
AUSTRALIAN CAPITAL TERRITORY DISTRICT REGISTRY
GENERAL DIVISION
Davies(1), Wilcox(2) and Miles(3) JJ.

CATCHWORDS

Contract - Arrangement by hotel owner and builder for redevelopment of hotel site - nature of arrangement - whether concluded contract for immediate partnership existed - whether concluded contract of future partnership - terms of contract - breach of terms.

Equity - Fiduciary duties - whether fiduciary duty existed as between parties to redevelopment scheme - withdrawal by hotel owner - whether breach of duty - appropriation by hotel owner of increment in land value - recoverability of benefit taken by third party - knowledge of third party.

Practice and Procedure - Pleadings - whether breach of fiduciary duty pleaded - whether a ground not pleaded can be raised on appeal - principles applicable where proved facts disclose a different basis of liability than contended at trial.

Relief - Damages - Calculation of damages - effect of increases in value of property.

Canny Gabriel Castle Jackson Advertising Pty. Ltd. v Volume Sales (Finance) Pty. Ltd [1974] HCA 22; (1974) 131 CLR 321

Chan v Zackaria [1984] HCA 36; (1984) 154 CLR 178

United Dominion Corporation Ltd. v Brian Pty. Ltd. [1985] HCA 49; (1985) 157 CLR 1

Masters v Cameron (1954) 91 CLR 351

Courtney Fairbairn Ltd. v Tolaini Brothers (Hotels) Ltd (1975) 1 WLR 297

Consul Development Pty Limited v DPC Estates Pty Limited [1975] HCA 8; (1975) 132 CLR 373

Swinfed v Lord Chelmsford (1860) 5 H and N 890; [1860] EngR 838; 157 ER 1436

Connecticut Fire Insurance Company v Kavanagh (1892) AC 473

Sutton v Gundowda Pty. Ltd. [1950] HCA 35; (1950) 81 CLR 418

Green v Sommerville [1979] HCA 60; (1979) 141 CLR 594

Wayde v New South Wales Rugby League Limited [1985] HCA 68; (1985) 59 ALJR 798

Harvey v Harvey [1970] HCA 11; (1970) 120 CLR 529 at p 553

HEARING

CANBERRA
19:7:1991

Counsel for the Applicant: Mr R. Bainton QC and Mr T. Johnstone

Solicitors for the Applicant: Donohue and Co.

Counsel for the Respondent: Mr D. Bennett QC and Mr G. Lunney

Solicitors for the Respondent: Barker and Barker

DECISION

The facts are set out in the reasons for judgment of my brother Wilcox J. I need not repeat them. I agree with the orders proposed by Wilcox J. but, as I take a different view on some points raised in the appeal, I should state my own brief reasons for judgment.

2. I accept the submission put by Mr Russell Bainton QC, with whom Mr T. Johnstone of counsel appeared for the appellants, that the two principal protagonists, Mr Janak R. Sharma and Mr Ivan Krizaic, did not enter into a concluded partnership to develop the Dickson Hotel. I agree with Mr Bainton's submissions that negotiations broke down early in April 1985 before Mr Sharma and Mr Krizaic had reached final agreement that the development would go ahead or as to the terms upon which, if the property was to be developed, the parties would respectively contribute capital and labour. The contemplated development was to be a large project and it was never intended that the parties would contribute like with like. Mr Krizaic proposed to contribute his services over the period of the development. One of his companies was to undertake the development; but the price had not been fixed. Mr Sharma was to contribute the existing hotel property, but it had not been agreed in what manner and on what terms. Moreover, Mr Sharma and Mr Krizaic had not finally agreed that the project should go ahead and had not discussed what should happen with the hotel after the development had been completed, whether it was to be sold or to be carried on as a hotel business. The terms upon which the hotel might be fitted out and furnished and what interest (if any) Mr Krizaic would have in the hotel licence were not discussed. The respective solicitors for Mr Sharma and Mr Krizaic had been given the task of formulating an arrangement; but they had not agreed as to how the project should be structured.

3. It is certainly true that, as the subject of the discussions was a commercial project, if one were satisfied that Mr Sharma and Mr Krizaic had reached final agreement, one could imply all the terms

necessary to make the agreement effective. In my view, however, Mr Sharma, Mr Krizaic and their solicitors had not reached agreement.

4. But that is not to say that the appeal should be allowed. What was wrong with the statement of claim and with the case as presented to the trial Judge was that the allegations were unnecessarily overstated. As Wilcox J. has pointed out, it was sufficient to establish liability to show that Mr Sharma and his company, Ravinder Rohini Pty Limited, were under a fiduciary obligation to share with Mr Krizaic the benefits arising from the joint activity undertaken by Mr Sharma and Mr Krizaic.

5. Mr Sharma and Mr Krizaic entered into an agreement to investigate the possibility of developing the Dickson Hotel. As the trial Judge held, the arrangement between them constituted a legally binding contract. Mr Sharma and Mr Krizaic were each to pay 50% of the costs of the investigation and did so. A joint bank account was opened. An architect was engaged and preliminary plans were prepared. Application was then made in the name of the owner of the hotel, Ravinder Rohini Pty Limited, for development approval. The National Capital Development Commission approved the proposal in principle. The trial Judge found that the work done in this investigation, which resulted in the obtaining of development approval in principle, increased the value of the property by a net $440,000, "because the approval brought certainty to what had previously been a prospective use." In this state of affairs, Mr Sharma broke off his negotiations with Mr Krizaic and put the property on the market for sale. Mr Sharma thereby took advantage of the benefit which the joint activities had conferred upon the property. The trial Judge held that, as Mr Sharma and Ravinder Rohini Pty Limited had realised that benefit, one-half thereof, namely $220,000, should be paid to Mr Krizaic.

6. In the appeal, Mr Bainton queried the basis upon which the trial Judge calculated what he described as the net benefit of $440,000. However, although the evidence about the matter was by no means clear, it established that the obtaining of development approval in principle was likely to have increased the value of the property by giving certainty to the property's potential for development and by reducing the time which would otherwise have been required to obtain development approval in principle. In this light and as the evidence as to the increase in value was necessarily imprecise, I would not interfere with the finding of the trial Judge.

7. Thus, Mr Sharma and Mr Krizaic entered into a joint venture to investigate the potentiality of the Hotel Dickson for redevelopment. That investigation was carried through to the extent that approval was obtained from the National Capital Development Commission. The obtaining of the approval was a step in the joint undertaking for the plans prepared for approval were the plans prepared by the architect for the joint venturers. The application for approval was made in the name of Ravinder Rohini Pty Limited but was prosecuted by Mr Krizaic and by the architect.

8. From that activity, a valuable benefit arose. The plans that were approved in principle and the approval thereof constituted part of that benefit. If the benefit was taken advantage of and realised, any profit had to be shared equally between the joint venturers. The benefit was in fact realised, not by proceeding with the development but by putting the hotel on the market for sale in the light of the development approval. Thus, two advertisements of the property of 18 and 25 May 1985 read:- "PRIME SITE -

CITY AREA
Presently showing T.O. in excess of $1.5 million
ideal for Developer-Investor. Development to 138
Units with restaurant and street front retail shops. POA"
and:- "Presently showing T/O in excess of $1.5 million.

Ideal for Developer/Investor - development to 138
units with restaurant and retail shops. P.O.A."
The development referred to was that set out in the plans prepared by the architect, the development which had been approved in principle by the National Capital Development Commission.

9. The duty to account for one half of the profit which was realised thus arose from the fiduciary duty which existed as between Mr Sharma and Mr Krizaic. Such a duty existed notwithstanding that the work of the joint venture had come to an end. The joint venture had produced a valuable benefit in respect of which Mr Sharma was liable to account, if he took advantage of it. See e.g. Canny Gabriel Castle Jackson Advertising Pty Ltd v Volume Sales (Finance) Pty Ltd [1974] HCA 22; (1974) 131 CLR 321, which shows that a joint venture may have the incidents of a partnership, and Chan v Zackaria [1984] HCA 36; (1984) 154 CLR 178, which shows that an advantage obtained after the dissolution of a partnership but before its affairs are finally wound up may be the subject of partnership obligations. See also United Dominion Corporation Ltd v Brian Pty Ltd [1985] HCA 49; (1985) 157 CLR 1.

10. The liability as so based was, in my opinion, within the ambit of the claim made before the trial Judge. That claim, as set out in the statement of claim and in the oral submissions made to the trial Judge, was overstated. But when the claim is reduced to its proper perspective, it is still within the confines of the claim made. I agree, moreover, with the observations of Wilcox J. that it is proper that an appellate court give effect to a liability which the facts disclose.

11. I agree with the orders proposed by Wilcox J.

This appeal challenges a decision of Gallop J., in the Supreme Court of the Australian Capital Territory, entering judgment in favour of a plaintiff, the respondent Ivan Krizaic, against the appellants, Ravinder Rohini Pty Ltd and Janak Raj Sharma, in the sum of $220,000. In making that challenge, counsel for the appellants did not put in issue his Honour's findings upon the primary facts; indeed, they expressly accepted their correctness. But counsel contended that the facts, as found, did not give rise to any liability, especially having regard to the manner in which the claim was pleaded.
The facts

2. The respondent and Mr Sharma, the second appellant, met in 1974. They became close friends. They shared an interest in hotels, the respondent having been involved in the redevelopment of a number of hotels in the course of his building contracting business. In March 1984 the first appellant, a company controlled by Mr Sharma, acquired the Dickson Hotel at Dickson.

3. Shortly after the purchase of the hotel Mr Sharma took steps to extend the hotel. In April/May 1984 he had sketch plans prepared by an architect and undertook preliminary discussions with officers of the National Capital Development Commission ("NCDC"). In July 1984 the plans were lodged with NCDC for approval.

4. At about that time Mr Sharma discussed the proposed extension with Mr Kriziac. He showed him the sketch plans. Mr Krizaic was not impressed. He expressed the opinion that the extended building would still be a second-class hotel and not financially viable. Mr Krizaic thought that the hotel should be demolished and the site redeveloped with a larger building. He suggested to Mr Sharma that they together embark upon a redevelopment venture. Mr Sharma responded that he lacked the expertise and the money for such a large project, but he said that he would be prepared to discuss a joint venture.

5. Gallop J. found that discussions did take place. During the period August-September 1984 the two men met up to three times a week. His Honour said:

"In those discussions the plaintiff made it plain to the second defendant that if they decided to develop the site it would have to be a true 50/50 partnership in which the first and second defendant provided the land and the plaintiff provided the planning expertise and supervision of the construction of the redeveloped hotel. Those discussions embraced the overall cost of the project, estimated to be not less than $4,000,000. If an independent builder was to be engaged, the construction could not be achieved at a cost less than $6,000,000."

6. Mr Krizaic suggested the retention of a different architect, Mr D.B. McDonald, to prepare plans for a new building. He arranged a meeting between Mr Sharma, Mr McDonald and himself for 24 September 1984. They discussed a building containing some 150 rooms, a food hall and retail outlets. They told Mr McDonald that they would enter into a partnership arrangement and undertake a joint development. They instructed Mr McDonald to have discussions with NCDC as to the type of development likely to be allowed.

7. Pursuant to these instructions, Mr McDonald contacted NCDC. He attended meetings with NCDC officers between 22 October 1984 and 6 November 1984. On the latter date NCDC approved - presumably, in principle - the demolition of the existing building and the redevelopment of the site. One week later Mr McDonald submitted sketch plans to NCDC.

8. Notwithstanding the stage the matter had reached, Mr Krizaic and Mr Sharma reconsidered whether it was better to go back to the original idea of an extension. But, after comparing the two sets of plans and further discussions with the first architect, they preferred Mr McDonald's proposal. However, that proposal was itself refined. After further discussions in late November and early December, the ground floor plan was revised. Gallop J. said:

"McDonald, in his evidence, described the frequency of meetings as taking place every second day. As both the plaintiff and the second defendant were running hotels, they both had a substantial input into the detailed preparation of the working drawings in the progress to more developed sketch plans. McDonald was given instructions by both to proceed from the preliminary sketch plan stage to working drawings. He had meetings with various professional engineers, who provided appropriate expert detail for the working drawings, on 18 and 19 December 1984. Further NCDC approval and development conditions were issued on 21 December 1984 and 16 January 1985."

9. Mr McDonald continued to hold meetings with NCDC officers and with his two principals. On 19 March 1985 working plans were lodged with NCDC. Between that date and 4 April, when they were approved, Mr Sharma, Mr Krizaic and Mr McDonald spoke almost every day. In addition, in late 1984 and early 1985, Mr Krizaic and Mr Sharma were engaged in constant consultation with other professional experts including traffic, structural and electrical engineers and plumbers.

10. Both Mr Krizaic and Mr Sharma were customers of the Commonwealth Bank. They knew Mr R.A. Fay, a bank officer who was apparently the local branch manager until November 1984. Both Mr Krizaic and Mr Sharma, sometimes separately but mostly together, discussed with him the possibility of bank finance for the building project. The figure of $4,000,000 was mentioned. Mr Fay told them that he would be prepared to seek bank approval for the necessary loan.

11. On 12 December 1984, Mr Krizaic and Mr Sharma opened a joint bank account at the Commonwealth Bank. Each man deposited $1,000. The account was to be operated by the signatures of both men but there were only two operations on the account over the next three months.

12. Mr Sharma and Mr Krizaic sought legal advice. Gallop J. described what happened:

"On 23 January 1985 the plaintiff and the second defendant consulted the second defendant's solicitor, Mr Chris Donohue, and informed him of the proposal to buy the site from the first defendant and to redevelop it through their respective companies. Donohue was the defendants' solicitor. At no stage did he act for the plaintiff, who had other solicitors. The consultation with Donohue was to acquaint him with the proposal.
In that initial consultation with Donohue, it was obvious that the project would need funds. The proposal was that they would form another company which would build the hotel and hold on trust for their respective family trusts. To assist in preparation of legal documents, the plaintiff was to provide copies of the documentation used in the City Gate venture.
There was another meeting at Donohue's office either on 26 March 1985 or 2 April 1985. There is a divergence in the evidence about the precise date but the actual date to my mind is not important. If it is, I find that it happened on 26 March 1985, because of other events. The plaintiff was present with his solicitor, Mr Trevor Barker. The second defendant and Donohue, of course were present. At that meeting there was discussion about formalising the arrangement between the plaintiff and the second defendant and the first defendant's title to the land. Donohue referred to the fact that the first defendant owned other assets besides the Hotel Dickson. The result of the meeting was that it was left to the respective solicitors to attend to legal formalities. So far as the plaintiff was concerned, it was a matter of no consequence how it was done, as long as he ended up with a 50% interest in the redevelopment.
Pursuant to the agreement at his office, Donohue prepared draft minutes of the meeting and draft deed of unit trust for consideration by the plaintiff's solicitors and forwarded them to the plaintiff's solicitors by letter dated 4 April 1985. Barker also prepared a draft agreement."

13. However, on 4 April 1985 Mr Krizaic and Mr Sharma fell out. On that day they attended a luncheon at a Canberra restaurant with Mr Fay and the Chief Manager of the Commonwealth Bank in Canberra, Mr Roger McCombe. Mr McCombe was asked about the prospects of a loan of $4,000,000. He replied that he could not approve a loan of that size, that it would have to go to Sydney, but that he could not see any problem with it. When the luncheon concluded the two bank officers left the restaurant. Mr Sharma and Mr Krizaic remained. They discussed the recent meeting in Mr Donohue's office. Mr Krizaic referred to the question raised by Mr Donohue as to the manner in which he would obtain a 50% interest in the project. Mr Sharma replied that Mr Krizaic could be made a director of the first appellant, Ravinder Rohini. But Mr Krizaic rejected that proposal because he was aware there were already four directors of that company and he thought that he would not have sufficient voting power on the board of directors of the company or own a 50%

interest in the development. Mr Sharma did not accept Mr Krizaic's objection. He told him, in effect, that if his terms were not accepted the deal was off. Gallop J. commented:

"Whether or not this was a tactic by the second defendant to withdraw from the venture is irrelevant. The fact remains that at this point relations between the plaintiff and the second defendant broke down."

14. Gallop J. noted that, in evidence, Mr Sharma advanced a different reason for the breakdown of the relationship. He said that, in January, the two men had discussed Mr Sharma's financial position while the hotel was being demolished and rebuilt. During that time Mr Sharma would have no source of income. Mr Sharma said that Mr Krizaic offered him payments at the rate of $40,000 per annum during this period, an offer which he thought generous and which he accepted. Accordingly to Mr Sharma, at the restaurant Mr Krizaic said that he did not agree that he (Mr Sharma) should be paid this money and suggested that the whole project be called off. His reply, he said, was that it was up to Mr Krizaic.

15. Not surprisingly, Gallop J. did not accept this account of the matter. He said:

"I am satisfied on the evidence that, when he agreed to participate, it was always the plaintiff's belief that it was to be a partnership on a 50/50 basis. The arrangement broke down at the restaurant because it was made clear to him by the second defendant that the first defendant would not relinquish its ownership of the title to the hotel site. This, of course, was not acceptable to the plaintiff. I accept the plaintiff's evidence that at all times he readily accepted the necessity of providing the second defendant with an appropriate income during the relevant years as the second defendant was dependent upon the existing hotel as his sole source of income. That subject was not the cause of the severance of their relationship."

16. There was a further meeting a few days later, on 9 April 1985. Mr Sharma said that they would have to work it out. Mr Krizaic replied that when Mr Sharma agreed to a 50/50 arrangement they could go ahead. But no 50/50 arrangement was made and the project did not proceed. Instead, Mr Sharma put the hotel on the market. Ravinder Rohini sold it on the basis of the approved redevelopment plans at a price considerably higher than the price at which it had purchased the property in the previous year. Mr Krizaic received no part of the proceeds of sale, nor any recompense for the time and expertise which he had contributed to the redevelopment plans. Worse, from his point of view, he was left out-of-pocket to the extent of $33,285.50, being his share of the expenses which had been incurred prior to the breakdown of the proposal. The appellants contributed $30,785.50.

The claim in contract

17. On 23 August 1985, the respondent issued a writ against the appellants. By his attached Statement of Claim he alleged an agreement between himself and each of the appellants, in the alternative. In each case it was said that the agreement was made between the months of September 1984 and April 1985 and was to the effect that the plaintiff and the relevant defendant "would in partnership develop the site by demolition of the existing structure and erection of new premises there". In each case the agreement was said to be in these terms:

"a) That the plaintiff would provide his skill and expertise in designing and preparing plans and all necessary documentation for approval of the development by the relevant authorities and

obtaining such approval.
b) That the plaintiff would build the development at cost foregoing the builder's profit and thereby contributing that profit to the assets of the partnership.
c) That the (relevant) defendant would cause the title to the site to be transferred to the benefit of the partnership.
d) That all costs of preparation for and development of the site would be borne by the plaintiff and (relevant) defendant equally.
e) That all profits resulting from the development would be shared equally by the plaintiff and the (relevant) defendant."

18. The Statement of Claim went on to allege, in respect of each of the alternative agreements, repudiation by the relevant defendant on or about 3 April 1985 and the acceptance by the plaintiff of that repudiation.

19. As I have indicated, Gallop J. accepted Mr Krizaic's version of events, where there was conflict between that version and that of Mr Sharma, and he found for Mr Krizaic. But he put his decision upon a basis which differed somewhat from the plaintiff's case as pleaded. Whereas the Statement of Claim had alleged an agreement for a future partnership, effective at the stage of demolition and redevelopment, Gallop J. held that by late March there was already a partnership. He said:

"I am satisfied on the balance of probabilities that the plaintiff and the second defendant had, by the time they had consulted their respective solicitors and attended a joint conference at the end of March or early April 1985, entered into the commercial activity or adventure of demolishing and redeveloping the Hotel Dickson on a 50/50 basis. By that time they had not only agreed to carry on that business but were actually carrying it on. All that remained was the formality of legal documents which, in the circumstances, presented the solicitors with a difficult professional task."

Although, in this passage, Gallop J. referred only to the second defendant, it was his opinion that both of the defendants, the present appellants, were parties to the partnership. He made this clear a little later in his judgment when he said:

"The partners in the business were the plaintiff and the defendants. The business of the partnership, as I have already found, was to demolish and redevelop the Hotel Dickson and to share the profits equally. The first defendant's land was to become a partnership asset when the legal formalities had been completed. It was sufficient for the purposes of the partnership business that the second defendant was in control of the first defendant."

20. The trial judge referred to Masters v Cameron (1954) 91 CLR 351 wherein the High Court analysed the various situations which might arise where parties who have been in negotiation reach agreement upon terms of a contractual nature but also agree that the matter should be dealt with by a formal contract. His Honour thought that the present case fell into the second situation identified by the High Court viz:

"a case in which the parties have completely agreed upon all the terms of their bargain and intend no departure from or addition to that which their agreed terms express or imply, but nevertheless have made performance of one or more of the terms conditional upon the execution of a formal document".

In Masters v Cameron the members of the High Court said that, in such a case, there is a binding contract. They distinguished the third case identified by them, a case "in which the intention of the parties was not to make a concluded bargain at all, unless and until they execute a formal contract".

21. Gallop J. thought that, in the present case, by March 1985 the parties did have the intention of making a concluded bargain. It seems to me that this view is plainly correct. It is true that Mr Krizaic and Mr Sharma were longstanding friends who each conducted hotels. It would be natural for Mr Krizaic to take an interest in Mr Sharma's planned extensions, even to the point of examining the first set of drawings and offering his opinion about them. He might even have made a disinterested suggestion about the retention of a different architect. Depending upon his personal inclinations and financial position, it would not be surprising if Mr Krizaic had intimated a readiness to participate commercially in a redevelopment scheme; all without there being any intention by either man to conclude an immediate bargain. But the evidence shows that Mr Krizaic did much more than the things I have mentioned. He attended numerous meetings, mostly with Mr Sharma but sometimes without him, at which the redevelopment proposal was discussed. These included discussions on such detailed matters as the engineering drawings, the requirements of NCDC and finance. His contribution went far beyond what would be likely to be made by a person who was involved merely as a friend, even a good friend with an interest in hotels. The parties opened a joint bank account. The initial deposits were small; but the opening of the account is a clear indication that, by December, Mr Krizaic's involvement had moved beyond that arising out of mere friendship. Moreover, Mr Krizaic undertook financial obligations towards the experts retained to advise upon the project. In money terms, those obligations were substantial. The fact that Mr Sharma left Mr Krizaic to bear a one-half share of the cost of the expert advice suggests that he regarded that share as a commercial commitment by Mr Krizaic, not moneys paid on behalf of a friend. Finally, there was evidence from Mr Krizaic, which does not appear to have been substantially challenged but in any event was accepted by Gallop J., that - as early as August/September, long before he made any substantial commitment of time or any financial commitment - he and Mr Sharma had had a discussion in which it was agreed that they would "go 50-50" on the basis that Mr Sharma would provide the site and Mr Krizaic would act as builder without charge.

22. However, whilst I find irresistible Gallop J.'s conclusion that a contract had been created before March 1985, I have difficulty in characterising their relationship in March as a presently operative partnership. As I have just pointed out, the discussion at which the arrangement took place occurred as early as August/September 1984; but at that stage the redevelopment proposals were still in an embryonic state. It was not certain that the necessary approvals would be available or, if they were, that the project would be financially viable. Although a future partnership was contemplated, if the approvals were obtained and the project proved viable, I do not think that it was intended that the partnership should commence until that time. I also have difficulty with the view that the first appellant, the company, was a party to the agreement made in August/September 1984. I do not doubt Mr Sharma's authority to bind Ravinder Rohini. But I do doubt his intention to do so. In August/September 1984 it was not envisaged that Ravinder Rohini would be the redevelopment vehicle. On the contrary, Mr Sharma was to have Ravinder Rohini transfer the land to a new entity - a company or a partnership, the two men do not seem to have discussed the details until March - in which each would have an equal stake. It was certainly envisaged that Ravinder Rohini would be affected by the agreement. But it was a subject of the agreement rather than a participant in it. I think that the relevant contract was made between Mr Krizaic and Mr Sharma, alone.

23. The difficulties just mentioned make me unable to accept the conclusions of Gallop J. as to the nature of the contract. But I have no difficulty in accepting the case pleaded in the Statement of Claim, insofar as it alleges an agreement with Mr Sharma.

24. I think that the arrangement was that the two men would collaborate in redeveloping the site. Mr Krizaic was to contribute his time and expertise in relation to the design of the building and obtaining the necessary approvals. If the necessary approvals could be obtained, and the parties considered the project to be economically viable, Mr Krizaic would carry out the work normally undertaken by a head building contractor, but without charge. Mr Sharma, in the language of the Statement of Claim, "would cause the title to the site to be transferred to the benefit of the partnership"; understanding the word "partnership" to refer back to the agreement between the two men "in partnership (to) develop the site", by whatever legal vehicle. The money costs of the project, and its profits, were to be shared equally.

25. I see no conceptual difficulty about a contract in the form I have stated. It is true that such a contract would leave unresolved many of the detailed matters which would inevitably arise in connection with a project of this nature and size. Moreover, there could be no guarantee that the project would proceed at all; NCDC approval might be denied, the project might prove infeasible or otherwise be frustrated. If so, it would be no breach of contract for a party to refuse to proceed further. But I do not think that these considerations mean that the agreement between Mr Sharma and Mr Krizaic was no more than "an agreement to agree". This is not a case like Courtney Fairbairn Ltd v Tolaini Brothers (Hotels) Ltd (1975) 1 WLR 297, cited by counsel, where there was an agreement by a building owner to employ a builder at a price to be negotiated. This is a case where the steps to be taken by each party, antecedent to the establishment of the partnership, were agreed between them. Whatever difficulties might have arisen during the currency of the partnership, as to which the general law of partnership would apply, the respondent's complaint is that Mr Sharma breached his antecedent obligations.

26. In making the last observation I do not overlook the point made by counsel that Mr Sharma and Mr Krizaic never determined what legal entity would be used to carry out the redevelopment; whether the two men would take equal shares in a new corporate owner of the site, whether they would adopt a unit trust mechanism or whether they would simply be co-owners in partnership. I do not think that it matters that this logistical question was unresolved. There was a firm agreement that each man would have a 50/50 interest. If they could agree about a 50/50 interest in a corporate owner or in a unit trust, well and good. If not, each would be entitled to insist upon a 50% interest in the land, once the approvals had been obtained and viability established.

27. In one respect, the present existence of a partnership, the findings made by Gallop J. go beyond the case alleged by the respondent in his Statement of Claim. But his Honour's findings also support the elements of that case; and those elements are in any event supported by unchallenged evidence. I would uphold the respondent's claim upon the basis set out in paras 4 and 5 of the Statement of Claim. I will return in a moment to the quantification of damages.

Breach of fiduciary duty

28. During the argument before us, counsel for the respondent not only sought to support the trial judge's finding by reference to the case alleged in paras 4 and 5 of the Statement of Claim. They also relied upon an alternative argument: that the appellants, or one of them, acted in breach of the fiduciary relationship which arises between parties who contemplate entry into a contract of partnership. Counsel contended that even if, contrary to their submission, there was never a concluded agreement between the respondent and the appellants, or either of them, a fiduciary duty arose. They say that the conduct of Mr Sharma, in declining to proceed further with the project and then appropriating for the first appellant the benefit of the work done, and the expenses incurred, by Mr Krizaic, was conduct inconsistent with his fiduciary duty.

29. As I have already indicated, I take the view that there was at material times an existing contract of future partnership between Mr Krizaic and Mr Sharma. But, even if there was not, even if they no more than envisaged a future contract, the circumstances were such as to give rise to a fiduciary relationship between them. The point is covered by the decision of the High Court of Australia in United Dominions Corporation Ltd v Brian Pty Ltd [1985] HCA 49; (1985) 157 CLR 1. That was a case of a joint venture on a development project. There were several parties to the joint venture. One of them, United Dominions Corporation ("UDC"), claimed to appropriate the profits of the project in satisfaction of a debt owed by the leading joint venturer, Security Projects Ltd, on an unrelated account. Unbeknown to the respondent, another joint venturer, the mortgage given by Security Projects to UDC to secure finance for the joint venture contained a collateralisation clause which purported to authorise this course. The respondent argued that, in taking this clause, UDC breached its fiduciary duty to other prospective co-venturers, including itself; it did not matter that there was not then any concluded contract between the prospective joint venturers. These submissions were upheld. At pp 11-12 Mason, Brennan and Deane JJ. dealt with the point about lack of a present agreement in this manner:

"It was submitted on behalf of U.D.C. that no fiduciary relationship existed and no fiduciary duties arose between the prospective participants in the joint venture until the joint venture agreement was actually executed in July 1974. To the extent that that submission involves a general legal proposition that the relationship between prospective partners or joint venturers cannot be a fiduciary one until a formal agreement is executed, it is clearly wrong. A fiduciary relationship can arise and fiduciary duties can exist between parties who have not reached, and who may never reach, agreement upon the consensual terms which are to govern the arrangement between them. In particular, a fiduciary relationship with attendant fiduciary obligations may, and ordinarily will, exist between prospective partners who have embarked upon the conduct of the partnership business or venture before the precise terms of any partnership agreement have been settled. Indeed, in such circumstances, the mutual confidence and trust which underlie most consensual fiduciary relationships are likely to be more readily apparent than in the case where mutual rights and obligations have been expressly defined in some formal agreement. Likewise, the relationship between prospective partners or participants in a proposed partnership to carry out a single joint undertaking or endeavour will ordinarily be fiduciary if the prospective partners have reached an informal arrangement to assume such a relationship and have proceeded to take steps involved in its establishment or implementation."

30. See also per Gibbs C.J. at pp 5-6 and Dawson J. at p 16.

31. As I have already indicated, I am of the opinion that the partnership contemplated by Mr Krizaic and Mr Sharma was not in operation when the dispute arose between the two men. But at all relevant times there was, at least, "an informal arrangement to assume such a relationship" and the prospective parties had "proceeded to take steps involved in its establishment". In actual fact they had completed all the antecedent steps.

32. The second step in counsel's argument is also obviously correct. It is a breach of duty for a person in a fiduciary relationship, without the consent of the other parties involved, to appropriate personally an advantage which occurs to him or her by reason of that relationship. In Chan v

Zacharia [1984] HCA 36; (1984) 154 CLR 178 this principle was applied by the High Court even in relation to an advantage which enured after the dissolution of the partnership, but before its affairs were wound up.

33. In their submissions counsel for the appellants did not really contest these two propositions.

34. The next question which arises in the case based on breach of fiduciary duty, on my assessment of the primary facts, is whether a third party is accountable for a benefit which it takes by virtue of a breach of fiduciary duty by another. Neither counsel addressed this question. But it arises because of the circumstance that the fiduciary relationship was between Mr Krizaic and Mr Sharma, whereas the benefit of the breach of the fiduciary duty was taken by Ravinder Rohini. The authorities make clear that the answer to that question is in the affirmative, at least where the third party takes with actual knowledge of the breach of duty. This was, of course, the situation in the present case, Mr Sharma being the mind of the company. It is sufficient for me to refer to Consul Development Pty Limited v DPC Estates Pty Limited [1975] HCA 8; (1975) 132 CLR 373. The parties in that case were investment companies controlled respectively by a former articled clerk (Clowes) and his former master solicitor (Walton). One Grey was employed by the respondent company as its manager. His duties included the finding and assessment of properties possibly suitable for acquisition by DPC. Unbeknown to Walton, Clowes came to an arrangement with Grey whereby some properties located by Grey would be purchased by Consul, any resultant profit or loss being shared equally between Consul and Grey. DPC sued for declarations that the properties were held by Consul on trust for DPC. There were differences of opinion as to the proper result of the case in both the Court of Appeal and High Court. But those differences stemmed from varying perceptions as to the extent of Clowes' knowledge of Grey's breach of fiduciary duty. All of the judges who dealt with the matter were agreed that Consul would be accountable if, through Clowes, it had actual knowledge of Grey's breach of his duty to DPC. Stephen J., with whom Barwick C.J. agreed, said at p 408:

"Absent, then, both actual knowledge and calculated abstention from enquiry, Consul will only be liable as a constructive trustee if recourse may be had to the doctrine of constructive notice and if, by that means, Clowes, and through him Consul, may nevertheless be treated as if they had that knowledge of Grey's breach of fiduciary duty which they in fact lacked.
That proof of knowledge is essential is not in doubt; Consul has not intermeddled with any trust property so as to make itself a trustee de son tort and without proof of knowledge no remedy will lie against it for participation in the dishonest scheme of the fiduciary, Grey. The applicable principle is that enunciated by Lord Selborne in Barnes v Addy (1874) 9 Ch App 244. Strangers to a trust may have extended to them the responsibility imposed by equity upon trustees if they make themselves trustees de son tort or are 'actually participating in any fraudulent conduct of the trustee to the injury of the cestui que trust' (p 251). But strangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers unless they 'receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees' (p 252)."
35. Gibbs J., the other member of the majority, said at pp 396-397:
"... the principle under discussion extends to the case where a stranger has knowingly participated in a breach of fiduciary duty committed by a

person who is not a trustee even though nothing that might properly be regarded as trust property - even property stamped with a constructive trust - has been received. The strict rule of equity that forbids a person in a fiduciary position to profit from his position appears to be designed to deter persons holding such a position from being swayed by interest rather than by duty (see Bray v Ford (1896) AC 44, at p 51); it is 'a rule to protect directors, trustees, and others against the fallibility of human nature': Costa Rica Railway Co. Ltd. v Forwood (1901) 1 Ch 746, at p 761. If the maintenance of a very high standard of conduct on the part of fiduciaries is the purpose of the rule it would seem equally necessary to deter other persons from knowingly assisting those in a fiduciary position to violate their duty. If, on the other hand, the rule is to be explained simply because it would be contrary to equitable principles to allow a person to retain a benefit that he had gained from a breach of his fiduciary duty, it would appear equally inequitable that one who knowingly took part in the breach should retain a benefit that resulted therefrom. I therefore conclude, on principle, that a person who knowingly participates in a breach of fiduciary duty is liable to account to the person to whom the duty was owed for any benefit he has received as a result of such participation." See also McTiernan J., who took a different view of the facts, at p 386.

36. Although there was no real contest about the legal propositions fundamental to the respondent's case of breach of fiduciary duty, counsel for the appellant strenuously disputed the respondent's entitlement to resist the appeal by reference to those propositions. They said that a case of breach of fiduciary duty had neither been pleaded nor advanced at the trial and that the respondent was therefore precluded from advancing that case at this stage.

37. It is clear that the respondent did not plead a case of breach of fiduciary agreement. He did plead an agreement to enter into a partnership with Mr Sharma and work done by him pursuant to such an agreement, the factual situation which gives rise to the relevant fiduciary relationship. He also claimed an accounting of the assets of the partnership at the time of dissolution. But he did not, in terms, allege a breach of fiduciary duty. Rather, the allegation of breach was stated only in terms appropriate to a claim of breach of contract. And it appears to be correct that no submissions about breach of fiduciary duty were put to the trial judge.

38. However, I do not think that it follows that the respondent is precluded from resisting the appeal by reference to a case of breach of fiduciary duty. The purpose of pleadings is to disclose the facts upon which a party relies. If a pleading discloses facts, proved at the trial, which entitle a party to succeed, it does not matter that the pleader did not realise that those facts disclosed a cause of action or defence other than the one to which they were directed. The principle is illustrated by the old case of Swinfed v Lord Chelmsford (1860) 5 H and N 890; [1860] EngR 838; 157 ER 1436. The defendant had appeared as counsel for the plaintiff in an earlier proceeding, which he compromised. The plaintiff disputed his authority to take that course. In an action against him she pleaded that, in compromising the suit, he acted fraudulently and from improper motives. The judge summed up on that basis but, towards the end of the summing up, counsel for the plaintiff put to the Court that the defendant was liable even if he acted bona fide, but without authority. The Court of Exchequer held that it was open to the plaintiff to advance that case, although it was not pleaded, because her declaration disclosed all of the facts upon which such a case would depend. In giving the judgment of the Court, Pollock CB said, at pp 920-921/p 1449:

"We are all of opinion that if a declaration discloses a state of facts upon which an action may be maintained, although there be neither malice nor fraud, the plaintiff is not bound to prove either, though both be alleged, and may recover upon the liability which the facts disclose, though fraud and malice be disproved, and we cannot distinguish this from a case where a defendant is charged with doing an act wilfully, being responsible for the act and its consequences, whether done wilfully or not." (Original emphasis)

39. In Swinfed v Lord Chelmsford the new case was raised at the trial, although belatedly. Other considerations intrude where a case is raised for the first time on appeal. Sometimes it may be unfair to allow a new case to be raised at that stage; evidence might have been directed to the question. This point was made by Lord Watson in delivering the advice of the Judicial Committee of the Privy Council in Connecticut Fire Insurance Company v Kavanagh (1892) AC 473. The Judicial Committee specifically accepted the accuracy of the rule applied in Swinfed v Lord Chelmsford "to the effect that, when a declaration discloses a certain state of facts, the plaintiff may recover upon the liability which the facts disclose." But Lord Watson added, at p 480:

"When a question of law is raised for the first time in a court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice, to entertain the plea. The expediency of adopting that course may be doubted, when the plea cannot be disposed of without deciding nice questions of fact, in considering which the Court of ultimate review is placed in a much less advantageous position than the Courts below. But their Lordships have no hesitation in holding that the course ought not, in any case, to be followed, unless the Court is satisfied that the evidence upon which they are asked to decide establishes beyond doubt that the facts, if fully investigated, would have supported the new plea."

40. This approach has been applied in Australia: see Sutton v Gundowda Pty Ltd [1950] HCA 35; (1950) 81 CLR 418 at p 438, Green v Sommerville [1979] HCA 60; (1979) 141 CLR 594 and Wayde v New South Wales Rugby League Limited [1985] HCA 68; (1985) 59 ALJR 798. In Green v Sommerville the question was whether the respondent was entitled to argue election as an answer to the appellants' claim that they had rescinded a contract for sale of land. Election was not pleaded but Mason J. (with whom Murphy and Aickin JJ. agreed) said at p 608:

"However, as the rescission was in issue and as the ground which I have taken does not depend for its validity on findings of fact not litigated at the time, I consider that the matter comes within the rule that the judgment appealed for may be supported on a ground not previously argued. When a question of law is raised for the first time, even in a court of last resort, 'upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is ... expedient, in the interests of justice,' to decide it (Connecticut Fire Insurance Co. v Kavanagh per Lord Watson)."

41. In Wayde a point was advanced in the High Court by counsel for the appellants, who were challenging a judgment of the New South Wales Court of Appeal overturning a decision in their favour at first instance. They conceded that the point, the alleged lack of power of the respondent to make a particular decision, had not been taken either in the Statement of Claim or at first instance. Although the point was said to have been "faintly raised" in the Court of Appeal, counsel's written submission to that Court conceded power. Nonetheless, Mason A.C.J., Wilson, Deane and Dawson JJ. said that, as the matter was one of some importance, it was "manifestly desirable" that the Court should determine it: see p 800.

42. As I have pointed out, in the present case the respondent pleaded facts which, if proved, would establish the existence of a fiduciary relationship. He alleged a breach by each of the appellants, in the alternative, of the agreement which he claimed to have made with them and sought an account of partnership assets. I think that these allegations fairly raised the factual issues upon which the case of breach of fiduciary duty arises. As to evidence, the respondent adduced evidence which, if accepted, leads logically to the conclusion that the particular appellant who was the prospective partner breached the fiduciary duty which it or he owed to the respondent. That evidence was accepted. On its face the case seemed to come within the principle enunciated by Lord Watson. But, for more abundant caution, we asked counsel for the appellants, during the course of their submissions, to indicate the nature of any additional evidence which might have been adduced on their clients' behalf if the claim of breach of fiduciary duty had been made at the trial. They were unable to suggest any such evidence. Especially in the light of this response, it seems to me that this is a case where the Court may feel satisfied that the whole of the relevant material is before it. More than that, this is a case where the respondent is able to point to findings of the trial judge which establish all of the elements of the case which he belatedly seeks to raise. I see no injustice in his being allowed to do so; on the contrary, it is in the interests of justice. Provided that there is no unfairness to the other side, the respondent ought not to be prejudiced by his lawyers' failure earlier to perceive an additional way in which his case could be put. And, once the respondent is allowed to put this alternative case, for the reasons I have already given I am of the opinion that it must also succeed.

Relief

43. I turn to the question of the appropriate relief. Consistently with his view that there was an existing partnership between the respondent and the appellants, Gallop J. dealt with relief by considering what was the appropriate division of the assets of the partnership; for that purpose treating the hotel as a partnership asset. But his Honour recognised that, during 1984-1985, the hotel increased in value for reasons other than the preparation and approval of the redevelopment plans. Apparently there was a general increase in property values at that time. The judge did not attempt to confer on the respondent any part of that increase; rather, he sought to calculate his award of damages by reference to the proportion of the overall increase in value which had been occasioned by the preparation and approval of the redevelopment plans.

44. The evidence about the extent of this increase was scanty. According to Mr Noel McCann, a real estate valuer called on behalf of the appellants, the property increased in value between March 1984 and April 1985 from about $700,000 to over $2,000,000. But Mr McCann said that most of this increase stemmed from general market factors. However, he agreed that "a prudent investor would probably be prepared to pay about half a million dollars more as a result of that work" (that is the preparation and approval of the redevelopment plans) "having been done". In other words, $500,000 of the increase in value which enured to the first appellant was a consequence of the work done by Mr Krizaic and Mr Sharma in consequence of their agreement.

45. Gallop J. referred in his reasons to what was said by Menzies J. in Harvey v Harvey [1970] HCA 11; (1970) 120 CLR 529 at p 553, namely:

> "There is authority which shows that where property, contributed by one partner as a partnership asset and for which that partner is credited in the capital account of the partnership, is improved, so that upon the dissolution of the partnership the sale price exceeds the value fixed at the time when the property became a partnership asset, the excess is divisible as profits of the partnership business; e.g. Robinson v Ashton (1875) LR 20 Eq 25."

Gallop J. went on:
"The partnership agreement between the present parties was for the defendants to contribute the Hotel Dickson as a partnership asset and, accordingly, upon the dissolution of the partnership, the increased value is divisible as profits of the partnership business. The nett increased value is in the order of $440,000.
There will be judgment for the plaintiff for the sum of $220,000 with costs. If any other orders are sought the parties may bring in short minutes."
46. No other orders were sought and judgment was accordingly entered.

47. Gallop J. did not explain the calculation which led him to a "nett increased value" of $440,000. However, it seems that his Honour commenced by adopting the figure of $500,000 stated by Mr McCann as the effect on value of the development approval. He seems to have deducted from that figure the sum of $60,000 which, in rounded figures, was the amount of expenditure incurred by Mr Krizaic and Mr Sharma. If the relevant question was the extent of the "nett increased value" of the property, it was undoubtedly correct to deduct that expenditure. But I do not think that it was correct to award Mr Krizaic only one-half of the nett increased value. In circumstances where he had already borne more than his one-half share of the expenditure and was not being separately reimbursed for that outlay, he was entitled to one-half of the gross increased value. However, there is no cross-appeal. The respondent is content to maintain the order of Gallop J., if he can.

48. Counsel for the appellants say that the order is not maintainable. Of course, they say that there was no basis upon which the respondent was entitled to succeed against either of their clients. But, even if there were, they say that his Honour erred in holding that there was an existing partnership; accordingly, it was an error to make an order based on dissolution of partnership property. Had there been a contractually binding agreement and breach, counsel argue, the respondent's claim is for loss of opportunity; a matter upon which he led no evidence.

49. As will already be apparent, I accept that it was erroneous to approach the matter of relief upon the basis that there was an already subsisting partnership. I also agree that it would be incorrect to assess damages for breach of contract by reference to the first appellant's enrichment. Those damages are to be assessed by reference to the loss sustained by the respondent as a result of the breach; there is no necessary equivalence between the respondent's loss and the first appellant's gain. However, counsel for the respondent pointed out to us that there was some evidence from Mr McCann - not dealt with by Gallop J. in his reasons but not contested at the trial - which indicated the benefit to a developer of the work that had been done. The respondent would have obtained one-half of that benefit if the project had proceeded. The effect of the breach, said counsel, was to deprive him of that one-half. That one-half can be valued and represents the respondent's damages for breach of contract.

50. The evidence referred to by counsel comprises three items. First, Mr McCann said that the NCDC consent, in terms of time saved and consequential savings in holding costs, would be worth about $250,000 to a developer. Secondly, the work done included the provision of the necessary architectural plans, at a cost of $46,000. Thirdly, the grant of approval made it certain that NCDC would allow the development to proceed. Although Mr McCann had some difficulty in putting a money value on the certainty factor, he thought it added $100,000 - $200,000 to the value of the land. Adding these three elements together, Mr McCann's evidence justifies the conclusion that the value to a developer of the plans and the approval was a figure in the range $396,000 - $496,000 It is not clear why that figure should differ from the figure of $500,000 additional value of the land, as estimated by Mr McCann; after all, the most financially beneficial use of the land was as a

redevelopment site. But all these figures, apart from the architectural fees, were merely estimates; precision being impossible. Leaving that matter aside and giving to the second appellant the benefit of the more conservative approach, if one takes the mean figure in the range of $396,000 - $496,000 ($446,000) and halves it to obtain the value of a one-half interest in the development, the resultant figure ($223,000) is just above the amount awarded by Gallop J. The judgment for $220,000 entered by his Honour against Mr Sharma can be justified, upon the basis of breach of contract, by Mr McCann's evidence.

51. Upon the view that Ravinder Rohini was not a party to the contract, his Honour's judgment against that appellant cannot be justified on the basis of breach of contract. However, it may readily be justified on the alternative case, breach of fiduciary duty. Here the position is reversed. Although the breach was committed by Mr Sharma, the beneficiary was Ravinder Rohini. It is that appellant which is accountable under this head. And here, of course, the relevant question is not the respondent's loss but Ravinder Rohini's gain. If Gallop J.'s assessment of that gain is vulnerable to criticism, it is that it is too low. Upon the basis of Mr McCann's evidence, I think that the gain should have been assessed at $250,000. But that does not matter. The alternative case supports the judgment entered by his Honour against the first appellant.

52. For the foregoing reasons I have come to the conclusion that the orders made by Gallop J. should not be disturbed. I would dismiss the appeal with costs.

I have read in draft the judgment of Wilcox J. I agree for the reasons stated by his Honour that the respondent plaintiff, Mr Krizaic, is entitled to damages for breach of contract against the second appellant, Mr Sharma. I concur with the finding that the agreement between those two parties fell short of establishing a partnership between them. It was nevertheless a legally enforceable contract with the necessary ingredients of offer and acceptance, consideration and ascertainable terms. The terms were as pleaded in para. 5 in the statement of claim. I am less sure that the effect was as pleaded in para. 4, but that is of no moment as far as the claim against Mr Sharma for breach of contract is concerned.

2. I am unable to agree that at this stage of the proceedings it should be held that a fiduciary relationship existed between the two men. I do not take anything that was said in the High Court in United Dominion Corporation Ltd v Brian Pty Ltd [1985] HCA 49; (1985) 157 CLR 1 to lay down clearly a rule that an agreement between two prospective partners which contemplates partnership as a further development (or even as a purpose) in their contractual relationship gives rise inevitably to mutual fiduciary duties. The action in the Supreme Court was an action at law for damages for breach of contract. There was no claim in quasi-contract. The entitlement of Mr.Krizaic to succeed on the basis of an equitable doctrine of breach of fiduciary duty was never pleaded (nor, apparently, argued) in the Supreme Court. No notice of contention was filed in this Court in accordance with Order 52 sub-Rule 22(3) (although a notice of contention was handed up during the hearing of the appeal over the objection of counsel for the appellant). The facts necessary to prove the entitlement in equity are not so indisputably clear, in my view, that this Court should positively hold that the entitlement existed.

3. There was no contract between Mr Krizaic and the first appellant, Ravinder Rohini Pty. Ltd. Furthermore, in the absence of a fiduciary duty owed by Mr Sharma to Mr Krizaic, there is no basis for Ravinder Rohini incurring liability by procuring a breach of any fiduciary duty. In my view, Ravinder Rohini, not liable at law in contract, should not be held liable in equity on some other footing. I would allow the appeal brought by the first appellant and enter judgment for it against the respondent. I would dismiss the appeal brought by the second appellant. In the circumstances I would order each party to pay his and its own costs.