2012 IL App (5th) 100574-U

NO. 5-10-0574

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

GEORGE W. RECTOR CREDIT SHELTER TRUST, Winifred A. Rector, Trustee; WINIFRED A. RECTOR; HELEN L. STONE; BASIC RESOURCES GROUP, an Illinois General Partnership; KEVIN J. NEWMAN, Personal Representative of the Estate of Morry A. Newman; KAREN J. PARKS; OATTIS E. PARKS, JR.; CAMILLA PARKS; RICHARD M. DUMAIS; REBECCA B. GAGNON, Trustee of the Trusts of Brandon J. Burger, Drew C. Gagnon, and Wes M. Gagnon; MICHELLE FELTRINELLI; and HENRY PARKS,	Appeal from the Circuit Court of White County.
Plaintiffs-Appellees and Cross-Appellants,	
v.	No. 06-L-15
WHITE COUNTY COAL, LLC, a Delaware Limited Liability Company, ALLIANCE PROPERTIES, LLC, a Delaware Limited Liability Company, and ALLIANCE COAL, LLC, a Delaware Limited Liability Company,	Honorable David K. Overstreet, Judge, presiding.
Defendants-Appellants and Cross-Appellees.	

JUSTICE WELCH delivered the judgment of the court.
Justices Goldenhersh and Wexstten concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court did not err in finding that the parties entered into a joint venture whereby one party was to acquire coal leases and the other party was to mine those leases, in finding that the defendants violated their fiduciary duties under that joint venture by forfeiting and reacquiring leases formerly owned by the plaintiffs, thereby depriving them of their royalty interests, and in awarding the plaintiffs damages in the form of payment of future royalties as coal is mined.

¶ 2 On July 22, 2008, the plaintiffs, George W. Rector, Winifred A. Rector, Helen L. Stone, Basic Resources Group, an Illinois general partnership, the estate of Morry A. Newman, the estate of Loretta Parks, Michelle Feltrinelli, and Henry Parks, filed in the circuit court of White County a second amended complaint against the defendants, White County Coal, LLC, a Delaware limited liability company, Alliance Properties, LLC, a Delaware limited liability company, and Alliance Coal, LLC, a Delaware limited liability company, seeking damages for unjust enrichment, for breach of contract, and for breach of fiduciary duty as a result of the defendants' failure to pay to them overriding royalties on certain coal leases to which they claimed they were entitled by contract and by virtue of the defendants' fiduciary duty to them as joint venturers. These coal leases had been obtained by the plaintiffs' predecessors in interest and assigned to the defendants' predecessors in interest as part of an agreement between them (the 1977 Agreement) to acquire and develop acreage and to mine for coal. Under the 1977 Agreement, the plaintiffs' predecessors in interest reserved an overriding royalty interest in the coal mined under leases they assigned to the defendants' predecessors in interest.

¶ 3 Following a bench trial, the circuit court entered judgments in favor of the plaintiffs and against the defendants on both the breach of contract claim and the breach of fiduciary duty claims. The court declined to enter a judgment on the alternative claim of unjust enrichment.

¶ 4 The court concluded that the defendants had breached the express terms of, and the implied covenant of good faith and fair dealing contained in, the 1977 Agreement. The court further found the existence of an "implied joint venture" between the parties and found that the defendants had breached their fiduciary duty to the plaintiffs thereunder. The court awarded the plaintiffs damages in the amount of $3,852,812 and ordered the defendants to pay to the plaintiffs, in the normal course as coal is mined, royalties to which the plaintiffs would be entitled under the certain coal leases, plus prejudgment interest on payments not made to date. The defendants appeal the judgment in favor of the plaintiffs, and the plaintiffs cross-appeal the damages award.

¶ 5 We will summarize the facts as succinctly as possible. In doing so, we may omit some details of which we are aware and which we have considered, but which are not necessary to our discussion of the issues. Additional facts will be included in our discussion of the specific issues. Our references herein to the "plaintiffs" and the "defendants" shall include the parties and their predecessors in interest. Accordingly, when we refer to the "plaintiffs," we are including the actual plaintiffs' various predecessors in interest, and when we refer to the "defendants," we are including the actual defendants' predecessors in interest.

¶ 6 The actual plaintiffs are the descendants, heirs, and assigns of Oattis E. Parks, George W. Rector, Jack Fowler, and Sam Stone. Rector and Stone were experienced "borehole" drillers whose company drilled holes for exploratory development of oil, gas, and coal reserves. Their company operated as far east as Virginia, and they became highly regarded for their ability to recover "cores" of coal seams used to determine the thickness and geographical extent of a coal deposit.

¶ 7 In the mid-1970s, Rector and Stone decided to look for coal properties by reviewing old, publicly available electric logs in White County. Based on that review, they decided to obtain options to lease approximately 4,000 acres in White County and drill four or five test holes. They used their expertise to identify areas in which to drill the test holes and determined that there was coal in White County which might be worth leasing to mine.

¶ 8 Rector and Stone knew some White County landowners who owned many acres of coal rights. Their relationships with these landowners, as well as their good reputations in the community, aided in their acquisition of lease options and coal leases. Rector and Stone were able to use their personal relationships to encourage landowners to lease to them and to discourage competitors from attempting to obtain leases in White County.

¶ 9 Rector and Stone contacted Parks, an experienced mining engineer and a former vice-president of exploration for a large coal mining company, where he had been in charge of acquiring coal reserves. Parks recruited Fowler, who was an experienced mineral attorney who had negotiated and drafted oil, gas, and coal leases. The four men formed a partnership called Newco-White County (Newco). The partnership's objective was to acquire a large block of coal reserves by leasing them from White County landowners and then find someone else to take over the leases and mine the coal. During the initial leasing, the Newco partners chose strategically located tracts so as to discourage possible competitors from coming into the area. They also kept their activities confidential so as to discourage competition for leases.

¶ 10 In 1976, after acquiring a number of leases, Newco approached the defendants' predecessors in title, MAPCO Coals, Inc., and MAPCO Land & Development Corporation (collectively, MAPCO), who were in the business of mining and selling coal, to see if they would be willing to take over the leases and begin mining operations. MAPCO had no prior knowledge of the White County coal reserves discovered by Newco.

¶ 11 In July 1976, Newco and MAPCO entered into an initial option agreement whereby MAPCO would have six months in which to determine whether it wanted to mine the coal underlying approximately 7,000 acres of Newco's leases. The option contemplated that Newco would continue to obtain leases during the six-month option period, which leases would be assigned to MAPCO should it exercise the option.

¶ 12 On January 24, 1977, this option was finalized when the parties entered into the 1977 Agreement which is at issue in this case. Newco continued to drill boreholes and perform logging operations to locate and evaluate coal reserves into 1979. Newco and MAPCO worked together to determine which locations to drill and test and together developed a plan to acquire additional leases in favorable locations.

¶ 13 Under the terms of the 1977 Agreement, the plaintiffs agreed to assign to the defendants all their rights, title, and interests in the White County coal leases, and in return the plaintiffs were to receive a 2.5% overriding royalty on all coal mined "on all leases secured as of January 15, 1977." Under the Agreement, the plaintiffs were allowed to acquire additional White County leases in their own names until January 1, 1978. Any of these later-acquired leases would be assigned to the defendants, but the plaintiffs would reserve a smaller overriding royalty in any coal mined from these leases.

¶ 14 The Agreement provides that after January 15, 1978, the plaintiffs agree to "forever quit the area of interest and any acreage acquired after said date will be free of any overriding royalty, commission or fee to [the plaintiffs]." The Agreement further provides that, after the date of the Agreement, the plaintiffs "agree not to compete with [the defendants] for any coal rights within the area of interest *** for so long as [the defendants] hold[ ] a valid coal lease that has been assigned to [them] under the terms of this Agreement." These provisions are referred to hereinafter as the noncompete clause. The defendants have at all times held a valid coal lease that has been assigned to them from the plaintiffs under the terms of the 1977 Agreement.

¶ 15 The 1977 Agreement does not provide any royalties to the plaintiffs for coal mined under any White County leases except for those acquired by the plaintiffs. The plaintiffs assigned to the defendants over 200 leases covering 24,890 acres. After January 1, 1978, the defendants secured, on their own, additional mineral leases directly from White County landowners, and continue to do so. The defendants have acquired mineral leases covering more than 40,000 acres of coal in White County.

¶ 16 When the plaintiffs began acquiring mineral leases in White County, they drafted leases which included a provision giving the plaintiffs the unlimited right to surrender and terminate the leases without restriction. This provision gave the plaintiffs the option of terminating the leases, and thereby terminating the minimum royalty payments owed to the lessors/landowners, in the event coal was not going to be mined from the property in the foreseeable future. This provision was included in the leases assigned to the defendants pursuant to the 1977 Agreement.

¶ 17 The defendants had no part in drafting these leases or the particular surrender and termination provision. However, after assignment, the defendants acquired the same right to terminate the leases without restriction as the plaintiffs had. Neither the leases themselves nor the 1977 Agreement contained any language protecting the plaintiffs' right in the event the defendants surrendered and terminated the leases. The 1977 Agreement does not require the defendants to notify the plaintiffs of their intention to terminate a lease or to notify the plaintiffs when they have actually terminated a lease. The 1977 Agreement does not require the defendants to offer to reassign a lease to the plaintiffs in lieu of surrendering and terminating it. In short, the 1977 Agreement does not contain a "notice and reassignment" clause.

¶ 18 The 1977 Agreement does not contain an "overriding royalty preservation" clause, often referred to as an "anti-washout" provision. Such clauses provide that the assignee must still pay to the assignor the overriding royalty if the assigned lease is thereafter surrendered, terminated, or expires and the property is later leased again by the assignee. The overriding royalty preservation clause provides that the assignee has to pay the overriding royalty for coal mined by it from the property that was covered by the original lease even if that lease is no longer in effect.

¶ 19 The defendants' White County mining operations began in 1983, when construction of the Pattiki I mine began. Production of coal began in 1984. In order to cut costs, the defendants decided to reduce the amount of advanced minimum royalties owed to mineral lessors on land that was not being actively mined. These landowner royalties were required to be paid each year in order to keep the lease in effect when the land was not being actively mined. Accordingly, in 1986, the defendants surrendered and terminated certain leases covering approximately 20,000 acres in White County. The leases to be surrendered and terminated were selected at random. Some of these leases were those acquired by the plaintiffs and assigned to the defendants pursuant to the 1977 Agreement. In 1994, the defendants again terminated leases that had been acquired from the plaintiffs pursuant to the 1977 Agreement.

¶ 20 Subsequently, the defendants decided to expand their White County coal mining operations and build a second mine. Accordingly, they began acquiring leases in White County, some of which included property that had been covered by the leases first obtained by the plaintiffs, then assigned to the defendants pursuant to the 1977 Agreement, and then surrendered and terminated by the defendants. The defendants negotiated with landowners and obtained these "Replacement Leases" through their own efforts. The defendants' second coal mine began production in 2003.

¶ 21 The plaintiffs sought payment of overriding royalties under the 1977 Agreement for coal mined under the Replacement Leases that covered land included in the lease assignments made pursuant to the 1977 Agreement. The defendants responded that the plaintiffs were entitled to overriding royalties only on coal mined under leases secured by the plaintiffs prior to January 1, 1978.

¶ 22 It seems that neither Newco nor MAPCO contemplated this situation when the 1977 Agreement was drafted and executed. The plaintiffs established that they did not intend, by assigning the leases to the defendants, to place in jeopardy their future overriding royalty interests. They anticipated that the defendants would only surrender and terminate leases on land which they were not ever going to mine. The plaintiffs did not anticipate that the defendants would surrender and terminate the assigned leases and thereafter go out and obtain leases on the same land in their own names, thereby attempting to extinguish the plaintiffs' overriding royalty interests. The defendants also admitted that when they surrendered and terminated the assigned leases they did not do so with the intention of using those terminations as a tool to extinguish the plaintiffs' overriding royalty interests. They did so only in an effort to cut costs.

¶ 23 A mining operation can exercise control over coal reserves by two methods: directly, by a lease or option obtained from the coal owner or, in the absence of such a lease or option, "by location." Coal reserves are "controlled by location" when they are interior to, adjacent to, or near reserves that are controlled directly, by lease or option. Coal reserves that are controlled by location have no economic value to anyone other than the adjacent coal owner because they do not contain enough contiguous, saleable tons of coal to warrant the capital expenditure required to mine them, and the landowner has no realistic ability to lease to anyone other than the mining company which controls the area. For example, if a mining company owns by lease all of the coal surrounding an unleased area, no other mining company would attempt to, or be able to, get a lease for the surrounded coal. The unleased coal cannot be mined until a lease is obtained, but it is unlikely any other operator will obtain such a lease. Accordingly, a mining company can safely surrender and terminate leases if it controls the coal "by location." When the company is ready to mine the location, it can in all probability get a lease from the landowner. In the meantime, the company does not have to pay the annual advance minimum royalty to the landowner.

¶ 24 The plaintiffs alleged that the defendants maintained control by location over all of the surrendered and terminated leases which it had originally obtained from the plaintiffs pursuant to the 1977 Agreement, and fully intended to reacquire those leases when it was ready to mine them. Indeed, the defendants did reacquire those leases from the landowners when it was ready to mine the property but, of course, those leases did not provide for an overriding royalty payable to the plaintiffs. The defendants have, in fact, mined coal under the Replacement Leases in the area of interest defined in the 1977 Agreement, but have not paid any overriding royalty to the plaintiffs.

¶ 25 In a letter dated October 17, 2002, the defendants informed the plaintiffs: "The 1977 Agreement neither expresses nor implies any intention or obligation to bind [the defendants] to the payment of overriding royalties following expiration or termination of the underlying leases. To the contrary, it quite clearly limits the reservation of the overriding royalty interest to 'leases secured' by [the plaintiffs] *** prior [to] January 1, 1978. It places no obligation upon [the defendants] to maintain the leases in force and effect, nor does it obligate [the defendants] to pay an overriding royalty on any subsequent lease taken after the expiration, cancellation or other termination of a [plaintiffs-acquired] lease."

¶ 26 In count II of their second amended complaint, sounding in breach of contract, the plaintiffs allege that the four corners of the 1977 Agreement "reasonably and fairly imply a reciprocal duty to pay the overriding royalties on any coal mined and sold from the described acreage, regardless of any intervening surrender of convenience effected solely to avoid paying minimum annual royalties to landowners." It further alleges that "the Defendants' acts and practices in wrongfully and unjustifiably declaring the overriding royalty interests terminated *** constitute willful, intentional, opportunistic and self-serving tactics that unconscionably breach express royalty payment provisions, as well as the covenant of good faith and fair dealing implicit in the 1977 Agreement and related assignments."

¶ 27 In count III of their second amended complaint, sounding in breach of fiduciary duty, the plaintiffs allege that by virtue of the noncompete provisions of the 1977 Agreement, a fiduciary relationship arose between the parties with the defendant occupying a superior and dominant position with regard to the plaintiffs' royalty interests. Thus, the defendants were bound "in equity and good conscience to act in accordance with the highest standards of good faith and fairness in relation to the valuable royalty interests entrusted to" them by the plaintiffs. The defendants' surrender and termination and later reacquisition of some of these leases constitutes a flagrant breach of that fiduciary duty.

¶ 28 In its written judgment order, the circuit court concluded that the plaintiffs had made out a *prima facie* case for breach of contract by proving that the defendants had mined and sold coal from areas described in the Newco-acquired leases assigned to MAPCO without paying the royalties called for in the 1977 Agreement. The court held that the defendants' claim that the plaintiffs' royalties were "washed out" by the surrender and termination of the Newco-acquired leases was an affirmative defense on which the defendants carried the burden of proof. The court found that the 1977

Agreement did not expressly provide for any such "wash out." The court rejected the "wash out" defense because of the overwhelming evidence that, even after surrender and termination of the leases, the defendants still retained control by location over the acreage covered by the leases. Accordingly, in practical effect, even though the defendants surrendered and terminated the leases, it never lost control over that acreage and remained the only mining company who would ever mine that coal. The leases became a mere formality. The defendants did not expose themselves to any meaningful economic risk by surrendering the leases. The court noted that the 1977 Agreement is silent on the question of "wash out" and provides neither that it applies nor that it does not.

¶ 29 The court further found that the 1977 Agreement contained an implied covenant of good faith and fair dealing which required the party with contractual discretion to exercise that discretion reasonably and with proper motive, not arbitrarily, capriciously, or in a manner inconsistent with the reasonable expectations of the parties. The court held that the defendants were prohibited by this covenant from taking advantage of Newco's failure to include in the 1977 Agreement an "anti-washout" provision where the evidence indicates the defendants knew the consequences of such an oversight. Further, since in terminating the leases MAPCO acted with no motive to wash out the plaintiffs' royalties, the defendants, MAPCO's successors in interest, cannot use MAPCO's act to accomplish that unintended result. Accordingly, the court entered judgment in favor of the plaintiffs on the breach of contract count of their second amended complaint.

¶ 30 The court also entered judgment in favor of the plaintiffs on count III, alleging breach of fiduciary duty. The court found that the plaintiffs and the defendants embarked on a joint enterprise to explore for, lease, and control recoverable coal reserves in the 88,500-acre "area of interest" and that the goal of that undertaking was to achieve dominant control over the entire area of interest so that the defendants could flexibly conduct mining operations for the mutual benefit of both venturers. The court held as follows:

"The acquisition and transfer of leases from Newco to MAPCO with the provision for payment of 'overriding' and 'earned' royalties to Newco establishes the requisite community of interest; the parties' cooperative efforts on exploration, coal testing, and a joint drilling program illustrate the existence of a single enterprise aimed at leasing, mining and selling the known and controlled coal reserves for a 'common purpose.' "

¶ 31 Newco shared in the profits of the joint venture in the form of its receipt of overriding royalties. Each party retained significant control over the exploration and leasing process until at least 1979. MAPCO and Newco formed a joint venture to acquire and control coal reserves in the area of interest that MAPCO would then mine and sell for the mutual benefit of the venturers.

¶ 32 The court held that parties who stand in the relation of joint venturers owe each other the highest duties of loyalty and good faith. A joint venturer cannot convert property of the venture for his own benefit to the detriment of coventurers. MAPCO had no intention of using the lease surrenders as a tool to seize Newco's royalties. By exploiting their control by location power to easily and rapidly secure Replacement Leases over the surrendered Newco reserves they intentionally seized and converted the plaintiffs' overriding royalty interests. The court found "that the power to obtain the Replacement Leases that occurred here amounts in sum and substance to an open ended option to reacquire the surrendered reserves; that option power constitutes property of the joint venture that created an equitable proprietary interest in favor of" the plaintiffs. The defendants had a fiduciary duty to share the benefit of their control by location with their coventurers.

¶ 33 As joint venturers, the defendants stood in a fiduciary relationship to the plaintiffs and could not convert property of the venture (the leases) for their own benefit to the detriment of their coventurers. By surrendering and terminating the leases assigned by the plaintiffs, then acquiring Replacement Leases and thereafter declaring the plaintiffs' overriding royalty extinguished and refusing to pay it, the defendants converted the plaintiffs' overriding royalty. The defendants' control by location which allowed them to obtain Replacement Leases was an asset belonging to the joint venture, and due in large part to the efforts of the plaintiffs, and gave rise to an equitable propriety interest in the plaintiffs to these Replacement Leases. The defendants had a fiduciary duty to share with the plaintiffs the benefits of their control by location of the coal reserves. Accordingly, the court entered judgment in favor of the plaintiffs on the count alleging breach of fiduciary duty.

¶ 34 The defendants appeal, arguing that the circuit court was wrong in entering judgment in favor of the plaintiffs on both counts. We affirm the circuit court's ruling on count III, alleging breach of fiduciary duty, and therefore find it unnecessary to address the circuit court's ruling on count II, alleging breach of contract. We conclude that the circuit court's finding of an implied joint venture is not contrary to the manifest weight of the evidence, that its conclusion that the joint venture gave rise to a fiduciary duty is not erroneous as a matter of law, and that its finding that the defendants breached that fiduciary duty is not contrary to the manifest weight of the evidence.

¶ 35 To recover for breach of fiduciary duty, a plaintiff must prove that a fiduciary duty exists, that the fiduciary duty was breached, and that the breach proximately caused the injury of which the plaintiff complains. *Crichton v. Golden Rule*

Insurance Co., 358 Ill. App. 3d 1137, 1149 (2005). A fiduciary duty arises either as a matter of law or by meeting a "special circumstances" test. *Crichton*, 358 Ill. App. 3d at 1149. Particular relationships, such as attorney-client and principal-agent, constitute fiduciary relationships as a matter of law. *Crichton*, 358 Ill. App. 3d at 1149. Joint venture partners are among the relationships from which a fiduciary duty arises as a matter of law. *Yokel v. Hite*, 348 Ill. App. 3d 703, 708 (2004). " 'The relationship between joint adventurers *** is fiduciary in character, and imposes upon all the participants the obligation of loyalty to the joint concern and of the utmost good faith, fairness, and honesty in their dealings with each other with respect to matters pertaining to the enterprise.' " *Ditis v. Ahlvin Construction Co.*, 408 Ill. 416, 428 (1951) (quoting 30 Am. Jur. 695, ¶ 34).

¶ 36 The party who contends that a joint venture exists has the burden of proving that the parties intended such a relationship. *Yokel*, 348 Ill. App. 3d at 708. Whether a joint venture exists is ordinarily a question of fact for the trier of fact, and its decision will not be disturbed unless it is against the manifest weight of the evidence. *O'Brien v. Cacciatore*, 227 Ill. App. 3d 836, 843-44 (1992). The reviewing court is required to review the entire record as a whole, considering all the evidence in its aspect most favorable to the appellee. *Herst v. Chark*, 219 Ill. App. 3d 690, 692 (1991). A decision is against the manifest weight of the evidence where, upon a review of all of the evidence in the light most favorable to the party prevailing at trial, the opposite conclusion is clearly apparent. *Reinneck v. Taco Bell Corp.*, 297 Ill. App. 3d 211, 219-20 (1998). The circuit court's finding in the case at bar that a joint venture exists between the parties to explore for, lease, and control recoverable coal reserves in the 88,500-acre area of interest with a goal to achieve dominant control over the entire area so that the defendants could flexibly conduct mining operations for the mutual benefit of all parties is not contrary to the manifest weight of the evidence.

¶ 37 A joint venture is an association of two or more persons to carry out a single enterprise for profit. *O'Brien v. Cacciatore*, 227 Ill. App. 3d 836, 843 (1992). A formal agreement is not essential to establish a joint venture. *O'Brien*, 227 Ill. App. 3d at 843. The existence of a joint venture may be inferred from the facts and circumstances demonstrating that the parties in fact entered into a joint venture. *O'Brien*, 227 Ill. App. 3d at 843. In determining whether a joint venture exists, the intent of the parties is the most significant element. *O'Brien*, 227 Ill. App. 3d at 843. The elements to be considered in determining the parties' intent are: (1) an express or implied agreement to carry on an enterprise; (2) a manifestation of intent by the parties to be associated as joint venturers; (3) a joint interest as reflected in the contribution of property, finances, effort, skill, or knowledge by each party to the joint venture; (4) a measure of proprietorship or joint control of the enterprise; and (5) a provision for the sharing of profits or losses. *O'Brien*, 227 Ill. App. 3d at 843.

¶ 38 The defendants argue that two of these requisite elements were not proven at trial: the parties did not share joint control and management over the actual coal mines and the parties did not share profits and losses. The defendants argue that the circuit court's finding that the parties intended to, and did, enter into a joint venture is contrary to the manifest weight of the evidence.

¶ 39 The defendants first argue that "the evidence is uncontested that Plaintiffs had no involvement in the management or operation of the Pattiki I and Pattiki II mines." The defendants argue that there can be no joint venture unless the plaintiffs had some degree of management and control over the mining operations.

¶ 40 The circuit court found that the parties embarked on a venture to jointly establish control over all the coal reserves in the 88,500-acre area of interest so that the defendants could thereafter mine the coal for the venturers' mutual benefit. The venturers' agreement to leave the actual mining to the defendants does not detract from ample evidence that supports the circuit court's finding that the plaintiffs had a sufficient right to control the enterprise (gaining control over all mineable coal in the area of interest) to satisfy the required element of "a measure of proprietorship or joint control of the enterprise." The defendants point to no requirement that the joint venturers all have equal right to control *every aspect* of the enterprise. Indeed, it appears that the plaintiffs had a superior right to control what leases were acquired, at least initially. The circuit court's finding that the plaintiffs had a measure of proprietorship or joint control of the enterprise sufficient to find the existence of a joint venture is not contrary to the manifest weight of the evidence.

¶ 41 The defendants next argue that the plaintiffs and defendants did not enter into an agreement to share profits and losses because the plaintiffs were not obligated to provide any of the capital or operating expenses incurred in the mining operation and were not obligated to share in the losses, if any.

¶ 42 The circuit court found that the evidence established that the defendants had no intention of operating any mines at a loss and that the plaintiffs' royalties would be paid out of the profits of the venture. It has been held that an explicit provision for the sharing of losses is not essential to the existence of a joint venture where the parties clearly did not contemplate the possibility of a loss. *Ambuul v. Swanson*, 162 Ill. App. 3d 1065, 1070 (1987). The circuit court's finding that the joint venture agreement included a provision for the sharing of profits and losses is not contrary to the manifest weight of the evidence.

¶ 43 The defendants argue that the evidence does not support the circuit court's finding that the parties intended to form a joint venture because the 1977 Agreement does not so state, and the testimony of the plaintiffs' witnesses does not support the implication of such intent. The defendants point to testimony of Rector that the transaction was simply a sale of coal leases for development and that after execution of the 1977 Agreement, the plaintiffs were no longer involved in the enterprise. However, other evidence in the record belies this testimony, and we will not substitute our judgment for that of the fact finder, which is in the best position to judge the credibility of the witnesses. *Ambuul v. Swanson*, 162 Ill. App. 3d 1065, 1070 (1987).

¶ 44 Finally, the defendants argue that even if they owed a fiduciary duty to the plaintiffs there was no breach of that duty as a matter of law. They argue that parties to a contract do not owe fiduciary duties and so if the defendants have not breached their contractual duties to the plaintiffs, no breach of fiduciary duty can arise. As we have already stated, " '[t]he relationship between joint adventurers *** is fiduciary in character, and imposes upon all the participants the obligation of loyalty to the joint concern and of the utmost good faith, fairness, and honesty in their dealings with each other with respect to matters pertaining to the enterprise.' " *Ditis v. Ahlvin Construction Co.*, 408 Ill. 416, 428 (1951) (quoting 30 Am. Jur. 695, ¶ 34). As the circuit court held, a joint venturer cannot convert property of the venture for his or her own benefit to the detriment of coventurers. This is essentially what the defendants did, and the circuit court's finding that the defendants breached their fiduciary duty to the plaintiffs is not contrary to the manifest weight of the evidence. Accordingly, the circuit court did not err as a matter of law in entering judgment in favor of the plaintiffs on count III of their second amended complaint.

¶ 45 We turn now to the cross-appeal. The circuit court awarded damages in the total amount of $3,852,812, based on unpaid past-due royalties in the amount of

$3,409,083 and prejudgment interest thereon in the amount of $443,729. The court also ordered the defendants to pay to the plaintiffs in the normal course as coal is mined royalties under the Replacement Leases from September 1, 2009, forward plus prejudgment interest on payments not made to date. The plaintiffs cross-appeal from this second portion of the damages award, arguing that the circuit court should have awarded the present value of future royalties instead of awarding what amounts to specific performance of the contract or joint venture agreement.

¶ 46 Before the circuit court, the plaintiffs argued that the court has broad equitable power in fashioning a remedy for breach of fiduciary duty. The plaintiffs asked to be awarded the present value of future royalties owed under the Replacement Leases. The plaintiffs pointed out that the defendants had already breached their fiduciary duties to the plaintiffs and the plaintiffs should not be left at their mercy with respect to future royalties. The defendants countered that to award the present value of future royalties would be speculative and inappropriate where those royalties can be paid as the coal is mined.

¶ 47 In its judgment, the circuit court found, based on testimony before it, that it is very difficult to estimate the amount of coal that will be mined in the future from an underground coal mine because of the existence of clay veins, water inundation, sandstone veins, slips, faults, regulatory factors, and changes in the law governing coal mining. The court also found that it is very difficult to predict the future price at which mined coal will be sold because coal is sold in a global economy and the market for coal changes quickly and unexpectedly. The court concluded that damages cannot be projected into the future with reasonable certainty due to uncertain market prices, legal and regulatory effects on the ability and cost to mine coal, competitive measures, new producers, alternative fuels, future energy legislation, and numerous other factors. Accordingly, the court concluded that to award damages in the form of the present value of future royalties would be "speculative at best." The court ordered the defendants to pay the plaintiffs in the normal course, as coal is mined, the royalties due under the Replacement Leases.

¶ 48 In their brief on cross-appeal, the plaintiffs argue that the circuit court's finding that awarding damages in the form of the present value of future royalties would be speculative is contrary to the manifest weight of the evidence. They also argue that the damages award is an abuse of the circuit court's discretion where it leaves the plaintiffs' fate in the hands of the defendants, who have already committed a breach of their fiduciary duties toward the plaintiffs. The plaintiffs argue that the form of damages awarded will enmesh the circuit court in protracted litigation and supervision of the defendants' conduct.

¶ 49 The defendants counter that the circuit court's finding is not contrary to the manifest weight of the evidence. The defendants further argue that the damage award will not embroil the circuit court in further litigation because the terms on which future royalties will be paid are clearly set out in the 1977 Agreement, which is "the normal course" in which royalties will be paid. Indeed, the defendants argue, they have throughout this litigation continued to pay the plaintiffs royalties on coal mined on leases acquired by the plaintiffs but not surrendered and terminated by the defendants and the plaintiffs have no complaints with respect thereto.

¶ 50 We affirm the circuit court's award of damages. The standard of review we apply when a challenge is made to a judgment following a bench trial is whether the judgment is contrary to the manifest weight of the evidence. *Judgment Services Corp. v. Sullivan*, 321 Ill. App. 3d 151, 154 (2001). A judgment is contrary to the manifest weight of the evidence only when an opposite conclusion is apparent or when the findings appear to be unreasonable, arbitrary, or not based on evidence. *Judgment Services Corp.*, 321 Ill. App. 3d at 154.

¶ 51 The circuit court's finding that to award the present value of future royalties would be speculative is not contrary to the manifest weight of the evidence. Both parties presented evidence on the issue of damages. The plaintiffs' expert testified that it was feasible to estimate the present value of future royalties and explained how that is done. The defendants' expert testified that future royalties could not be predicted with reasonable certainty because of uncertain market prices, legal and regulatory effects on the ability and cost to mine coal, competitive measures, new producers, alternative fuels, and future energy legislation. The circuit court weighed this contradictory evidence and came down on the side of the defendants. Its finding is not contrary to the manifest weight of the evidence. Could the circuit court have made a different finding based on the evidence? Perhaps, but its finding is still supported by the evidence and is not contrary to its manifest weight.

¶ 52 Furthermore, given the fact that the plaintiffs had been receiving royalties throughout this litigation on leases which had not been forfeited and reacquired, apparently without any problems, the circuit court's award of damages is not an abuse of discretion. The plaintiffs will continue to receive royalties on *all* the leases as coal is mined, just as they have to date on those which were not forfeited.

¶ 53 For the foregoing reasons, the judgment of the circuit court of White County is hereby affirmed.

¶ 54 Affirmed.