



Trinity Term
[2026] UKSC 21
On appeal from: [2025] EWCA Civ 708

JUDGMENT

**Saxon Woods Investments Limited and others
(Respondents) v Francesco Costa (Appellant)**

before

**Lord Sales, Deputy President
Lord Briggs
Lord Hamblen
Lord Burrows
Lady Rose**

**JUDGMENT GIVEN ON
14 July 2026**

Heard on 17 June 2026

Appellant

Jonathan Crow CVO, KC
Lara Hassell-Hart
(Instructed by DLA Piper UK LLP)

Respondents

Edward Davies KC
Jack Rivett
(Instructed by Stephenson Harwood LLP)

LORD BRIGGS (with whom Lord Sales, Lord Hamblen, Lord Burrows and Lady Rose agree):

Introduction

1. This appeal is concerned with the standard of conduct required of a company director when the director genuinely disagrees with his or her fellow directors as to the best route to achieving success for the company. In what follows I will refer to the director as “he” because the director in the present case is a man. Can he simply act single-handedly in driving the company towards his preferred objective, if necessary concealing what he is doing from his colleagues, or is his status as a fiduciary owing a duty of loyalty to the company, and the requirement that he act in good faith, sufficient to require him to disclose his opinion to his colleagues, to discuss it with them and to assist them in forming a collective view as to the best way forward for the company? Is the choice between those alternative courses simply one for that director, with which the court is powerless to interfere, if the route chosen by the director is one which later causes the company loss, or unfairly prejudices one or more of its shareholders?

2. When the question is put in that simple way, the answer to it might appear obvious to anyone with experience of corporate business affairs, whether as a director, trustee or other fiduciary, working under a governance constitution which charges a group of individuals, rather than any single individual, with the collective responsibility for management of the affairs of the entity in question. The individual director cannot go it alone. But counsel for the Appellant director have, in sustained and well-researched submissions, contended that a director who chooses to take the single-handed and covert route, genuinely believing that to be the best course for the company, cannot be held by the court to have committed a breach of fiduciary duty to the company, because of the effect of what used to be a principle of equity, now enshrined in the fiduciary duty of loyalty set out in section 172(1) of the Companies Act 2006, which provides as follows:

“(1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to—

(a) the likely consequences of any decision in the long term,

(b) the interests of the company's employees,

(c) the need to foster the company's business relationships with suppliers, customers and others,

(d) the impact of the company's operations on the community and the environment,

(e) the desirability of the company maintaining a reputation for high standards of business conduct, and

(f) the need to act fairly as between members of the company.”

Section 170(1) provides that this duty is owed to the company, rather than to its shareholders.

3. The Appellant’s case is that, provided only that the director genuinely believes that his preferred way forward for the company is the most likely to promote its success for the benefit of its members as a whole, then it is entirely a matter for the individual director how to act to secure that objective. If he conceals his chosen course of conduct from his fellow directors, and even actively misleads them for that purpose, then he cannot thereby be held by any court to have committed a breach of the duty to the company set out in section 172(1), even where (as here) the course chosen by him turns out to have been disastrous for the company.

4. It might be thought that this issue turned simply upon the interpretation of section 172(1) read in context. But it is common ground, and rightly so, that the answer depends at least in part upon an examination of the common law predecessor to the duty in section 172, as in force before the 2006 Act, because of the special rules of interpretation set out in section 170(3) and (4), as follows:

“(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 law rules and equitable principles in interpreting and applying the general duties.”

The section 172 duty is one of those general duties: see section 170(1).

It is therefore necessary to start with the duty in its common law form, and to bear in mind that, save where the language of section 172(1) clearly provides otherwise, its purpose was to codify rather than to change it.

The Facts

5. It is first necessary to summarise the relevant facts. In doing so I largely adopt the findings of the trial judge (Mr Simon Gleeson sitting as a deputy judge of the High Court: [2024] EWHC 387 (Ch)) as confirmed by the Court of Appeal. In doing so I bear in mind the warning delivered by Mr Jonathan Crow KC for the Appellant that any summary risks missing out some of the factual nuances. But I consider that the summary which follows is sufficient for the resolution of the essentially legal questions debated upon this appeal.

6. Spring Media Investments Limited, the Eighth Respondent (the “Company”), is a company incorporated in England and Wales. It is the holding company for a group which provides creative services to existing businesses in the fashion, beauty and luxury brand sectors.

7. The Appellant, Francesco Costa (“Mr Costa”), was a director of the Company at all material times until October 2025. Until July 2024, he was also chairman of the board. He has a substantial indirect interest in the Company through a Luxembourg entity, which in turn holds an interest in the Second, Third and Fourth Respondents.

8. The First Respondent, Saxon Woods Investments Limited (“Saxon Woods”), is a shareholder in the Company. As at 31 December 2019, it held 22.33% of the Company’s shares as nominee of the Logan 2011 Capital Trust (a trust settled by Mark Loy (“Mr Loy”)). The Second to Seventh Respondents are the other shareholders in the Company. They have played no active role in the proceedings.

9. The business was founded in 1996 as Spring Studios Limited (“SSL”) by Mr Loy and two other individuals who left soon afterwards. Mr Loy was initially the Chief Executive Officer (“CEO”). In 2012, Mr Loy decided to expand the business into New York. This required raising external investment, and Mr Loy was introduced to Mr Costa. Mr Costa, along with others, invested in the business (through an investment vehicle, the Third Respondent). Mr Costa was appointed to the board and became chairman of the board of directors.

10. In its Articles of Association the Company adopted at the material time the Model Articles for private companies limited by shares set out in Schedule 1 to the Companies (Model Articles) Regulations 2008 (SI 2008/3229) as amended. Model Article 3 provides that:

“Subject to the articles, the directors are responsible for the management of the company’s business, for which purpose they may exercise all the powers of the company.”

11. The Company’s own articles provide, at Article 2, that the general rule about decision-making by directors is that decisions of the directors must be taken (a) by majority decision at a directors’ meeting; or (b) in the form of a directors’ written resolution.

12. A shareholders’ agreement was entered into on 27 February 2013 between SSL and its shareholders. That agreement was subsequently superseded, as explained below. Further rounds of financing took place in 2014 and 2016, during which other investors joined the business. In the course of the 2016 restructuring, the Company was incorporated: shares in SSL were transferred to the Company, and the previous shareholders of SSL were issued with shares in the Company in consideration.

13. On 20 May 2016, a Novated, Amended and Restated Shareholders’ Agreement was executed in respect of the Company (the “SHA”), replacing the 2013 agreement. The parties to the SHA were: the Company; SSL; each of the shareholders (being Saxon Woods, the Second, Third, Fourth, Fifth, Sixth and Seventh Respondents) and Mr Loy. Collectively, these parties were defined in the SHA as the “Investors”.

14. Clause 6.2 of the SHA provided as follows:

“6.2. Investment Period. The Company and each of the Investors agree to work together in good faith towards an Exit no later than 31 December 2019 (the ‘Investment Period’). In addition, the Company and each of the Investors agree to give good faith consideration to any opportunities for an Exit during the course of the Investment Period. In the event that an Exit has not occurred upon the expiry of the Investment Period ... the Board of Directors shall engage an investment bank to cause an Exit [after] the Investment Period at a valuation devised by such investment bank and on such terms as shall be consented to by the Board of Directors, which consent shall not be reasonably withheld.”

15. Clause 6.3 of the SHA went on to state:

“6.3. Exit Process. If an Exit is proposed in accordance with the terms of this Agreement, each of the Investors shall: (i) give such co-operation and assistance as is reasonably required in connection with the proposed Exit, which shall include co-operation and assistance in the preparation of any information memorandum/‘teaser’ and the giving of presentations to potential purchasers, investors, financiers and their advisers, as well as assisting on any due diligence exercise conducted in relation to an Exit; and (ii) procure (insofar as it lawfully can) that such Exit is achieved in accordance with such proposal.”

16. “Exit” was defined in clause 1.1 of the SHA as:

“the sale of all or substantially all of: (i) the issued equity share capital of the Company; or (ii) the business or assets of the Company (whether through the shares of a Subsidiary or otherwise), in each case, on arm’s length terms as part of a single transaction or a series of related transactions.”

17. Pausing there, it is to be inferred from the Company’s participation in the SHA that its board then considered that to pursue the Exit in the manner therein provided was the most likely to promote the success of the Company for the benefit of its members as a whole, within the meaning of section 172.

18. Mr Loy ceased to be CEO from 1 January 2017.

19. The Company (in the words of the trial judge) “entrusted the conduct of the sale process exclusively to Mr Costa” (para 200 of the judgment). Bearing in mind that the conduct of the affairs of the Company was primarily entrusted by its constitution to the board, this “entrusting” must have been in effect carried out by Mr Costa’s fellow directors by way of delegation to him. This led to the sale process not being conducted in accordance with the provisions of the SHA, because Mr Costa believed that a sale later than by the end of 2019 would be likely to generate a much better financial return, both for the Company and its investors. Again, in the trial judge’s words: “[From] Mr Costa’s perspective, almost the worst possible outcome would have been a firm offer in late 2019 to purchase the Company for \$100m capable of being accepted by the shareholders” (para 165).

20. In seeking to pursue a different sale strategy from that laid down in the SHA and approved by the board, Mr Costa pursued the following tactics so as to achieve his own (slower) programme for the sale, without impediment from his fellow directors:

- (a) His primary focus was to ensure that no other director or shareholder (other than Mr Uberoi) had any knowledge of or involvement in the Exit process (para 163),
- (b) He aggressively rebuffed any attempt by his fellow directors to obtain knowledge about the Exit process (ibid),
- (c) He misled the board by giving them the impression that the Company was fulfilling its obligations under the SHA, whereas it was not, to his knowledge (para 202),
- (d) He knew that the instructions he had given to the Company's advisors in connection with the sale (Jefferies and Sidley Austin) did not encompass achieving a 2019 Exit in accordance with the SHA, and failed to disclose this to the board,
- (e) He employed delaying tactics in the progress of the sale (paras 165–166).

21. The trial judge's summary of Mr Costa's conduct appears most vividly in this passage from para 208:

“he ensured that it was him and him alone who controlled the Company's actions in this regard, such that he was not merely in a position to recommend a course of action, but to ensure that that course of action was in fact pursued. However I do not believe that it was his intention by doing this actively to injure either the Company or any investor. I think his state of mind might be summarised as ‘they wouldn't like it now if they knew, but they will thank me in the long run’. Put another way, I think Mr Costa did sincerely believe that he was acting in the best interests of the Company and its investors. Applying the test set out in *Regentcrest*, I therefore do not find that Mr Costa was in breach of his duties under section 172(1).”

22. Mr Costa achieved his strategic objective of delaying any sale beyond the end of 2019. Unfortunately for him, the Company and its investors, the prospect of a beneficial Exit was then completely destroyed by the adverse impact of the Covid Pandemic upon its business in and after 2020.

The proceedings

23. Saxon Woods presented a minority shareholders' petition against Mr Costa for relief from unfair prejudice under sections 994–996 of the Companies Act 2006, essentially on the basis that he had been personally responsible for the Company's failure to abide by the Exit strategy agreed in the SHA, so that he should be ordered to buy out Saxon Woods' shares in the Company at a price reflecting the value which they would have had if that strategy had been followed, and an Exit achieved in 2019, before the onset of the pandemic.

24. At the trial (from which issues of quantum had been extracted for a separate hearing) the judge held that Saxon Woods' case on unfair prejudice had been made out, but that Mr Costa's conduct had not amounted to a breach of fiduciary duty (under section 172) or involved dishonesty on his part. Accordingly he made only a conditional buy-out order, that Mr Costa buy Saxon Woods' shares at the value they would have had at the end of 2019, the condition being that it was proved at a later quantum hearing that, if the Company had complied with the Exit strategy agreed in the SHA, a final offer of more than US\$75m net of debt would have been received for the Company by the end of 2019.

25. Both Saxon Woods and Mr Costa appealed to the Court of Appeal. In a judgment of the Court (Edis, Snowden and Zacaroli LJ: [2025] EWCA Civ 708; [2025] Bus LR 2443) Mr Costa's appeal was dismissed, and Saxon Woods' appeal allowed. The Court of Appeal ordered an unconditional buy-out by Mr Costa of Saxon Woods' shares at their pro rata undiscounted value on 31 December 2019, that value to be determined at a further hearing in the High Court.

26. The principal ground upon which the Court of Appeal departed from the trial judge's order was because they regarded the facts found by the judge as disclosing a breach of fiduciary duty by Mr Costa under section 172. This was first because, in their view, Mr Costa's deception of the board had been dishonest, and therefore not in good faith. For that purpose they applied the modern objective test of dishonesty set out in *Ivey v Genting Casinos (UK) Ltd (trading as Crockfords Club)* [2017] UKSC 67; [2018] AC 391. Secondly the Court concluded that it was not open to Mr Costa to formulate, or to act upon, his own different judgment about a strategy for the success of the Company, since that had been determined by the SHA.

27. Against both these conclusions Mr Costa appeals to this court. As to the first, he submits that it has never been permissible to apply an objective test to determine whether a director has committed a breach of the duty now codified in section 172, whether as to dishonesty or any other aspect of the duty to seek the success of the company. As to the second, he submits that a decision by a director to procure that his company act in breach of contract is not per se a breach of duty under section 172. The question depends upon whether the director genuinely believed that it was in the interests of the company and its shareholders to do so.

28. It is to be noted that this second ground of objection to the reasoning of the Court of Appeal was not the subject of an application for, or grant of, permission to appeal to this Court. By common consent the point was fully argued, *de bene esse*, on the basis that, if necessary, the Court would determine in its judgment whether the point was open to being pursued. In any event it was the first ground of appeal, relating to dishonesty and the use of an objective test for determining breach of duty under section 172, that occupied most of the parties' and the Court's time and attention.

The first issue: breach of section 172

Business judgment – the law prior to the 2006 Act

29. The principle that it is for directors to exercise their business judgment in managing the affairs of a company, with which the court will not interfere if the directors act bona fide in what they consider to be in the best interests of the company, is of long standing. It was perhaps best expressed by Lord Greene MR in *Re Smith and Fawcett Ltd* [1942] Ch 304, 306:

“The principles to be applied in cases where the articles of a company confer a discretion on directors with regard to the acceptance of transfers of shares are, for the present purposes, free from doubt. They must exercise their discretion bona fide in what they consider—not what a court may consider—is in the interests of the company, and not for any collateral purpose.”

In that case the directors' relevant discretion (to refuse to register a transfer of shares) was described in the articles of association as “their absolute and uncontrolled discretion”. The case was about whether the refusal by the board to register a transfer could be challenged. The decision was not about what an individual director might do if his business judgment differed from that of the majority of his fellow directors, but what the board (unanimously or by majority) might lawfully do.

30. The principle enunciated by Lord Greene MR has come to be applied generally to the exercise of all discretionary powers by the board. Under a typical corporate constitution, it therefore applies to all aspects of the general power of management of the company's affairs by the board. It implements the obvious intention of the framers of the company's constitution that it is upon the board of directors and no-one else that the exercise of business judgment about the management of the company's affairs has been conferred. That means the board as a whole, acting unanimously or by majority, subject to any provision to the contrary in the articles. In the present case there is no such contrary provision.

31. The duty described in *In re Smith and Fawcett* has been understood in later authorities and textbooks as a fiduciary duty of loyalty, and the test for breach of it, whether by the board or by individual directors, has been described as subjective: see eg *Palmer's Company Law vol.1*, (24th ed) (1987) at para 63–06; and *Gore-Browne on Companies*, (44th ed), supp 46 at para 27.4. The use of “subjective” in that context is as shorthand for the principle that the court will not interfere with the (subjective) view of the directors merely because it forms a different (objective) view of what was really in the best interests of the company.

32. This principle has come to be applied not only to decisions of the board, but also to decisions or acts of individual directors, in deciding whether a particular act amounted to a breach of fiduciary duty: see eg *Onyl de Falbe International Ltd v Jefferies* (unreported) 1 July 1992 and *Regentcrest plc (in liquidation) v Cohen* [2001] 2 BCLC 80. In the latter case the relevant decision was that of the board, but two directors were sued for breach of fiduciary duty in voting in favour of the relevant board resolution.

33. I have however been unable to trace any authority or any academic writing prior to 2006 which suggests that the court's respect for the business judgment of directors extends to a case where one director has sought to pursue his own judgment as to the best way to promote the company's best interests by a covert strategy (ie concealed from his fellow directors) to pursue an objective which directly conflicts with the business judgment and strategy already resolved upon by the board as a whole. I would have been surprised to find one, because such conduct would appear to be obviously disloyal by a fiduciary, and contrary to the mode of governance of the company laid down by its typical constitution. It would not appear to be acting bona fide or, in the English translation, in good faith. Nonetheless Mr Crow submits that, on the issue of good faith (or bona fides as it used to be called), all that matters is whether the director's thought process, rather than his conduct, demonstrated a genuine belief on his part that what he planned to do was in the best interests of the company.

34. Although there may be no reported case directly on point, there are powerful dicta suggesting the contrary in the reported cases on breach of duty by directors. Two examples will suffice. In *In re National Funds Assurance Company* (1878) 10 Ch D 118

the liquidator of a company sought to make the directors liable for causing the company to make improper payments of capital to shareholders. He did so pursuant to section 165 of the Companies Act 1862, entitling the liquidator to seek payment from directors in consequence of (inter alia) any breach of trust on their part. The directors pleaded that they had acted bona fide, genuinely believing that they were acting properly in what they did. After finding that the directors had thereby acted ultra vires and therefore misappropriated company money, Sir George Jessel MR continued (at p 128):

“I think also they have been guilty, within the meaning of the 165th section, of a ‘breach of trust in relation to the company’, by dividing part of the capital among their shareholders, and that they are liable for doing it. Ought I to make them account? I think I ought. As to saying they did it bona fide, I think it is impossible to come to that conclusion; a man may not intend to commit a fraud, or may not intend to do anything which casuists might call immoral, and he may be told that to misapply money is the right thing to do, but when he has the facts before him—when the plain and patent facts are brought to his knowledge—as I have often said, and I say now again, I will not dive into the recesses of his mind to say whether he believed, when he was doing a dishonest act, that he was doing an honest one. I cannot allow that man to come forward and say, ‘I did not know I was doing wrong when I put my hand into my neighbour's pocket and took so much money out and put it into my own.’ It is impossible in a Court of Justice to call a particular act a bona fide act simply because a man says that he did not intend to commit a fraud.

This Court is not, as I have often said, a Court of conscience, but a Court of Law; and when a man misappropriates money with a knowledge of all the facts, I cannot allow him to say that he is not liable simply because somebody or other told him that he was not doing wrong, or that somehow or other he convinced himself that he was not doing wrong.”

35. The following dictum of Cotton LJ in *In re Marzetti's Case* (1880) 42 LT 206, 209 is to the same effect, in applying the test of bona fides to conduct rather than just intention:

“...directors are confidential agents with the liabilities of trustees, but they have a large discretion and *if they act bona fide* they are relieved and are not liable for want of judgment or error ...” (Emphasis added.)

The travaux préparatoires leading to the 2006 Act

36. Both parties to this appeal sought to bolster their submissions as to the true construction of section 172 by reference to the voluminous travaux préparatoires generated by what became a joint project of the English and Scottish Law Commissions to modernise company law. They were relied upon both to show what the distinguished participants in the review thought was the then existing common law duty and to illuminate their intention behind its codification in section 172. I have not found them, viewed in the round, to be particularly helpful. On the one hand, the travaux generally endorse the subjective approach of the court to issues of business judgment. On the other hand there are passages which seem to assume that acting honestly toward the company was already part of the director's fiduciary duties at common law, but other passages which suggest that it was not.

37. The travaux do reveal express consideration of the question whether a codification of the general duties of directors should include a specific duty of honesty. The eventual conclusion was that it should not, for reasons which appear from the following passage from the report in November 2000 entitled "Modern Company Law for a Competitive Economy – Completing the Structure":

"Our proposal to include in the duty of compliance a duty of honesty was very widely supported. However a minority expressed concerns, which we now share, as to the uncertain effect of such a provision. Directors are of course subject to the general law about dishonesty (theft, fraud etc). An explicit duty of honesty on directors would be relevant only where it could be argued that honesty required directors to do something which was contrary to their other duties, in particular their duty to act for the success of the company for the benefit of its members as a whole. It is very difficult to predict how such an indefinite duty of honesty would be interpreted — for example, if it was in the interest of the company in this sense to terminate a contract would a duty of honesty prevent this? Such a termination would be entirely proper in many cases. Opinion may differ about whether it would be 'honest'. Uncertainty of this kind is undesirable and in our view unnecessary. We doubt whether an explicit duty of honesty would add significant protection over and above that provided by the general law, and it risks creating uncertainty. We do not therefore propose to include an explicit duty of honesty as part of the directors' duties to the company."

38. What is absent from the travaux is any consideration of the question now before the court, namely whether the then existing duty, to be codified and replaced by section 172, was such as to enable a single director to pursue his own minority view as to the best course to promote the company's success by a covert single-handed campaign, concealed from his fellow directors, contrary to the collective view of the board that a different course should be followed, provided only that he genuinely believed that this was in the company's best interests. In short, is the court's subjective approach to breach of the duty such as to give the dissenting director free rein to subvert the constitutional right of the board as a whole to manage the company's affairs?

The construction of section 172

39. The first question is whether the breach of fiduciary duty alleged against Mr Costa falls within section 172 at all. The essence of the alleged breach is not that he formed a different view about the best way to promote the success of the Company, or even that he desired to bring about the implementation of his view. Rather it is all about the way in which he sought to do so. His conduct is criticised as a failure to collaborate openly with his fellow directors, preferring to pursue his objective covertly, behind their backs, so as to subvert their constitutional right to manage the Company's affairs in accordance with the objectives upon which they had resolved and agreed by committing the Company to the SHA.

40. There are two aspects to this question. The first is whether such conduct is a breach of any of the general duties specified in sections 171 to 177. The second is whether, if it is, it is better characterised as a breach of a different general duty from that specified in section 172.

41. Section 172 is one of a set of sections (sections 170 to 181) constituting Chapter 2 of Part 10 of the 2006 Act, headed "General duties of directors". The chapter identifies a series of duties specified by sections 171 to 177 and provides, by section 170(3) (quoted above) that they are based upon corresponding common law duties and equitable principles and replace them, as regards duties owed by a director to the company. The description of these duties as general implies that there may be particular duties owed in certain circumstances, not within the listed general duties. If so, they are neither codified nor replaced. Section 178 tends to confirm that there may continue to be other non-codified duties. It provides that the general duties in sections 171 to 177 (other than section 174) are enforceable in the same way as "any other fiduciary duty owed to a company by its directors".

42. A duty not covertly or otherwise to subvert the management of the company's affairs by the board as a whole is not expressly mentioned in section 172 or elsewhere in Chapter 2 as being, or being part of, one of the general duties. But in my view it is best

regarded as part of the section 172 general duty, rather than something completely separate from it. This is for the following reasons.

43. First, primary responsibility for promoting the success of the company for the benefit of its members as a whole is reposed by the typical company constitution upon its board, resolving disagreements between individual directors by majority. Section 172 easily accommodates that communal obligation by reading the singular “director” as including the plural.

44. Secondly, if that primary board responsibility is to be discharged effectively, it follows that an individual director must bring his independent view of the way best to promote the success of the company to the attention of his colleagues on the board, and that he must not by covert conduct pursue some other strategy than that decided upon by the board, if necessary by majority. This is recognised by section 173, which provides that the duty of a director to exercise independent judgment is not infringed by his acting in a way authorised by the company’s constitution.

45. Thirdly, there are numerous indications in Chapter 2 that it is intended to affirm rather than impede the proper governance of the company in accordance with its constitution. The general duties are owed by a director to the company (that is, a legal person which takes decisions through the organs identified in its constitution): section 170(1). Therefore, where section 172(1) includes a requirement of “good faith” as part of the duty imposed, it means good faith in relation to the company. I have already mentioned section 173. Section 171 expressly requires a director to act in accordance with the company’s constitution. Section 175(4) recognises the power of the board (described as “the directors”) to authorise an individual director to act notwithstanding a conflict of interest. Section 175(5) amplifies the board’s power to do so by reference to the company’s constitution, differentially as between public and private companies.

46. Fourthly, the concept of assimilating specific duties by directors to make disclosure to the board within what is now the section 172 duty is affirmed by authority. The decision of the Court of Appeal in *Item Software (UK) Ltd v Fassihi* [2004] EWCA Civ 1244; [2005] 2 BCLC 91 called for an examination of an alleged duty of a director to disclose his own misconduct to the board. Arden LJ described it as an aspect of the loyalty duty, ie the predecessor of what became the section 172 duty. After considering cases about the duty to disclose a director’s own misconduct, she continued, at para 41:

“For my part, I do not consider that it is correct to infer from the cases to which I have referred that a fiduciary owes a separate and independent duty to disclose his own misconduct to his principal or more generally information of relevance and concern to it. So to hold would lead to a proliferation of duties

and arguments about their breadth. I prefer to base my conclusion in this case on the fundamental duty to which a director is subject, that is the duty to act in what he in good faith considers to be the best interests of his company. This duty of loyalty is the ‘time-honoured’ rule: per Goulding J in *Mutual Life Insurance Co of New York v Rank Organisation Ltd* [1985] BCLC 11, 21. The duty is expressed in these very general terms, but that is one of its strengths: it focuses on principle not on the particular words which judges or the legislature have used in any particular case or context. It is dynamic and capable of application in cases where it has not previously been applied but the principle or rationale of the rule applies. It reflects the flexible quality of the doctrines of equity. As Lord Templeman once put it ‘Equity is not a computer. Equity operates on conscience ...’ (*Winkworth v Edward Baron Development Co Ltd* [1986] 1 WLR 1512, 1516.)”

And at para 44:

“The only reason that I can see that it could be said that the duty of loyalty does not require a fiduciary to disclose his own misconduct is that it has never been applied to this situation before. As I have explained, that is not a good objection to the application of the fiduciary principle. ‘Equity refuses to confine within the bounds of classified transactions its precept of a loyalty that is undivided and unselfish’ (per Cardozo J in *Meinhard v Salmon* (1928) 164 NE 545, 548 (US)).”

47. To the same effect is the following dictum of Etherton J in *Shepherds Investments Ltd v Walters* [2006] EWHC 836 (Ch); [2007] 2 BCLC 202 at para 132:

“As Arden LJ so clearly stated in *Item Software*, in relation to a fiduciary’s duty to disclose his own misconduct to his principal, or, more generally, information of relevance and concern to his principal, the single and overriding touchstone is the fundamental duty of a director to act in what he considers in good faith to be in the best interests of the company. There is no separate and independent duty of disclosure. In the context of the director’s own acts to promote a competing business, the breach of fiduciary duty is to carry out the impermissible acts of promotion without first disclosing the intention to do them and obtaining permission to do so.”

48. Arden LJ was one of the principal participants in the company law review which led to the 2006 Act. Her analysis, supported by that of Etherton J, leads inexorably to the view that it is applicable to the section 172 duty, expressed as it is in substantially the same language by which they described the fiduciary duty of loyalty which preceded it.

49. Finally, it is no answer to a claim of breach of the section 172 duty that the matter complained of looks more like a breach of one of the other general duties. As Mark Arnold KC and Marcus Haywood explain in *Company Directors: Duties, Liabilities and Remedies* 4th ed (2024) at 12.05:

“The duty to promote the success of the company is closely related to the other general duties owed by a director to the company. Indeed, the duty has been described as ‘the fundamental duty to which a director is subject’. In a sense, it is the duty from which the other fiduciary duties of a director flow. Accordingly, where a director acts in breach of one of the other general duties, he will often also be in breach of his duty under section 172(1). In particular, the duty under section 172(1) is closely related to the duty under section 175 to avoid conflicts of interests.”

50. In the present case it may be said that the conclusion that Mr Costa set about to subvert the management of the Company by its board was a plain breach of both limbs of section 171. It involved undermining rather than acting in accordance with the Company’s constitution, contrary to section 171(a). It also involved the exercise of powers conferred upon Mr Costa by the board in a manner contrary to the purposes for which those powers were conferred, which was to further the Exit strategy agreed upon in the SHA, contrary to section 171(b). But this does not thereby exclude it from the ambit of section 172.

51. I turn therefore to the critical question of construction of section 172 which is decisive of this appeal. It concerns the meaning and effect of the requirement that the director exercise good faith in acting to promote the success of the company. Although quoted above, the critical words are worth setting out again:

“A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company ...”

Read in isolation it may be said (and the Appellant submits) that the requirement for good faith only governs the director’s thinking, rather than his conduct. Grammatically the words “in good faith” appear to be part of the phrase “he considers in good faith”. Thus if the director genuinely believes that a certain course for the company to take is best

calculated to promote its success, then the director is free to adopt (indeed, perhaps is obliged to adopt: “must act”) any course of conduct he wishes to secure that the company takes that course, regardless whether, objectively speaking, his conduct involves lies, cheating, deception, dishonesty or disloyalty, ie what any reasonably well-informed observer would regard as plain bad faith.

52. The alternative view (contended for by Saxon Woods) is that the requirement for good faith extends not merely to the director’s thinking but also to his conduct in pursuit of achieving what he believes is the best course for the company to take. They submit further that, even though the court will not second guess the director’s genuine view about the best way forward for the company by its own objective assessment, nonetheless the requirement for good faith does involve at least some objective element, if the director’s conduct is challenged in court.

53. In my judgment, while the rigorous application of grammatical rules might be said to favour the first of those alternatives, the second is clearly to be preferred. This is for three main reasons. First, it is more consistent with a codification of the pre-existing law. Secondly, it fits section 172 better into its context as part of Chapter 2, and with its purpose. Thirdly, it strains credulity to think that the first alternative can have been intended, because of its consequences. I will explain each of those reasons in turn.

Consistency with the previous law

54. My analysis of the previous law recognises the great importance of the principle that the court should respect the business judgment of directors as to the best way to promote the best interests of the company. But the court developed its common law (sometimes called judge-made) understanding of the duties of directors by reference to well-established equitable principles derived from the duties of fiduciaries, originally focussed upon trustees, and extended to directors by analogy. The core duty thus identified was what has generally, and rightly, been described as a duty of loyalty (see *Bristol and West Building Society v Mothew* [1998] Ch 1) and the courts did not shrink from applying an objective test to determine, in any particular case, whether the fiduciary’s conduct fell short of the sometimes rigorous requirements of that duty. It was never enough for the fiduciary just to say that he genuinely believed that it did not.

55. That essentially objective approach to the determination of the extent of a fiduciary duty, and of an allegation of breach of it, continues unabated to this day: see eg this court’s analysis of the fiduciary duty to account for profits in *Recovery Partners GP Ltd v Rukhadze* [2025] UKSC 10; [2026] AC 209 and the deficiency of genuine belief as to the company’s best interests as a defence for the directors in *Eclairs Group Ltd v JKX Oil & Gas plc* [2015] UKSC 71, [2015] Bus LR 1395. As noted above, there is no previous case in which the need to adhere to the respect for a director’s business judgment has been

extended to the use of a purely subjective test of the conduct of a single director, in covertly seeking to implement his own dissenting view as to the company's best interests in the face of, and so as to subvert, the contrary view resolved upon by the board. Such conduct is so obviously disloyal that it would have been surprising if any doubt about that qualified as a triable issue, or therefore as the subject matter of a reportable case.

56. Any question of interpretation of the now codified statement of the general duties of directors in sections 170–181 of the 2006 Act is to be addressed by reference to the previously applicable common law rules and equitable principles: see section 170(4). It would in my view have required the clearest words to displace the entitlement, indeed duty, of the court to address questions of breach of fiduciary duty by directors in that objective way, let alone by the application of a purely subjective test. Of course, the court will start by accepting the business judgment of the board (or, as the case may be, the individual dissentient director), providing his belief is, as a matter of fact, found to be genuine. To that extent, and in that sense, the test is subjective. But the individual director does not thereby obtain *carte blanche* to seek to implement his dissenting view by any means, however covert or disloyal, he thinks necessary.

Consistency with context and purpose

57. I have already noted at para 45 above how, taking Chapter 2 of Part 10 of the 2006 Act (sections 170 to 181) as a whole, it is plainly directed at codifying a set of general duties in a way which will operate in harmony with the governance of a company in accordance with its constitution. That is of course achieved in part by preserving the court's respect for the board's business judgment, because that is what the typical corporate constitution is designed to treat as the prime motivational force in the company's success. But it is not achieved by a construction of section 172 which permits (and perhaps even requires) an individual director to pursue his own dissenting opinion about the best way to secure the company's success by covert and disloyal tactics in defiance of the board's opinion as to the best business strategy for the company to follow, even to the point of misleading the board. If the requirement of good faith is limited to the director's thought process in forming his business judgment as to strategy, then section 172 would be likely to prove thoroughly disruptive to the good governance of the company in accordance with its constitution.

58. Section 171 contains two general duties which would be likely to be infringed by disloyalty of this kind, as is illustrated by the facts of the present case. Section 171(a) expressly requires the director to act in accordance with the company's constitution. Section 171(b) requires a director only to exercise powers for the purposes for which they are conferred. Mr Costa was given by the board the delegated power to undertake the task of securing the Exit strategy resolved upon by the board by causing the Company to enter into the SHA. To use his powers as director to procure an irreconcilably opposed strategy was a plain abuse of them.

59. More generally it was plainly the overall purpose of the codification of the directors' general duties that it should take on board the relevant existing common law rules and equitable principles, and that they should continue to inspire the interpretation of the codified duties: see section 170(3) and (4). The section 172 duty has already been developed as a fiduciary duty of loyalty, in the conduct of which good faith (or bona fides as it was previously called) was an essential requirement. The interpretative tool mandated by section 170(4) clearly calls for the requirement of good faith expressed in section 172 to be applied to the director's conduct, and not limited to his thought processes about company strategy.

Straining credulity

60. I return to the simple question posed at the beginning of this judgment. Is a director required by section 172 to act, or merely to think, in good faith? The notion that the careful and experienced framers of this important codification of directors' duties thought only the latter is highly unlikely. Far from promoting corporate success in the modern world, it would be a recipe for chaos and paralysis in corporate governance, and destructive of the collegiality of the board of directors as a whole which all stakeholders in limited companies are entitled to expect.

The second aspect of breach of the section 172 duty: whether the Company's success strategy was determined by the SHA

61. It follows from the foregoing analysis that I consider that the Court of Appeal was correct to reverse the trial judge on the question whether a breach by Mr Costa of his duty under section 172 was made out on the facts. In my judgment it clearly was. His conduct was manifestly disloyal to the Company, and he acted in bad faith towards the Company. His fellow directors were the human manifestation of the Company so far as his conduct was concerned. To the extent that he concealed his intended sabotage of the Exit strategy from the board, he concealed it from the Company.

62. The Court of Appeal focussed its analysis upon a conclusion that Mr Costa had acted dishonestly, applying the objective test laid down in the *Ivey* case. It will be apparent that my analysis proceeds upon a somewhat broader basis, concentrating on the requirement for good faith rather than dishonesty on its own, even though the dishonesty question may form part of that wider enquiry. An elaborated test for dishonesty as set out in the *Ivey* case makes sense in the context of legal duties which arise irrespective of a pre-existing or separate fiduciary relationship by which the defendant is bound. Examples include the test for theft in criminal law, or dishonest assistance in civil law. But where the defendant owes a fiduciary duty of loyalty, the question is whether that duty has been breached, and while dishonesty may be evidence of that, the duty itself supplies the

relevant analytical framework; it is unnecessary to elaborate it by reference to the *Ivey* case.

63. But the outcome is the same, namely that, there was a breach of section 172 by Mr Costa. As explained below, this means that the order made by the Court of Appeal cannot be impugned. That is the conclusion regardless whether the Court of Appeal's second reason (at para 125), that Mr Costa was independently in breach of duty simply because the SHA determined what was the route for success of the Company, is correct.

64. If the case of breach of fiduciary duty by Mr Costa had depended entirely upon this second reason, I would not have found it easy to determine. The mere fact that a company has contracted with others (here its shareholders) to pursue a certain route to success cannot in my view altogether close off any analysis by its directors whether it would be better served by changing course, even if that were to involve a breach of contract. Circumstances arising after the date of the contract may require the directors to reconsider the course which they had previously committed the company to pursue. Beyond that, the question whether such a change of course should be pursued would be a matter for the business judgment of the board. Accordingly, I would prefer to express no concluded view as to this second reason for the decision of the Court of Appeal about breach of fiduciary duty by Mr Costa (other than to point out, as I have above, that he was not entitled to subvert the previous collective determination by the board by covert means). It is unnecessary for this court's resolution of his appeal.

Was the Court of Appeal entitled to substitute its own discretionary remedy for that ordered by the trial judge?

65. As explained above, the Court of Appeal was right to hold that the trial judge erred in ruling that Mr Costa did not act in breach of his duty to the company under section 172(1). This was an important matter relevant to the exercise of discretion as to the remedy to be ordered. For that reason, and for the additional reasons given by the Court of Appeal at para 133, with which I agree, the trial judge's exercise of discretion as to remedy cannot stand. The Court of Appeal was therefore required to exercise the discretion as to remedy afresh. It is not suggested that there is any criticism to be made of that exercise. The Court of Appeal was entitled to hold that the appropriate remedy was that the judge's order should be replaced by the immediate buy-out order which the Court of Appeal made.

66. Therefore, I would dismiss this appeal.