Secret Commissions in IT Contracts

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Abstract. IT contracts often necessitate a myriad of contractual arrangements extending beyond the two principal contracting parties, and usually involving third party facilitation. In *Imageview Management Ltd v. Kelvin Jack*, the Court of Appeal (of England and Wales) has unreservedly confirmed that such facilitation does constitute agency. The court also unequivocally emphasised both the importance and the fiduciary nature of the consequential obligations and duties of the agent to the principal. In particular, the agent's receipt of a 'secret benefit' often falls short of a 'bribe' but may nevertheless constitute a breach of such obligations and duties. Moreover, it is often identified only retrospectively in the bitterness of the breakdown of the parties' effective working arrangements. However, in determining the remedies applicable following a breach, the Court has evidenced only a slight preference for the twentieth century restitutional, rather than a Victorian penal, approach. That the penal approach remains in judicial contemplation necessitates careful management of contractual relationships. The paper concludes by recommending documented disclosure of, and the principal's consent to, both patent and obscured benefits.

1. Introduction

The Penguin Dictionary of Modern Quotations attributes the quotation "a verbal contract isn't worth the paper it's written on" to Sam Goldwyn and that illustrates the evidential difficulties of establishing all the terms of a contract. Also, it cuts to the heart of business relationships: that, in business, trustworthiness or "character", as Sir Alan Sugar described it in *The Apprentice* (Broadcast BBC 1, Wednesday, 3rd June 2009) is more important than a mere piece of paper. This is particularly important where oral variations (or extensions) are effected to a written contract – a situation commonly occurring to reflect revised circumstances and to address unforeseen problems in IT provision. Although lawyers would always urge that such variations be fully documented and agreed, they do recognise that the reality is usually very different. Where the contract (irrespective of any variation or extensions) affords an unforeseen or undisclosed benefit to one of the contacting parties, the common law usually lets that benefit rest undisturbed.

However, the quiver of English Law contains not just Common Law but also Equity – the law operating on a man's conscience. Equity recognises that certain relationships are special and, as they can only operate on trust, necessitate fiduciary obligations engaging a higher, and rarely displaced, set of governing rules to manage that fiduciary nature. After their development immediately following the Provisions of Oxford (1258), the principles (Maxims) of Equity have remained remarkably constant - in marked contrast to the ever-changing scenarios and circumstances of their application. *Imageview Management Ltd v. Kelvin Jack*, although factually concerning a football club, an international footballer, an agent, and the regulation of work permits, clearly evidenced the Court of Appeal's broader principle of approach to fiduciary obligations generally and secret benefits in twenty-first century agency. There, Mummery LJ lamented (at para 65):

> "that it is still necessary, in the 21st century, to remind agents of what was said by the greatest of all the judges, Bowen LJ in *Boston Deep Sea Fishing* at pages 362-363, about conflicts of duty and interest and the necessity for transparency in the dealings of agents, if confidence in them is to continue. In our age it is more important than it ever was for the courts to hold the precise and firm line drawn between payments openly, and therefore honestly, received by agents, and undeclared payments received by agents secretly, and therefore justly liable to *all* the legal consequences flowing from breaches of an agent's fiduciary obligations."

This paper briefly outlines the concept of agency in the context of a commercial IT contracts, describes the principle of fiduciary obligations and analyses their general application by the Court of Appeal to the specific context of secret commissions. It then addresses the issue of remedies consequent upon breach, and proceeds to argue that whilst acknowledging the continuing need of effective remedies for secret benefits, the judicial normative approach is restitutional rather than penal. It concludes by suggesting that the inclusion of a de minimis benefits provision would illuminate the existence of commissions, evidence agreement in advance, and thereby obviate unnecessary minor disputes.

2. The Concept of Agency

In its simplest articulation, agency is epitomised by one person acting for another to bring that person into a legal relationship with a third party. The agent metaphorically sits between the principal and a third party and has the ability to effect *legal* relations between the principal and third party; and the resultant contract is between the principal and the third party, so obviating the obstructive principle of privity of contract. However, as Mann J. demonstrated in *Spearmint Rhino Ventures (UK) Limited v. The Commissioners for H.M. Revenue and Customs*, simplicity risks masking the subtle complexities of agency and fails to illuminate its variety and diversity (reflecting its historical legal origins in contract, tort and equity). Whilst it is not surprising that academic commentators continue to struggle to agree on a single definition, the learned editors of *Bowstead and Reynolds on Agency* propose it to be

a fiduciary relationship, with the consequentially burdensome fiduciary duties imposed on the agent as shown in *Tesco Stores Ltd v. Simon Pook, Natasha Kersey Pook, Universal Projects (UK) Ltd*. But this onerous fiduciary nature is a justified, if limited, counterbalance to the agent's power.

Agency was a common necessity in eras without real time global communication and where actual attendance of the principal was impractical or even impossible. Whilst some elements of the rationale for agency have diminished over the years, the use of agency in commercial contracts remains commonplace – not least in IT provision where several parties need to interact to achieve successful delivery. Typically, such contracts rely heavily on third party provision for the procurement of basic elements (e.g. hardware architecture, software design, data input) as well as for the development of more 'sophisticated' applications or features to satisfy commercial demands. At the simplest level, a large organisation (the principal) seeking a new IT system, might choose, for convenient and practical reasons, to appoint a consultant (agent) to review the available systems meeting the specification and to effect recommendations. Presuming the principal's acceptance of the agent's recommendation, the agent may then also negotiate for the principal the best contractual terms with the supplier (third party); and the resulting contract is between the principal and third party. Through the application of the rules of agency, and throughout this process, the agent's contractual nexal link remains with the principal to which the agent's duties were owed (and to the exclusion of any to third parties). Whilst the duties are fiduciary, their extent and nature remain subject to the terms of the underlying legal contractual agreement - as the High Court confirmed in Towcester Racecourse Co Ltd v. Racecourse Association Ltd. Thus, the fiduciary rules are not immutable but are protected, and whilst all of these obligations can be displaced by agreement between the principal and the agent, the playing field is tilted against the agent asserting any such displacement i.e. contra proferentem.

3. The Fiduciary Obligations

The agent is expected to behave in a manner reflecting respect for the commercial legal power to commit the principal to contracts. The principal can agree to the displacement or amendment of these fiduciary obligations, but there must be fully informed consent; and the burden is upon the agent to show not only the actual consent but also that the principal gave it willingly and after being fully informed. In outline, those duties include the expectation that the agent will carry out his duties personally, give to the principal a full and proper account of financial transactions, and furnish supporting documentation (*Yasuda Fire and Marine Insurance Co of Europe Ltd v. Orion Marine Insurance Underwriting Agency Ltd*). One consequence is that the agent needs to be adequately involved in the agency to be able to do so, hence the rule *delegatus non potest delegare* - that the agent (where an individual) should act personally (and not leave the work to others) without the principal's consent (*Quebec and Richmond Railway Ltd v. Quinn*), unless it is customary (*De Bussche v. Alt*), or there is an emergency, or where the work requires no discretion (*Allam & Co Ltd v. Europa Poster Services Ltd*), and keep the principal's business confidential (*Faccenda Chicken Ltd v. Fowler*). Although the issue of delegation where the agent is a corporate structure has not taxed the courts, it might be thought that as equity operates on a man's

conscience, and clearly there is no one 'man' where the agent is corporate, the rule has no application; but the better view, is that if the core personnel of the corporate structure are material to the selection of the (corporate) agent, then that personnel is burdened with the fiduciary obligation not to delegate.

The overriding imperative is that the agent acts in good faith; and in the financial context, that obligation is characterised by the duty to avoid conflict of financial interest such as not profiting from entrusted property (*Shallcross v. Oldham*) or information (*Regal (Hastings) Ltd v. Gulliver*), not making secret profits (*English v. Dedham Vale Properties Ltd*), not accepting a commission from third party without permission. The last rule applies even where the principal would not otherwise have been eligible as in *Hippisley v. Knee Bros* where auctioneers received a discount on printing orders but innocently failed to pass it onto their clients (to whom the discount would not have been granted). Whilst the court accepted that the auctioneers had acted under a mistaken belief of customary entitlement, it required the repayment of the discount on the printing (although allowing the retention of the auctioneers' commission relating to the sale).

In practice, where the system functions as anticipated by the purchaser, there will be little concern that the supplier has obtained a benefit from a third party: however, where the system disappoints, the purchaser will be alert for any means of avoiding the contract, and in default, of obtaining compensation such as delivered by a breach of fiduciary duty claim.

4. Secret Commissions

One particularly problematic area is the blurred distinction between bribery and secret commissions both of which assumes the third party's collusion by actual knowledge or at least wilful blindness; and a secret payment may prompt both criminal (bribery) and civil (secret commission) consequences. Commissions may themselves be legal payments by the payer (such as a payment by an insurer to an agent for the placing of an insurance sub-risk with a third party insurer) but they breach the fiduciary rules through the manner in which they are received and retained by the recipient agent – i.e. secrecy. Advance knowledge of the benefit is not required, so it is irrelevant that the recipient agent had any expectation of the benefit payment, or acted in expectation thereof. It is not the making or receipt, but the element of secrecy, which offends; and, so, intention of receipt is irrelevant to the breach, although may be relevant in addressing the remedy. In *Boston Deep Sea Fishing and Ice Co. v. Ansell* (1888) 39 ChD 339 the court found against the managing director of a company who had secretly agreed with shipbuilders to receive a commission for ordering vessels for his company. The order was from the company, and, as a company lacks capacity to contract directly, was effected by the company's agent – the managing director to whom the payment was made without disclosure to the company. There, Cotton LJ commented (at 357):

> "He puts himself in such a position that he has a temptation not faithfully to perform his duty to his employer."

Bowen LJ underlined that the evil lay in the element of secrecy (at 362-3) speaking of "commissions taken behind the master's back, and in fraud of the master."

Moreover (at 368) Fry LJ emphasised the principled nature of the maxims, and refused to apply:

> "any artificial or technical rules, but according to the simple dictates of conscience, and according to the broad principles of morality and law, and I think it is the duty of the Courts to uphold those broad principles in all cases of this description."

Half a century later, in *Rhodes v Macalister*, Bankes LJ dismissed the agent's beliefs as irrelevant and (at 23), his Lordship re-emphasised that it was not the payment itself but the element of secrecy which offended:

> "He could no longer act consistently with his duty, unless he disclosed the facts"

Taken no further, these dicta imply that an unscrupulous agent could take a secret benefit and avoid the risk of action merely by disclosure, so Scrutton LJ explained at length (at 27) that disclosure alone failed to satisfy equity, as there needed to be:

> "both disclosure to and consent from his principal".

But the draconian nature of the consequences of breaching this Victorian rule sat uneasily with some of the court. Kennedy J advanced the principle of separability to sustain the principle of the rule but to restrict the excesses of its impact:

> "where the several duties to be performed are separable, as to my mind they are in the present case, the receipt of a secret profit in connection with one of those duties would not, in the absence of fraud, involve the loss of the remuneration which has been fairly earned in the proper discharge of the other duties".

Lord Alverston went further to suggest, in some commercial contracts, there should be a requirement of a nexus between the secret payment and duties to be performed.

Whilst this suggestion of nexus has equitable resonance and offered some measure of tolerance in the otherwise strict application of the rule, it remains generally unadopted. This leaves the unscrupulous agent with a clear economic choice: on the one hand disclosure, but with the possible loss of the benefit through lack of consent, against the immediate financial advantage of retaining the secret benefit, and maintaining silence but at the risk of heavy penalty if discovered. In effecting that choice, the severity of the remedies available to the principal is clearly highly significant. Where the contract is no longer in the principal's interests, e.g. superior / cheaper hardware / software / services can be obtained elsewhere, a breach of fiduciary duty could allow the principal to not only be extricated from a contract, but also obtain substantial recompense.

5. Remedies

In cases of secret profit, the civil courts readily signal strong discouragement and award generously restorative civil damages (*Industries and General Mortgage Co Ltd v. Lewis*; and *Mahesen v. Malaysia Government Officers' Co-operative Housing Society Ltd*), even where the principal has been returned to his previous financial position (*Logicrose v. Southend United Football Club*). Other remedies are extensive: the principal may dismiss agent (without either or both of notice and compensation) (*Boston Deep Sea Fishing and Ice Co. v. Ansell*), reclaim the amount of the bribe, and refuse to pay for the agent's services rendered and recover monies already paid.

However, a clear line falls to be drawn between remedies appropriate where responsibility lies solely with the agent and remedies appropriate where responsibility extends to the third party. In the former category, where the payment has resulted in the principal paying more or being financially disadvantaged, the rationale for both restorative and compensatory awards is evident, even if the quantum of that award may be more problematic. Receipt of a secret commission of 3000 Euros for the recommendation of a software supplier whose price is 1,000 Euros greater than a comparable supplier can be seen to justify a restorative award of 1000 Euros, and a compensatory award of 3000 Euros; but, ironically, this leaves the principal profiting from the agent's breach; but the agent is not significantly worse than would have been the case of acting with probity. In many cases the principal might suffer no direct loss i.e. where the payment is connected with the benefit received by the third party supplier not that received by the purchaser principal, and there discouragement may require more that simple restorative awards. So, a payment made to the agent by the IT hardware supplier recommended out of several offering identical products on identical terms leaves the principal at no immediate financial loss, and any damages awarded to the principal will be a benefit *ex vacuo*. A restorative award becomes somewhat chimerical in the absence of the principal's loss, either because it never arose or because the principal has been returned to the previous financial position, without resultant loss, as in *Logicrose v. Southend United Football Club*.

Nevertheless, the agent's breach of the fiduciary duties bites at the heart of the relationship; and caselaw reflects the extensive range of remedies available for breach of duty and, therein, reflect the desire of successive courts to send a clear message of discouragement. In contrast to mere 'ordinary' breaches of contract at common law, where remedies are awarded but the contract often continues, the breach of a fiduciary duty offends equity, and allows the injured principal to determine the tainted relationship. Thus, the principal may dismiss the agent without either or both of notice and compensation (as occurred with the Managing Director in *Boston Deep Sea Fishing and Ice Co. v. Ansell*). However, the principal-agent relationship is not thereby avoided *ab initio*, so that actions taken by the agent may remain for the principal's advantage; but the agent's financial entitlement is jeopardised. So, in respect of that contract, the principal is under no obligation to pay commission to the agent for services already rendered, and, indeed, may reclaim any commission and other payments (including expenses) already made under the contract. As Lord Alverstone CJ explained in *Andrews v Ramsay* (at p.636):

> "a person who purports to act as an agent [but takes a secret commission] is not in a position to say to his principal, 'I have been acting as your agent, and I have done my duty by you,' [and so]… is not entitled to recover any commission from that principal."

In *Rhodes v Macalister* (at 27), Scrutton LJ justified the severe consequences applicable, even in the absence of any loss to the principal. In addition to the above remedies, the principal may terminate the contract

with the third party (*Logicrose v. Southend United Football Club* and *Boston Deep Sea Fishing and Ice Co. v. Ansell*), and sue the third party for damages *(Salford Corporation v. Lever*). The accumulation of remedies reflects the stern Victorian values and the condemnation of parties who breached commercial morality; but it also placed the wronged principal in a profitable and a strong position. So, the principal was able to avoid all financial commitments to the agent no matter how extensive the agent's expenses may have been and no matter how beneficial the agent's endeavours may have been to the principal. Secondly, the principal could avoid the contract negotiated by the agent, allowing the principal the advantage of retrospective decision-making (akin to ratification) as the secret commission usually comes to light only at late in the contractual relationship. Whilst fair in a static market, this remedy could render the third party extremely vulnerable economically and commercially in a volatile or dynamic market such as IT development or hardware architectural design. The third party may have invested significant resources to meet the principal's contractual specification within an agreed timeframe, only to see a rival's development close behind and offering a price advantage: so, the principal's right to cancel could destroy the third party's competitive advantage over its rivals. In practice, of course, the principal might renegotiate on price, but the agent's vulnerability is patent, as is the principal's advantage. Thirdly, the principal's additional right under *(Salford Corporation v. Lever*) to sue the third party for any loss suffered affords the prospect of additional and independent benefit where loss was suffered and the third party had knowledge. The extent of these remedies constitutes a significant, and rightly harsh, response to a breach of fiduciary duty, but also reflects the contemporaneous pivotal point of the see-saw of wronged principal / penalised agent. *Salford* can be seen as the apogee of the imposition of stern Victorian commercial values and the granting of cumulative legal remedies. Less than a century later in *Mahesen v. Malaysia Government Officers' Co-operative Housing Society Ltd* the Privy Council exercised considerable caution towards the cumulative approach to remedies. Citing *United Australian Ltd v. Barclays Bank Ltd*, Lord Diplock (at 383) confirmed multiple remedies.

Whilst twentieth century commercial morality continued to condemn the errant agent, it also started to frown on the excessive rights, and the consequentially excessive unjust enrichment, of the wronged principal.

5.1 Imageview

Imageview Management Ltd v. Kelvin Jack demonstrates both the ease with which the strict rule against secret commissions can be breached and also contemporary judicial approach to remedies. There, an international professional football Player appointed an agent to negotiate (as it did) a two year contract to play with a UK club. The terms of the contract of agency were:

- Term: 2 years.
- Fee: 10% of Player's monthly salary
- The agent was
    - to provide

"advice and representation in connection with any contract or renewal of a contract which the Player might wish to enter into".

    - to "use its reasonable endeavours to promote the Player and act in his best interests".

All parties had also been aware that, to play for the new club, the Player would need a Work Permit, although the mechanics of obtaining this were not identified or agreed and the Court of Appeal accepted that the Player never expected to pay for the Permit. As the Player's agent had expertise in securing such Work Permits, the Club agreed to pay that agent £3,000 for that service, but without alerting the Player. More significantly and suspiciously, the court at first instance had found that the "in real terms" value of the work to secure the permit was only £750, but that the higher level of the fee (£3,000) had been set "by, in part, taking into account the length of [the Player's] contract". As the fee significantly exceeded the value of the work, it risked falling to be viewed as a commission paid to the agent although there was no finding that the Player had been financially disadvantaged by this "secret deal" 'side payment'. However, the Player, having become aware of the payment, discontinued the agency fee payments, after the agent claimed that "it was none of your business." The Court at first instance also found that the 'side payment' made it

> "possible that the more [the agent] got for itself, the less there would or could be for [the principal]. Moreover it gave [the agent] an interest in [the principal] signing for [the third party] as opposed to some other club where no side deal for [the agent] was possible."

In the Court of Appeal, the primordial question was, following the dicta of Bankes LJ in *Rhodes v Macalister*, not whether the agent believed he was doing any wrong, nor whether there was any direct

disadvantage to the principal (*Hippisley v. Knee Bros*) but whether the "secret deal" 'side payment' breached the agent's duty and created the possibility of a conflict of interest.

As the Court of Appeal explained (at para 6):

> "An agent's own personal interests come entirely second to the interest of his client. If you undertake to act for a man you must act 100%, body and soul, for him. You must act as if you were him. You must not allow your own interest to get in the way without telling him. An undisclosed but realistic possibility of a conflict of interest is a breach of your duty of good faith to your client."

Of course, situations do arise where there might be a conflict of interest, but that could be easily negated by transparency through disclosure and consent. The essential objection is the element of secrecy - not the commission itself. Commissions have remained at the core of many dealings in the financial sector; and it is now common practice for contracts to carry statements declaring the existence and parameters of such commissions. Such disclosure may not totally obviate a conflict of interests but it does destroy its secrecy, which is more pernicious than the conflict itself; and the application of this approach to IT contracts is self-evident.

Whilst each profession and commercial context had its own customs, Jacob LJ underlined the universality of the principles (at para 23):

> "Like any other agent he or she cannot serve two masters. Nor, without full disclosure, can his or her own interest ever be allowed to conflict with that of his or her principal."

The severity of the consequences of any breach, articulated some years ago by Scrutton LJ in *Rhodes* (at 28) remains equally applicable today and that that there was no doctrinal reason to prevent the principal from profiting from the agent's breach of fiduciary duty:

> "It does not matter that the employer takes the benefit of his contract with the vendor; that has no effect whatever on the contract with the agent, and it does not matter that damage is not shown. The result may actually be that the employer makes money out of the fact that the agent has taken commission.

Moreover, addressing the concept of separability advanced by Kennedy J in *Rhodes*, the Court rejected the argument that the work permit contract was "harmless collaterality", and so separable, as the agent's secret benefit was not "unconnected" with the agent's contract. Jacob LJ emphasised the equitable nature of trigger – namely "the conflict of interest which ought to bring the conscience into play", and asserted that the correct approach was to ask:

> "whether the agent was faced with a realistic possibility of a conflict of interest, rather than whether there was a "secret profit … directly impacting on the moneys payable to the principal."

The court acknowledged the flexibility of equity and that there could be exceptions to the strict rule as Atkin LJ had observed in *Keppel (*at 592):

> "there may well be breaches of duty which do not go to the whole contract, and which would not prevent the agent from recovering his remuneration; and as in this case it is found that the agents acted in good faith"

But (at para 49 and 50) it also referred to, and recognised the significant weight of, the caselaw (*Keppel*, *Andrews*, and *Rhodes*) as well as the policy in favour of forfeiture of all remuneration without applying any principle of separability:

> "The policy reason runs as follows. We are here concerned not with merely damages such as those for a tort or breach of contract but with what the remedy should be when the agent has betrayed the trust reposed in him – notions of equity and conscience are brought into play. Necessarily such a betrayal may not come to light. If all the agent has to pay if and when he is found out are damages the temptation to betray the trust reposed in him is all the greater. So the strict rule is there as a real deterrent to betrayal. As Scrutton LJ said in Rhodes at p.28,
>
> 'The more that principle is enforced, the better for the honesty of commercial transactions.' "

So, the court preferred maintaining the line of principle against conflicts of interest, rather than predicating action on direct loss to the principal. The principal was able to determine the agency contract free of any future payments, and recover fees already paid as well as the secret payment; and no allowance was made for the agent's efforts to negotiate the contract or secure the work permit.

6. Profiting from the secret profit of others?

Over the years, there as been some uncertainty in the courts support for such cumulative remedies. Any benefit from the wrong-doing agent was often seen as a benefit for the principal (in the capacity as the innocent and wronged party), and so in *English v. Dedham Vale Properties Ltd* (1978) the increase in the value of land derived from the prospective purchaser's securing planning permission 'as agent', was held to belong to the principal. However, *Mahesen v. Malaysia Government Officers' Co-operative Housing Society Ltd* challenged, on the ground of excessive enrichment, the accumulation of the wronged principal's remedies, and so required the party taking r the asset at its enhanced value to make an allowance for the work undertaken to achieve that enhanced value. More recently Arden LJ in *Murad v. Al-Saraj* reverted to supporting multiple remedies in granting the remedy of an account allowing unjust enrichment (at para 56):

> "Equity recognises that there are legal wrongs for which damages are not the appropriate remedy. In some situations therefore, as in this case, a court of equity instead awards an account of profits. As with an award of interest (as to which see Wallersteiner v Moir (No 2) [1975] QB 373), the purpose of the account is to strip a defaulting fiduciary of his profit."

This uncertainty was also reflected in the progress of *Imageview* from first instance to the Court of Appeal. The issue was whether the mere breach of duty *per se* justified denying the agent any reward notwithstanding that the principal had benefited from the acquisition of the work permit (and so, arguably, should pay for that benefit), or that the benefit accruing to the principal justified the agent being recompensed for its efforts.

The court at first instance, allowed the agent to retain the value of the work to secure the work permit but in the High Court, Underhill J. (at para 36) disallowed it, treating it as a 'profit' and citing §7-127 of *Snell's Equity*, 31st Edn. that

> "A fiduciary is bound to account for any profit that he or she has received in breach of fiduciary duty".

His Lordship did however allude to the oft-criticised approach that an allowance for skill and effort could be made where

> "it would be inequitable now for the beneficiaries to step in and take the profit without paying for the skill and labour which has produced it." [The quotation is from the judgment of Wilberforce J in *Phipps v Boardman* [1964] 1 W.L.R. 993 at p.1018)]."

In the Court of Appeal Jacob LJ implicitly accepted the possible application of the rule, quoting (at para 57) from Fox LJ in *O'Sullivan v Management Agency etc*:

> "the justice of the individual case must be considered on the facts of that case… [and refusal of relief]…. will depend on all the circumstances."

but observed (at paras 59 - 60):

> "as Underhill J pointed out, the work involved was never anything Mr Jack was expecting to pay for. It was something which he surely knew had to be done before he could play. But it was not a benefit which accrued to him financially. How [the third party] arranged for the permit was simply a matter for [the third party]. So, like the Judge, I cannot see any reason for exercising the power – one to be exercised sparingly - to make an allowance."

7. Analytical Conclusion

Imageview is surprisingly paradoxical, reiterating well-established law but in a twenty-first century context and offering broad implications for agency situations and complex contractual situations such as IT infra structure and architectural provision.

Systemically, it is surprising to find this appeal in the Court of Appeal, as it raised no evident novel legal point, nor addressed any particularly new issue of law, nor sought to clarify conflicting interpretations. At one level, it can be viewed as a triad of judgements merely revisiting well-established cases to re-apply well-established rules on which the three Lords Justice of Appeal were in agreement. Given that Jacob LJ admitted: "I go to just three old cases to demonstrate that what I said above contains nothing new", it must be questioned whether re-iterations of established law really should warrant the valuable time of the Court of Appeal.

Secondly, and against the above point, is the substantive law. The law of agency is founded on notoriously outdated principles (and criticised as such), and it must be right to seek, from time to time, judicial revalidation of Victorian principles in the broad context of evolving social and ethical standards. Here, the courts have unreservedly confirmed that an agent's duties remain fiduciary in nature, and fall to be measured against a standard higher than that applicable to 'mere' contracts. In so doing, the courts have effected a valuable service: the revalidation of not only the incidents and values of agency but also the validity of the continued application of agency to special relationships of certain professions and activities. But whilst the principles of agency were founded on practices and principles of a past era when the agent was readily acknowledged as playing a significant role in geographically diverse and dispersed commercial transactions without easy communication, the problems, albeit of a different nature, remain. Many contracting parties will rely on others to procure essential elements of the contract (e.g. specialist software), thereby creating a relationship in agency. It is that reliance coupled with the agent's power to commit the principal which is sufficiently precious to justify the courts maintaining a higher standard of conduct and duty from the agent.

The third element of the paradox is that the challenging values, to which our Victorian forebears aspired, today remain as elusive as ever in every quarter of society. The words of Mummery LJ on "conflicts of duty and interest and the necessity for transparency in the dealings of agents, if confidence in them is to continue" are readily transferable to many quarters of modern life, including bankers, company directors, and, of course, IT contractors. The nature of Equity's maxims is that they are general and are adaptable to emerging scenario.

Fourthly, in respect of remedies, by allowing the principal the commission and to pay nothing for the agent's services already rendered, the Court of Appeal has followed the older and more robust approach taken in *Murad* rather than the earlier caution of the Privy Council in *Mahesen*.

However, the importance of the *Imageview* also lies beyond the immediate facts and professional contexts to all those acting as agents. The case involved seemingly innocent arrangements external to the main contracts and posing no disadvantage to the principal: yet these actions breached the strict requirements imposed by fiduciary duties. It must be questioned how much care should be taken in all commercial dealing to effect full disclosure.

Whilst the laws of agency were established in a bye-gone age, *Imageview* has restamped their validity so that the fundamental principles remain equally important today, as Jacob LJ commented (at para 6):

> "All [the agent] has to do to avoid being in breach of duty is to make full disclosure. Any agent who is doubtful about his position would do well to do just that – the mere fact that he has doubts will generally be a message from his conscience".

Moreover, as Mummery LJ explained, the consequence of failing to do so is the agent's liability,

> "to *all* the legal consequences flowing from breaches of an agent's fiduciary obligations."

So, the agency agreement should contain a *de minimis* provision (limited to, say, 5% of the overall value of the agent's commission) to allow for minor items. Not only would clause that bring the issue to the attention of the agent and, more importantly, the principal, but would meet the principal's claimed right to receive "details of any side-deals that may form part of [the] arrangements." As Counsel rightly claimed, "Sunlight is, after all, the best of disinfectants."

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