Case No: HC10C02393

Neutral Citation Number: [2012] EWHC 1226 (Ch)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
The Rolls Building, London, WC4A 1NL

Date: 09/05/2012

Before :

HHJ DAVID COOKE

- -

Between :

Robert Frank Stupples	**Claimant**
- and -	
Stupples & Co (High Wycombe) Ltd	**Defendant**

- -
- -

Nicholas Trompeter (instructed by **Iliffes Booth Bennett**) for the **Claimant**
Seb Oram (instructed by **Blandy & Blandy LLP**) for the **Defendant**

Hearing dates: 18-20 April 2012

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Judgment

HHJ David Cooke:

1. In this case the claimant Mr Stupples claims £69.668.90 plus interest in respect of fees for acting as consultant to the defendant Stupples & Co (High Wycombe) Ltd. The principal issue in the case is whether Mr Stupples has forfeited his entitlement to those fees, and even as the defendant pleads become liable to repay some or all of the fees of £349,823 already paid to him in the course of his consultancy, by reason of alleged breaches of his fiduciary duty of loyalty and good faith. There are two allegations against him, both relating to a client called Hypnos Ltd for which he was acting on behalf of the defendant. The first is that he sought to obtain a secret profit by payment to himself of a separate success fee of £25,000 in addition to the fees payable to his principal, and the second is that he sought to cut the defendant out of its fees by encouraging Hypnos to disinstruct the defendant and give new instructions to himself, through a company he controlled.

2. Mr Stupples was one of the founding partners of a firm of estate agents that bore his name, Stupples & Co based in High Wycombe. I refer to it as a firm and him as a partner although by the time of the relevant events it had been incorporated. In 2004 he was seeking to retire from practice, and agreed to sell his shares in Stupples & Co to his partner Mr Chandler. The mechanism chosen, on tax advice, was to incorporate a new company, the defendant, controlled by Mr Chandler, which would acquire Mr Stupples' shares in Stupples & Co. The new company was not intended to trade, so that all trading activity would continue to be carried on by Stupples & Co. A share sale agreement (bundle p 238) was entered into, dated 28 October 2004, providing for payment to Mr Stupples on completion of cash consideration of £228,028. There were two other main elements to the deal; he was also issued on completion with loan notes to the value of £110,000 to be repaid over a period depending on results, which he referred to as an 'earn out', and he also entered into a written consultancy agreement with the defendant company (p268).

3. The purpose of the consultancy agreement was to enable Stupples & Co to obtain the benefit of projects in which Mr Stupples was engaged at the time of the sale, by providing a mechanism for him to hand over some clients and their projects to other members of the firm and complete others where his personal involvement was important, for the benefit of Stupples & Co. These continuing projects were divided into two groups referred to as Schedules A and B to the agreement. The general structure of the consultancy agreement was that it was for a term of 3 years expiring on 31 October 2007, but with an option for either party to give one month's notice to terminate it early, at the end of the second year. Mr Stupples was to be paid a fixed monthly fee at an annual rate of £42,500, and 'bonuses' or 'success fees' when Stupples & Co received payment of fees from clients on the Sch A projects. The bonuses were at the rate of 11% on the first £552,000 of such fees, and 33% on the remainder.

4. The issues in this case revolve around two related matters which were among the Sch A projects. Mr Stupples had a longstanding client relationship with Hypnos Ltd, and was personally on very friendly terms with its managing director Mr Keen. For a number of years on their behalf he had been seeking to persuade the local planning authority to change the designated planning use of the area in

which Hypnos's factory premises at Station Road, Princes Risborough, were situated from industrial use, so that the factory could be sold to a residential developer. Hypnos would then acquire alternative premises elsewhere, realising, it was hoped, a substantial profit. By 2004, this long ambition seemed to be about to be realised, as the planning officials were prepared to countenance the necessary change of use. The two projects were referred to as the 'Hypnos sale' and the 'Hypnos acquisition', or collectively as the Hypnos project. It was particularly important to make use of Mr Stupples' personal connection, both with the client and the planning officials.

5. The terms of the consultancy agreement defined the defendant and any subsidiary (including Stupples & Co Ltd) together as 'The Company' and Mr Stupples as 'The Consultant', and included the following:

> "1.1 The Company has offered and the Consultant has accepted engagement, on the terms set out in this Agreement, to provide development and investment advisory and consultancy services ("the Services") to the Company in relation to those jobs… listed on Schedule A hereto… ("the said jobs")
>
> 1.2 In particular subject to clause 5.1 the Consultant shall use his best endeavours to complete the jobs listed on Schedule A hereto. The Consultant shall use best endeavours to arrange that any spin off agency work … therefrom shall be given to the Company and that the development and investment business of the Company be maintained improved and extended… and in particular but without limitation will use best endeavours to ensure that the Schedule A … jobs remain with the Company and are not terminated by the clients
>
> 3.1 The Consultant shall provide Services… from 1 November 2004… for a period of 3 years …unless terminated during such period
>
> > (a) by either the Company or the Consultant giving the other not less than one month's notice to expire at the end of the second year; or…
> >
> > (c) in accordance with clause 16 … [ie for breach]
>
> 5.1 The Consultant may with the Company's agreement … hand over certain jobs to others to handle in the Company's office without affecting the Consultant's fees, and in any event the Consultant shall begin an orderly handover of the jobs which are likely to exceed the length of this agreement.

> 5.3 Success fees shall be payable notwithstanding termination under clauses 3 or 16 hereof… during the subsistence of this agreement or afterwards…
>
> 17.1 The Consultant covenants with the Company that… he shall not directly or indirectly… for the period specified in clause 17.2:…
>
> > 17.1.2 in relation to the Restricted Services [defined in the share sale agreement as, broadly, all the types of services provided by Stupples & Co]… solicit or canvass, accept orders from or otherwise deal with any person… who:
> >
> > (a) was a client of the Company at any time during the period of this agreement…
> >
> > And with whom the Consultant had personal dealing in the course of the Company's business…
> >
> > 17.2 The covenants in clause 17.1 shall apply for the period of one year from the expiration date [defined as the end of the period for which Services were to be provided]
> >
> > 17.3 The Consultant… shall not at any time after the expiration date directly or indirectly…:
> >
> > > 17.3.2 interfere or seek to interfere with the continuance of the supply of goods and services to or by the Company (or the terms of any such supply)
> >
> > 24.2 Subject to the Consultant having fully complied with this agreement, if the client terminates the Company's contract for any of the said jobs otherwise than due to any act or default or omission on the part of the Consultant and if the Consultant enters into a new contract directly with the client to carry out the job the Consultant shall be entitled to retain the full benefit of the new contract and the Company will not object thereto on the grounds of breach of the provisions of clause 17 hereof…"

6. Thus the agreement envisaged, in relation to the Hypnos project, that it would either be completed within the 3 year term, or at the end of that period it would be handed over to another member of Stupples & Co to complete. Mr Stupples would continue to be entitled to a percentage of the fees received after termination. He would be prevented from working on that project, or accepting other work from Hypnos Ltd, for a further period of 12 months by the restrictive covenant, unless permitted by the specific exclusion provisions referred to. Clause 24.2 would

permit him to accept instructions if the client, Hypnos Ltd, had terminated Stupples & Co's instructions but only if Mr Stupples had complied with his obligations under the agreement and the termination was not due to any default on his part. Those obligations included, by clause 1.2, the obligation to use his best endeavours to seek to preserve the Sch A and B jobs for Stupples & Co, and to ensure that the client did not terminate Stupples & Co's instructions. All of this is consistent, as Mr Stupples accepted in cross examination, with the general nature of the deal, namely that he had sold his interest in the goodwill of the business, and in the work in progress and opportunities represented by the Sch A jobs, in return for the consideration payable under the two agreements.

7. As matters transpired, the Hypnos project was not completed by October 2007 when the three year period of the consultancy agreement (which was referred to in the pleadings and evidence as the First Agreement) expired, but rather than hand them over for completion by others on behalf of the firm, after negotiation new arrangements (referred to as the Second Agreement) were made between Mr Stupples and Mr Michael Garvey on behalf of the defendant for Mr Stupples to carry on working on those jobs as what Mr Garvey described as 'an ad hoc consultant'. It is accepted that the terms of the Second Agreement were reflected in a letter written by Mr Garvey on 29 October 2007 (p314) after the two men met on 17 October, although the effect of those terms is in dispute. It is accepted though that Mr Stupples continued to be the agent of the defendant, and to be acting for it in a fiduciary capacity. He ceased to receive any fixed monthly payments, and would be remunerated solely by success fees representing a share of fees received by Stupples & Co.

8. The fees claimed (p6) consist of:

   i) An invoice for £20,000 in relation to the Hypnos acquisition

   ii) An invoice for £34,555 in relation to the Hypnos sale, and

   iii) An estimated fee of £4,737.68 in connection with an unrelated project

   plus VAT in all cases. It is accepted that these amounts are correctly calculated, and would be due but for the matters pleaded by way of defence and counterclaim.

9. The defence pleads as follows:

> "11. In repudiatory breach of the First Agreement… and/or in breach of fiduciary duty, at a time or times unknown to the defendant but which it believes to have been around the end of 2004 and/ or March 2007, and without the defendant knowing, the claimant approached Hypnos and proposed to them a private fee arrangement by which he would receive a fee of £25,000 in respect of work that he would undertake for Hypnos…
>
> 12 Further or alternatively in repudiatory breach of the terms of the First Agreement… and of the Second Agreement… and/or in breach of fiduciary duty, in or

> around early 2009 and without the defendant knowing, the claimant through a company owned and controlled by him, Old Regency Securities Ltd ("ORS") approached Hypnos and proposed to it that he should provide them with services for reward. The claimant encouraged Hypnos to disinstruct the defendant…"

In each case, particulars are given, which I will not set out. The defendant was alerted to the alleged attempt to disinstruct it in 2009 when in May of that year Mr Garvey asked Mr Stupples for a copy of the agreement setting out fees agreed between Stupples & Co and Hypnos, but Mr Stupples by mistake sent him a copy of a draft agreement, which had been prepared by him, for the Hypnos project to be taken over and completed by his company Old Regency Securities Ltd ("ORS"). Mr Garvey later met Mr Goodman, the financial director of Hypnos, who was seeking to renegotiate the fees payable, and, on Mr Garvey's evidence, told him of the earlier approach by Mr Stupples for a separate personal fee of £25,000. Additional information emerged in the course of disclosure and both written and oral evidence, on which the defendant relies.

10. The defence further pleads by paragraph 15 that the claimant was under a separate fiduciary duty to make immediate disclosure of the two matters complained of, by paragraph 16 that had he done so the defendant would have terminated his agency and dismissed him, and by paragraph 17 that alternatively in the circumstances the defendant is entitled to rescind the First and Second Agreements, and has done so. The counterclaim seeks an account and repayment of all the remuneration paid to the claimant under the First and Second Agreements, which is said to have been forfeited. There is a claim for damages or equitable compensation, which was unparticularised and is not pursued. I allowed an amendment at the opening of the trial to seek an order for return of documents and information in accordance with clause 14 of the First Agreement, it being accepted that the defendant is entitled to such return subject to the claimant's lien for such amount of the fees claimed as I hold he is entitled to.

11. The main issue of law in the case is in relation to the circumstances in which a fiduciary may be held to have forfeited his contractual entitlement to remuneration for his services. Mr Trompeter's submission was that this is so only if the agent has acted with dishonesty or in circumstances taken as ipso facto amounting to dishonesty such as the receipt of a secret profit, that dishonesty must be explicitly pleaded and proved, and that since the defence did not in terms make any allegation of dishonesty against the claimant, the issue of forfeiture does not arise. Mr Oram submits that dishonesty is not an essential requirement, that the right to remuneration is lost if an agent acts in a position of real conflict of interest with his principal, but that if he is shown nevertheless to have done so honestly (the onus being on him) he may be permitted in equity to retain his remuneration.

12. I am grateful to both counsel for their focused submissions and citation of authority. Many of the cases referred to start from *Keppel v Wheeler* [1927] 1KB 577. In that case the seller of a property had accepted an offer for it, subject to contract. The estate agents acting for him then received a higher offer from another party, which he communicated to the first buyer, asking if he would 'accept a profit on his deal' by selling on to the overbidder, incidentally earning a

second commission for themselves. The case was approached on the footing that the agents in good faith, though mistakenly, believed that their duty to the seller was performed when he had been introduced to and accepted the offer of the first buyer. It was held that the agents were liable in damages for the loss of the sale to the overbidder, but were nonetheless entitled to their commission on the sale to the first bidder. Atkin LJ said:

> "Now I am quite clear that if an agent in the course of his employment has been proved to be guilty of some breach of fiduciary duty, in practically every case he would forfeit any right to remuneration at all. That seems to me to be well established. On the other hand, 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, and as the transaction was completed and the appellant has had the benefit of it, he must pay the commission."

13. The issue in the case was whether the agent's contractual responsibility to the seller client came to an end on acceptance of the first offer, it being held that it did not. As I read the decision, the agent was held to be in breach of a contractual duty to inform the client of the higher offer, and not a duty arising specifically because of the agent's fiduciary position.

14. Distinguishing between contractual duties and specifically fiduciary duties is not straightforward. In what is often cited as the classic exposition of the nature of fiduciary duties and remedies for their breach, Millett LJ (as he then was) said this in *Bristol & West Building Society v Mothew* [1996] 1 Ch 1 (beginning at p16):

> "Despite the warning given by Fletcher Moulton L.J. in *In re Coomber; Coomber v. Coomber* [1911] 1 Ch. 723, 728, this branch of the law has been bedevilled by unthinking resort to verbal formulae. It is therefore necessary to begin by defining one's terms. The expression "fiduciary duty" is properly confined to those duties which are peculiar to fiduciaries and the breach of which attracts legal consequences differing from those consequent upon the breach of other duties. Unless the expression is so limited it is lacking in practical utility. In this sense it is obvious that not every breach of duty by a fiduciary is a breach of fiduciary duty…[he then distinguished duties of skill and care arising at common law and in equity and went on]
>
> This leaves those duties which are special to fiduciaries and which attract those remedies which are peculiar to the equitable jurisdiction and are primarily restitutionary or restorative rather than compensatory. A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The

> distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary."

15. In *Kelly v Cooper* [1993] AC 205, the Privy Council considered the case of an estate agent acting for the vendors of two adjoining luxury properties in Bermuda, who arranged sales of both to the same buyer, but without telling the plaintiff vendor that the purchaser had already agreed to buy the property next door. Thus it was said the plaintiff lost the opportunity to negotiate a higher price for the special benefit of acquiring two adjacent houses. It was held that since the plaintiff must have known that the agent might be acting for vendors of competing properties, his contract could not have required him to disclose to one client confidential information gained in acting for another. The scope of the fiduciary duties owed by the agents was to be defined by the terms of the contract of agency, and thus the agents were not in breach of either set of duties by failing to inform the plaintiff of the special interest of the buyer.

16. The question of forfeiture of their commission therefore did not arise, but was referred to in the briefest terms at the conclusion of the Board's opinion, delivered by Lord Browne-Wilkinson, in a passage relied on by Mr Trompeter (though he accepts it is obiter):

> "In the circumstances, it is not necessary to consider in any detail the judge's assessment of damages and the right of the defendants to commission…
>
> As to the defendants' claim for commission, even if a breach of fiduciary duty by the defendants had been proved, they would not thereby have lost their right to commission unless they had acted dishonestly. In *Keppel v. Wheeler* [1927] 1 K.B. 577 the agents admitted an honest breach of fiduciary duty by mistake and yet were entitled to their commission. In the present case the plaintiff did not allege, nor did the judge find, any bad faith by the defendants. Even on the view the judge took therefore there was no ground for depriving the defendants of their commission."

17. Mr Trompeter is right to say that this is a clear statement of principle by a Board of great authority. It is not formally binding, being a decision of the Privy Council, and also obiter. I venture to suggest that it overstates the position in *Keppel*, since the report of that case does not, as far as I can see, record any admission of a breach of fiduciary duty, and as I set out above the decision in *Keppel* seems to have been founded rather on breach of contract.

18. Another case frequently cited is *Andrews v Ramsey & Co* [1903] 2 KB 635, in which an estate agent who accepted a secret commission of £20 from the buyer of a property (and had previously had other dealings with the same buyer) was sued for return of the contractual commission of £50 paid to him by his client, the seller. Lord Alverstone CJ, with whom the other judges agreed, said this:

> "It is said that the defendants ought not to be called upon to hand over the £50 to the plaintiff because the plaintiff has had the benefit of their services. The principle of *Salomons v. Pender* (1865) 3 H&C 639 seems to me to govern the case, and it is, in my opinion, amply sufficient to do so. In that case it was held that an agent who was himself interested in a contract to purchase property of his principal was not entitled to any commission from the principal…
>
> I think, therefore, that the interest of the agents here was adverse to that of the principal. A principal is entitled to have an honest agent, and it is only the honest agent who is entitled to any commission. In my opinion, if an agent directly or indirectly colludes with the other side, and so acts in opposition to the interest of his principal, he is not entitled to any commission."

19. That was clearly a breach of a specifically fiduciary duty, in that the agent may be said to have had a personal interest in the contract because it would earn him a commission from the purchaser, but also insofar as he had two clients, their interests as buyer and seller conflicted so that he could not give his whole loyalty to the seller. The remedy of disentitlement to commission did not depend on showing loss, for as was noted it was impossible to say what the outcome would have been had the agent acted properly. It can properly be described as a restitutionary remedy.

20. *Robinson Scammell & Co v Ansell* [1985] 2 EGLR 41 was a case in which an agent disclosed to his client's potential purchaser information which suggested that his own client might not be able to complete in the timescale envisaged. This might have caused, but in the end did not cause, the purchaser to withdraw. Robert Goff LJ considered the line of authority including *Andrews v Ramsay* and *Keppel v Wheeler*, and then considered how the present case fell into those authorities:

> "We are not of course here concerned with the case of an agent who has procured a sale to himself or to a company in which he is interested, so that he has placed himself in a position where his interest conflicts with his duty to his principal; nor are we concerned with a case where an agent has received a secret commission from the purchaser, an act which has been regarded as per se dishonest…
>
> I am satisfied that, in informing the prospective purchaser before informing their vendors, the respondents, the appellants did indeed commit a breach of duty to the respondents… But there is no question here, in my

> judgment, of any dishonesty or bad faith on the part of the appellants…
>
> In these circumstances, having regard to the decision of this Court in *Keppel v Wheeler*, I can see no basis for depriving the appellants of their commission."

and Purchas LJ concurring said:

> "In these circumstances it is not possible to allege realistically that [the agent] acted in any way other than under an honest mistake of his position and of the facts. This seems to me to distinguish this case from those cases where an agent receives an undisclosed commission or bribe and falls clearly within the sort of breach contemplated in the judgment of Atkin LJ, and clearly accepted by Bankes and Sargant LJJ [in *Keppell v Wheeler*] as being grounds for a claim for damages for breach of contract, but falling short of a breach of the fiduciary relationship which would disentitle the agent from his commission."

21. Both these judgments seem to me to be drawing the distinction between matters which constitute breaches of the special fiduciary duties of loyalty arising from the agent's position, and those which may be treated as being merely breaches of his contractual or other legal obligations. Holding the case to fall in the latter category, the consequences of the breach sounded in damages but not in the restitutionary remedy of loss of commission. I read the references to 'dishonesty' or 'bad faith' as being another way to denote breaches of these peculiarly fiduciary duties, and no more. In that sense, receipt of a secret profit is 'per se dishonest' - it is a breach of fiduciary duty without any need to establish that the agent knew it was improper, or had any motive that could be considered dishonest in any other sense. Likewise in *Andrews v Ramsay*, when Lord Alvestone CJ referred to a principal's entitlement to 'an honest agent', I read that as simply another way of referring to an agent who complies with his fiduciary duties of loyalty and good faith, and not as indicating that any other or greater degree of 'dishonesty' is required to be proved before the agent forfeits entitlement to his remuneration.

22. Mr Trompeter referred to cases in which, he said, an agent had been allowed to retain his commission despite being found to have acted dishonestly to some degree. In *Hippisley v Knee Brothers* [1905] 1 KB 1 an auctioneer charged a seller by way of expenses the full price of newspaper advertisements, not disclosing that he had in fact received a trade discount from the publishers. It was found that he acted honestly, believing that there was a custom entitling him to retain the discount, because the seller could not himself have obtained it. It was held that he was liable to pay the discount to his client, but not prevented from recovering his commission on the sale. Lord Alverstone CJ distinguished his own decision in *Andrews v Ramsay* as follows:

> "If the Court is satisfied that there has been no fraud or dishonesty upon the agent's part, I think that the receipt by

> him of a discount will not disentitle him to his commission unless the discount is in some way connected with the contract which the agent is employed to make or the duty which he is called upon to perform. In my opinion, the neglect by the defendants to account for the discounts in the present case is not sufficiently connected with the real subject-matter of their employment. If the discount had been received from the purchasers the case would have been covered by *Andrews v. Ramsay*; but here it was received in respect of a purely incidental matter; it had nothing to do with the duty of selling. It cannot be suggested that the plaintiff got by one penny a lower price than he would otherwise have got."

Retaining the discount clearly was a breach of fiduciary duty as it amounted to a secret profit. But the remedy was limited because it was held that the breach was in relation to a matter purely incidental to the main function of the auctioneer's employment, to sell the goods. Had it been more closely connected with that employment, for example a payment by the purchaser, the commission would have been lost.

23. In *Nitedals Taendstikfabrik v Bruster* [1906] 2 Ch 671 an agent for the importation of matches acted in breach of fiduciary duty in two respects, first by also acting for a competitor when he had agreed not to, and second in some but not all cases of sale of the plaintiff's products, he earned a secret profit by selling them on at a higher price and pocketing the difference. In the first respect, it was agreed that he must give an account of profits. The issue in the second was whether he was entitled to any commission at all on sales of the plaintiff's products. Neville J said this:

> "Having regard to the decision in *Andrews v. Ramsay & Co* it is clear that the defendant is not entitled to charge any commission in all the cases where he has credited a price to the plaintiffs other than that received by him from the customer. But I am asked to say that he is to have no commission in any case where he acted properly under his agency as well as in the cases where he acted improperly. Having regard to what is said in *Andrews v. Ramsay & Co*, I feel there is a difficulty about the matter, but the conclusion I have come to is this, that the doctrine there laid down does not apply to the case of an agency where the transactions in question are separable, as I think they are in this case, and does not entitle the principal to refuse to pay commission to his agent in cases where he has acted honestly because there are other cases in which the agent, acting under the same agreement, has acted improperly and dishonestly. I think, therefore, that in this case in every instance where the transaction is one in which the defendant has acted within the terms of his contract, and has credited his principals with the full amount received by him from the

> customer, the commission ought to be allowed, but in all the instances in which he has acted dishonestly it should be disallowed."

This in my view goes no further than that if the agent has acted in a number of matters and is in breach of fiduciary duty in some but not others, the circumstances may be such that they can be treated as separate. It does not show that an agent who is found to have acted in breach of fiduciary duty in relation to a particular matter may nevertheless retain his commission in that matter.

24. In *Imageview Management Ltd v Jack* [2009] EWCA Civ 63 a footballer's agent negotiated a contract for him to come to the UK and play for Dundee United. A commission based on his monthly salary was agreed. Unknown to the footballer, the agent also negotiated a side arrangement under which he would be paid £3,000 by the club for obtaining the player's work permit. The player found out after about a year and stopped paying the monthly commission. On the agent suing for that commission, the player counterclaimed for repayment of the commission already paid, and disgorgement of the £3,000 as a secret profit. Upholding the decision in favour of the player on both counts, the Court of Appeal, Jacob LJ (with whom the other members of the Court agreed) said:

> "[6] … The law imposes on agents high standards. Footballers' agents are not exempt from these. 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…

[after citing from the judgments of Bowen and Cotton LJJ in *Boston Deep Sea Fishing and Ice Co v Ansell* (1888) 39 Ch D 339, [1886–90] All ER Rep 65 he continued]

> [12] In those days the courts were apt to use the word 'fraud' for a breach of an agent's fiduciary duty. These days such use can perhaps inflame matters and detract from the debate. The term used does not matter, it is the breach of duty which does. This appears best from the judgment of Fry LJ ((1888) 39 Ch D 339 at 368–369, [1886–90] All ER Rep 65 at 75):
>
> > 'In my judgment, the conduct of Ansell in so dealing was a fraud—a fraud on his principals—a fraud, not according to 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.

> We were invited to consider the state of mind of Mr. Ansell; whether he thought it wrong; in other words we are invited to take as the standard for our decision the alleged conscience of a fraudulent servant. I decline to accept any such rule as one on which the Court is to decide such questions.'

[13] It is evident that the court felt it necessary to state the principles forcefully—witness Bowen LJ's reference to the 'large portion' of agents he thought were doing undisclosed side deals for themselves.

[14] The effect of Ansell's breach of duty was that he had to account for the commissions received and that he was not entitled to outstanding salary which otherwise would have been due. That clearly governs Imageview's claim for outstanding commission which would otherwise have been due.

[15] Note also that it did not matter whether or not Ansell thought he was doing wrong. So also here. It does not matter whether Mr Berry thought it was all right to make the side deal, as he may have done if a practice of side deals exists in the world of football agents...

[16] Fifteen years on from *Boston Deep Sea Fishing and Ice Co v Ansell* there was the case of *Andrews v Ramsay & Co* ... It was because this case was the principal authority upon which the judge based his decision that Scott Baker LJ gave permission for this second appeal, saying that there was a question of principle as to whether it should be followed. We have had more authorities cited. And a search reveals that *Andrews v Ramsay & Co* has been regularly cited down the years. Never, so far as I can see, has it been doubted…

[36] Mr Lopian submitted that *Hippisley v Knee Bros* demonstrated that an agent could legitimately try to make a profit 'on the side' which was not regarded as so serious that his entire commission became repayable. Mr Lopian fastened on the phrases 'in some way connected', 'not sufficiently connected' and 'purely incidental matter' in Lord Alverstone CJ's judgment and 'several duties to be performed' in the judgment of Kennedy J…

[44] I accept Mr Lopian's submission that there can be cases of harmless collaterality. And that there can be cases where there is just an honest breach of contract such as *Keppel v Wheeler*. But this is simply not such a case. This is a case of a secret profit obtained because Mr Berry/Imageview was Mr Jack's agent. And there was a breach of a fiduciary duty

> because of a real conflict of interest. That in itself would be enough, but there is more: the profit was not only greater than the work done but was related to the very contract which was being negotiated for Mr Jack. Once a conflict of interest is shown, as Atkin LJ said in the last passage quoted, the right to remuneration goes…
>
> [46] I would also observe this: that none of the cases relied upon by Mr Lopian involve a direct conflict of interest between that of the agent and of his principal: they do not involve any question of a breach of fiduciary duty arising from such a conflict. Nor do any of the cases involve a secret payment to the agent from the very party with whom the agent is dealing on his principal's behalf. It is in such cases that the *Andrews v Ramsey* principle applies with its full rigour."

25. These passages also, it seems to me, emphasise the distinction to be drawn between a breach of the particular fiduciary duties of loyalty and the general contractual or other duties also owed by an agent, and that the equitable remedies for breach of those duties, including disentitlement to commission, are available without proof of loss and without proof of any mental element of dishonesty or fraud beyond that necessary to establish the breach itself. The only exception recognised was of circumstances which could be regarded as 'harmless collaterality', such as *Hippisley v Knee*. There is no doubt that in that case there was a conflict of interest between the auctioneer and his client in relation to the amount of the discount, but in Lord Alverstone CJ's view it was not a matter which could realistically have affected the performance of his duty to sell the goods.

26. It should also be noted that although in *Imageview* there was an issue whether the defaulting agent should be entitled to an allowance for the value of his work expended, it was only argued in relation to the secret profit of £3,000 on the side deal (and was in any event refused). There was no question of the agent receiving any allowance in lieu of his contractual commission from the player.

27. I turn to the facts of the case. It is plain, and Mr Stupples accepted in evidence, that as the Hypnos project dragged on, Mr Stupples came to feel that he would be insufficiently rewarded for the work he was putting in by the deal he had done at the time of the sale, and sought to renegotiate it. It also seems that relations were poor between himself and Mr Garvey with disagreements over the generosity or otherwise of the sale consideration and the amount of fee income Mr Stupples was generating as a consultant; see the letter at p 278, dated 30 March 2006. It seems from that letter that Mr Garvey was pressing for Mr Stupples to hand over jobs to other members of the firm; Mr Stupples resisted on the grounds that he was only obliged to do so if they would overrun the 3 year period, and he expected all but 3 to be complete in that time. In the same letter he acknowledged his obligation 'to use my best endeavours to ensure the listed jobs are left with the company and not terminated upon my departure'.

28. Both parties seem to have been considering whether to exercise the option to terminate the consultancy after two years (ie after October 2006) and using that possibility to renegotiate its terms. On 6 June 2006 (p 285) Mr Stupples responded to a suggestion that the fixed fee element be reduced to £12,000 for the third year with a counterproposal that it be reduced to nil, but in exchange his share of further fees be increased from 33% to 50%. He also sought a relaxation in the terms of the restrictive covenant; a matter pursued in subsequent correspondence through August and September in which each side held open the option of termination- see eg at p289 and 292. It seems however that neither side gave the required notice, which would have to have been done by 30 September 2006. A draft letter recording new terms was circulated and amended in October (p294). Mr Stupples did not accept this, and as late as 24 October suggested that 'we… just call it a day?' (p297). In the end, there were no amendments and the agreement carried on into its third year on the same terms.

29. One matter which has now emerged, but which was not known to the defendant at the time, was that Mr Stupples prepared a draft letter to be written by Mr Keen, dated 30 August 2006 (p293). It was clearly intended to bring about a position in which Mr Stupples could continue to act on the Hypnos project if the termination option was exercised, notwithstanding the restrictive covenant. It recorded Mr Stupples as having informed Mr Keen that his consultancy may end in October with Mr Garvey taking over the project, Mr Keen as having discussed this with his Board and wishing to 'respond immediately to this news'. It emphasised Mr Stupples' role in the project and Hypnos' wish that he continue to act, and noted that he would be precluded from doing so by his agreement with the defendant. It concluded "We find this unacceptable and would value your assurance that your erstwhile colleagues will, should you depart, release you from your restriction…".

30. The letter was never sent and although Mr Stupples said Mr Keen had asked him to write it, Mr Keen said he had no recollection of doing so and had never seen the letter before. On his own account this draft letter shows Mr Stupples prepared to enlist the assistance of his client in seeking advantage over the defendant. It is not a matter which is complained of as a breach of fiduciary duty in itself. I should say that there could not be (and is not) any suggestion that Mr Stupples acted in breach of duty merely by seeking to renegotiate the terms of his agreement with his principal.

31. In January 2007 Mr Stupples sent a revised fee agreement on behalf of Stupples & Co to Mr Goodman (p298). By that time, negotiations were in hand to sell the factory site to a development company called Cathedral for a price of about £20m, which would be highly beneficial to Hypnos and produce a large fee for Stupples & Co, in which of course Mr Stupples would share. There was some negotiation on the terms of the fee agreement, resulting in a new agreement drafted on 29 March 2007 but not signed by Hypnos until 29 October, which provided for a fixed fee for the sale of £172,500 + VAT (p 301).

32. In May 2007, Mr Stupples opened discussions as to what would happen after the 3 year contract expired in October of that year. In an email of 9 May he said that his 3 main projects would still be continuing and "most of my clients will want me to finish off their projects". He seems in that letter to have been seeking an extension, but by August he was writing saying (p3060) "I see little advantage to

stay on as a formal consultant from the end of the year…although I assume an ad hoc arrangement might be mutually advantageous for any propositions on a job by job basis." He made proposals for such an arrangement, and responded robustly to Mr Garvey's counter- proposal on 5 October: "[I] feel it better that I clear my desk by the end of the month and you remove my name from the notepaper. Doubtless you will give some thought as to how my jobs will be handled and the duty of care you owe me in respect of pursuing them diligently".

33. There was then a further meeting on 17 October at which an accommodation was reached, resulting in Mr Garvey's letter of 29 October (p314). There was no reply to it, but it is common ground that it sets out accurately what was agreed. It included the following:

> "…I am writing to confirm the matters we discussed in connection with the end of your 3 year consultancy agreement that expires at the end of this month…
>
> … the Wantage development is one of two major instructions that overhang the end of your consultancy and we agreed you will continue to handle this instruction as an ad hoc consultant…
>
> The disposal of the Hypnos site and the acquisition of a new facility is the other major instruction that will overhang the end of your consultancy and here we agreed that the existing fee arrangement will continue in respect of the disposal… but... fees relating to any [acquisition] will be shared 50/50…"

34. There appeared at one stage to be an issue whether the effect of this was to extend the 3 year agreement as a whole, but Mr Oram confirmed that he did not contend for that result, rightly in my view. His submission was that a new contract was made, but the contractual obligations of Mr Stupples under it in relation to the Hypnos project were a continuation of those set out in clause 1.2 of the previous agreement, including the obligations to use best endeavours to complete the project, to ensure that any spin off work came to the defendant, and to ensure that the instructions were not terminated. It was accepted that the 12 month period provided for in the non-dealing covenant ran from November 2007. Mr Trompeter's submission was that the clause 1.2 terms were not expressly agreed and could not be implied into the agreement; they were not necessary to give it business effect.

35. In evidence, Mr Garvey accepted that there had been no discussion on the point, saying that after all the negotiation and threats of termination they had agreed not to try to have a new written agreement, but simply that Mr Stupples would carry on as he had been in relation to the outstanding projects, on the amended remuneration terms. Mr Stupples accepted that the agreement amounted to a limited extension of the previous agreement, relating only to the three outstanding jobs, and that nothing had changed so far as concerned what he was doing or the services to be provided in relation to them.

36. In the end I do not think anything much turns on the point, but in my view the preferable interpretation is that the effect of the agreement was that Mr Stupples' role and functions in relation to the Hypnos project would continue as before, and that these included all the matters set out in clause 1.2 of the previous agreement, of which he was well aware as shown by his previous correspondence. This is not in my view a matter of implication of additional terms beyond those agreed, but interpretation of the scope of the agreement the two men in fact reached. They focused on the work he had been doing on the Hypnos project on behalf of Stupples & Co and agreed that it would continue; the natural interpretation is that its scope would be the same unless they agreed otherwise, which they did not. This does not mean that any other provisions of the consultancy agreement would similarly continue, such as the restrictive covenants, and indeed in relation to them there would be policy reasons for holding that parties are not bound by terms in restraint of trade unless they are explicitly agreed.

37. Whether or not Mr Stupples' obligations included all those in clause 1.2, it is accepted that he continued to act as agent for the defendant, and in a fiduciary capacity. Although the scope of his fiduciary duties was not conceded, his obligations of loyalty would necessarily extend to prohibit him from seeking to put his own interest ahead of that of his principal, in dealings with the client.

38. In September 2007, Hypnos had exchanged contracts with Cathedral, conditional on planning permission for residential development, which was given in early 2008. Completion however did not take place - I do not believe I have a full account of the reasons why, but it seems there was a difficulty on Hypnos' part in showing title to all the land, part of it being registered in the name of Network Rail, and it was necessary for Hypnos to establish a possessory title, which it appears they never did. In late 2008 the property market fell, and the Cathedral contract was formally terminated in early 2009. Mr Goodman and Mr Keen laid the blame for this on Cathedral, saying they were unable to complete as their bank had withdrawn funding, but this does not ring true as a complete explanation because the termination was effected by an agreement under which Hypnos not only repaid Cathedral's deposit of £300,000 but also paid its abortive costs of £500,000. Although they said that they were keen to move on and the survival of the company was at stake, that does not seem an adequate explanation for offering so large a sum to procure termination of a contract from which Cathedral themselves would be expected to be keen to escape.

39. Whatever the true explanation, the search began for a replacement purchaser, and when one was located, in the changed market conditions the price achieved was much lower, about £7m. In the meantime Hypnos had also located new premises, which were taken on lease, so that a fee became due to Stupples & Co for the acquisition.

40. The loss of the Cathedral sale was clearly a severe blow to Hypnos, and led to recriminations between it and the various professionals involved. From early 2009, Hypnos sought to renegotiate its fee agreement with Stupples & Co, and hints were made of a potential negligence claim against the firm, though whether this was any more than a negotiating tactic seems doubtful as Mr Keen remained happy to instruct Mr Stupples, who would have been responsible for any

negligence there may have been. There was also inevitably a further delay before the project could conclude.

41. On 21 January 2009 Mr Keen wrote to Mr Garvey saying:

> "I have been shown your email to Bob [Stupples] of 15 December… the picture you paint is wholly misleading.
>
> …I am unhappy with the way the transaction has moved but that is a criticism of the property market and not Bob. He has as before my total support in this project…
>
> …your email has brought to the surface something that I think is now clearly unfair- and that is your sharing arrangements. Bob has worked now for over four years on this project since 'retiring' without earning… I understand he will only benefit from one third of your fee whereas he is doing all the work. I would like you to know I feel it is time for you both to sit down and revise your historical arrangements with something that rewards him more for his efforts. "

What Mr Garvey was not told was that Mr Stupples had drafted this letter to be sent by Mr Keen (p332), though he no doubt suspected some involvement. Mr Garvey said that Mr Keen had asked him to write it, though when Mr Keen was asked he was clearly unfamiliar with the letter and could only say that he had 'probably' done so but "I honestly don't remember", and he had 'possibly' discussed the content with Mr Stupples beforehand. He said he did not remember the letter, and it may have been that the draft went to Mr Goodman rather than himself. It was put to him that his involvement with this letter and those surrounding it was 'nominal', to which he responded "Totally". To the suggestion that it was more likely Mr Stupples had asked if he could send a letter in his name, Mr Keen said "Possibly, I can't remember".

42. Mr Stupples wrote a further letter of 26 January in which he said "Hypnos have made it clear that…they feel they ought to review their instruction to you with a view to possibly terminating it and instructing others…I would remind you that my 'non-competing' clause has long expired…". On 9 February he prepared another draft letter, this time in Mr Goodman's name referring back to correspondence between Mr Garvey and Mr Stupples and saying:

> "…I feel I must take some positive action and therefore with great regret would be obliged if you could accept this letter as terminating your instructions forthwith.
>
> Bob will be instructed to handle the new sale of the site from now on…
>
> Thank you for your help in the past but I am sure you realise that this rather quaint and historic arrangement you have with Bob is not commercially attractive to us."

43. At the same time Mr Stupples prepared and sent to Mr Goodman a form of agreement under which his company ORS would take over the work on the disposal and acquisition, charging a fee on the disposal of £150,000, rather lower than the £172,500 agreed with Stupples & Co.

44. The letter terminating Stupples & Co's instructions was never sent, and the agreement with ORS was not entered into. Mr Stupples' position was that he had drafted them at Hypnos' request, to say what they had instructed him to say. There is no doubt that Mr Keen as his friend was in general sympathetic to Mr Stupples' views and interests. He wrote a further letter, this time prepared by himself, dated 19 March, of which he had a very good recall. It said:

> "…This letter is coming from me not [Bob]… I do wonder bearing in mind the amount of extra work he has put into it, whether or not we should re-look at our arrangements with Stupples & Co…as you know we have re-marketed the site and are looking for a reduction in fees bearing in mind the drop in value and the current economic climate."

45. Mr Goodman's evidence was that Mr Keen had raised the possibility of getting other agents involved, and was particularly interested in having a London agent. He had asked Mr Stupples to submit the draft agreement with ORS, on Mr Stupples having assured him that he would be free to act if Stupples & Co's retainer was terminated. He had seen the draft letter intended to do that, but decided not to send it. He agreed with Mr Stupples' view that he was not being adequately rewarded, but his sole interest was for the company. He wanted to achieve a reduction in fees and considered disinstructing Stupples & Co but in the end drew back because he felt it would be bound to provoke a dispute with the firm which would take time to resolve.

46. Mr Goodman subsequently had further discussions over Stupples & Co's fees. A suggestion was made that Hypnos should pay a fee of about £40,000 to Stupples & Co and a separately negotiated figure to Mr Stupples- this seems to have originated in another draft prepared by Mr Stupples in Mr Goodman's name (p341) but not sent (see email exchange between Mr Stupples and Mr Goodman at p346).

47. On 22 May Mr Stupples sent an email (p348) to Mr Garvey about fees saying that he had been asked to put Hypnos' proposal, though he regarded that as unfair on him. The proposal he put was however one that seemed to have been generated by him in the course of the email exchange and draft letter referred to above. His own fee would be £56,000, based on 1/3 of the original fee of £172,500 (he said he would 'waive any claim to an enhanced fee') but Stupples & Co would receive only £40,000. It was this that led Mr Garvey on 29 May to ask for a copy of the current fee agreement, in response to which Mr Stupples let the cat out of the bag by sending him instead his draft fee agreement for ORS. Mr Garvey also rang Mr Goodman, and got the impression Mr Goodman was not aware of the email purportedly putting his fee proposal.

48. In June 2009 Mr Goodman had a meeting with Mr Garvey at which they agreed a further reduction in the fee for the sale to £120,000. He said that he had not

known, and not been interested in, how much would go to Mr Stupples, but did get agreement at that meeting that Mr Stupples would be paid his share. It was at that meeting that he told Mr Garvey that Mr Stupples had previously approached Hypnos for a personal fee of £25,000. He said he did not recall the date (Mr Garvey said he had been told it was about March 2007) but that Mr Stupples had made an approach. Mr Keen had told the project group that when the contract was signed for the disposal to Cathedral, there would be bonuses for all the members of the project team. That of course would be an initiative by Mr Keen and not Mr Stupples, but Mr Goodman said he had told Mr Garvey that there had been an approach by Mr Stupples 'because that was what happened'. I understood him to mean that when the bonus had been mooted, Mr Stupples had asked for his part to be paid to him personally. Mr Stupples accepted that he had not told the defendant about this fee, maintaining that he did not think he had to do so as it was subject to Board approval which was never given before the Cathedral sale went off. I do not accept that he genuinely thought that. If a fee was being sought, offered or discussed in principle it was his duty to obtain it for his principal, and the facts amount to his having sought to obtain a secret profit.

49. I accept Mr Garvey's evidence that he was told that this occurred in about March 2007; it was suggested that discussion of a bonus was unlikely at that stage as the contract had not been signed but on the contrary there would be every reason for Mr Keen to propose a bonus to be paid if the project team successfully turned the prospective contract into reality.

50. Mr Garvey also said that Mr Goodman had told him that Mr Stupples had encouraged Hypnos to disinstruct Stupples & Co. In relation to this, Mr Goodman said he could not recall saying that, but "not realising the significance, I may have implied it, or said something similar". It was put to him that a fair reading of the documents showed Mr Stupples asking Hypnos to disinstruct the firm, to which he said the option to disinstruct had been initiated by Mr Keen and Mr Stupples had assisted them. Mr Oram suggested he had done so "actively" and Mr Goodman replied "when I took the decision not to he didn't try to fight me. He rang and asked if I was going to send it. I said I think we have to stay where we are. He said fine".

51. My impression was that out of sympathy for Mr Stupples, Mr Goodman was seeking to minimise the degree to which he was an initiator of these events or a driving force behind them. Having heard all the witnesses I do not believe that Mr Stupples was merely doing what he was asked to do by Hypnos, and that it is much more likely that he was positively promoting the line that was taken. He did so and used his connection with the client to serve his own interests at the expense of the defendant, as is clear from the preparation of letters in Mr Keen's name designed to assist Mr Stupples in renegotiating his fee arrangement. It was no doubt the case that Mr Keen was sympathetic to Mr Stupples' dissatisfaction with his fees, but if so that must have been because Mr Stupples told him of it and sought to get him involved, which was itself an act of disloyalty as it set the client against his principal in support of his own position. He may have pushed Mr Keen further than he was prepared to go, by preparing the extremely self serving letter that Mr Keen could not recall requesting and did not send.

52. In particular, I am satisfied that Mr Goodman did tell Mr Garvey that Mr Stupples had encouraged Hypnos to disinstruct Stupples & Co, and that he said that because it was true. The evidence of Mr Keen and Mr Goodman went no further than that Mr Keen had raised the possibility of getting other agents involved, and considered the option of disinstructing Stupples & Co. Neither said they had any plan to replace Stupples & Co with Mr Stupples or his own company, and yet that was the clear purpose of the draft documentation prepared by Mr Stupples. I do not accept therefore that Mr Stupples was given clear instructions that that was what Hypnos wished to do (and even if he was, his duty of loyalty should have prevented him from acting for the client at the expense of his principal).

53. At its strongest, the client may have been considering disinstruction as a possibility. By preparing the draft letter of disinstruction and simultaneous fee agreement for ORS Mr Stupples was providing such encouragement at the very least. It was clearly in breach of his fiduciary duty to do so, as it damaged the interests of his principal and promoted his own, in dealings between the principal and the client. There could hardly be a more disloyal act by an agent than to seek to encourage a client to transfer his instructions and fees from the principal to himself. If I am right that the terms of the Second Agreement incorporated the express terms of clause 1.2 of the First Agreement, it was also a breach of contract.

54. Mr Stupples maintains that he honestly believed he was entitled to do as he did, but I do not accept that for a moment. His clandestine involvement in this long series of correspondence makes that quite untenable. Far from disclosing that involvement to his principal, as Mr Oram showed in cross examination he introduced many disingenuous references to letters he had himself drafted designed to give the impression he had nothing to do with them. It was submitted that he had acted honestly in some respects where he had the opportunity to do otherwise, such as by invoicing various minor amounts of spin off work through Stupples & Co when he might have concealed them, and reminding Mr Goodman (p 346) "Do remember that the AGREED fee is still £170k and until I get Michael's approval that should be the figure in your budget". The former matters it seems to me have no bearing on Mr Stupples' lack of loyalty and good faith in other respects, and the latter seems to me rather to indicate disloyalty; far from protecting the interests of his principal, that email and the surrounding ones show him taking an active role in seeking to reduce their fees, in collusion with the client.

55. What loss this may have caused the defendant it is impossible to tell. In the end they were not disinstructed, and although their fees were reduced, there is no direct link to Mr Stupples' actions. Mr Garvey said his principal motivation was to get payment of some fee in circumstances where Hypnos might not have survived. To what extent his negotiating position was made more difficult by Mr Stupples effectively being in the other camp must be speculation. It is noteworthy that at the same time as he was supporting a reduction in the fees of Stupples & Co, Mr Stupples was insisting that he should not suffer, as his share would be calculated as 33% of the previously agreed figure. But as I have set out above the remedy of disentitlement to commission is not dependent on proof of loss.

56. The result is that in my judgment because of these breaches of fiduciary duty, Mr Stupples' claim to payment of further fees from the Hypnos transactions fails, and the counterclaim for repayment of fees already paid in relation to those transactions succeeds. I reject the argument that any additional element of 'dishonesty' need be pleaded or proved; I have found the breaches proved in the terms they were pleaded, and the conduct they entail is 'dishonest' in the sense that term was used in the older cases referred to.

57. However, Mr Stupples is entitled to payment of the fee due in respect of the Anglo Chesham matter; no breach of duty was suggested in relation to that, and it is in my view severable, as were the non-tainted dealings in *Nitedals*. It appears there may be a need to disclose the actual amount of the fee received by the firm, as the claim is based on an estimate; Mr Stupples is clearly entitled to such disclosure.

58. In my judgment it would be unjust to order repayment of the fixed monthly consultancy fees paid, since they relate to Mr Stupples' services generally and not the Hypnos transactions specifically, although there is obviously some degree of connection in that after the first breach, in March 2007, the fees continued in force and in part at least were earned by work on the Hypnos project. There are no grounds in my judgment to order repayment of success fees paid in relation to other clients.

59. Mr Oram also argued that Mr Stupples was in breach of a separate duty to disclose his own wrongdoing, as a result of which the defendant had suffered loss by being deprived of the opportunity to terminate the consultancy agreement and avoid payment of the fees under it. That argument was not I think pursued with any great enthusiasm; I reject it because (a) as he accepted, there is no free-standing duty arising merely because of the holding of a fiduciary position to disclose the fiduciary's own wrongdoing. Such a general duty was expressly rejected in *Fassihi v Item Software* [2004] EWCA Civ 1244 though it was held that the particular obligations of a director to his company did give rise to such an obligation in that case, and (b) there was no evidence to establish any loss in any event. Merely avoiding future fees to Mr Stupples would not be enough; it would have to be found that the firm would not have lost a greater amount through loss of business, but there was no evidence at all of what effect termination would have had.

60. The defendant also sought an order for an account of Mr Stupples' dealings with Hypnos and other clients, suspecting that there may have been undisclosed side deals or secret profits in other cases. But there is no evidence of that whatsoever, or even of any matters which may be said to require investigation. The avowed intent was to seek a negative statement backed up by statement of truth, and embark on an exercise of investigation of bank and other records to verify it. A principal is of course entitled to an account from his agent, but there is no evidence from which it may be thought that Mr Stupples has not given a true account already, by the invoices raised in the name of the firm. On the evidence before me, the order sought would, as Mr Trompeter said, be oppressive, and the disclosure anticipated would be a pure fishing expedition. I refuse it.