

H. Brent Kelly

*Appellant*

v.

Margot Cooper and Helen Cooper  
Trading as Cooper Associates (A firm)

*Respondents*

FROM

THE COURT OF APPEAL FOR BERMUDA

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE  
OF THE PRIVY COUNCIL, DELIVERED THE  
19TH OCTOBER 1992  
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*Present at the hearing:-*

LORD KEITH OF KINKEL  
LORD ACKNER  
LORD BROWNE-WILKINSON  
LORD MUSTILL  
LORD SLYNN

*[Delivered by Lord Browne-Wilkinson]*

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This is an appeal from a judgment dated 30th November 1989 of the Court of Appeal for Bermuda (Sir Alastair Blair-Kerr P., Sir Denys Roberts J.A. and Kenneth C. Henry J.A.) allowing an appeal from a judgment dated 14th November 1988 of the Supreme Court of Bermuda (Hull J.) awarding the appellant, Mr. Kelly, damages in the sum of \$200,000, declaring that the respondents, a firm of estate agents trading as Coopers Associates ("Coopers") were not entitled to commission on the sale of Mr. Kelly's property, Caliban, and dismissing Coopers' counterclaim for such commission. In the Court of Appeal, the judgment below was set aside and judgment was entered for Coopers on their counterclaim.

Mr. Kelly was at all material times the beneficial owner of Caliban, a house in Tucker's Town in Bermuda, which was built on an oblong-shaped area of land measuring 2.85 acres fronting onto the ocean. Adjacent to Caliban to the west, but separated by a small ravine which prevented direct access from one property to the other, was a house "Vertigo" built on a similar shaped area of land measuring 2.742 acres also fronting onto the ocean. Vertigo belonged to a Mr. Brant. Although direct access between the two properties was not possible because of the ravine, both

properties fronted onto the same beach which, though public, was not much used by outsiders. Access from one property to the other was possible along that beach or along the road.

Since about 1979, Mr. Kelly had been keen to sell Caliban and had employed a number of estate agents for that purpose, including apparently Coopers. By a letter dated 7th March 1983 Mr. Kelly formally appointed Coopers as agents to sell Caliban at a price of \$3.5 million or such sum as Mr. Kelly might agree to accept, Coopers to be paid a commission of 5% of the selling price. Up to 1985, Caliban attracted limited interest and no offers acceptable to Mr. Kelly had been made.

At a date which is not identified in the evidence Coopers were also instructed by Mr. Brant as agents to sell Vertigo. Both Caliban and Vertigo were available for sale to those who did not have Bermudan status (i.e. to expatriates) with the consent of the Governor, but in practice the Governor did not permit an expatriate to purchase more than one property.

In April 1985 an American, Mr. H. Ross Perot ("Mr. Perot") arrived on the Islands and approached Coopers with a view to purchasing property. Coopers had previously encountered Mr. Perot in 1983 when they had sought to negotiate a letting of Caliban to Mr. Perot but the negotiations had broken down.

On 19th April 1985 Coopers took Mr. Perot to view both Caliban and Vertigo. On 20th April, Mr. Perot made an offer of \$2 million for Vertigo. On the same day he told Coopers that he was interested in making an offer for Caliban and asked Margot Cooper to sound out what would be Mr. Kelly's response to an offer in the range of \$2 to 2½ million gross i.e. Mr. Kelly to bear the agent's commission. Margot Cooper passed on to Mr. Kelly this indication of interest by Mr. Perot. Mr. Kelly responded by saying he was interested in selling at \$2.5 million but would prefer that sum to be nett of commission. Margot Cooper told Mr. Perot of Mr. Kelly's response.

On 22nd April, Mr. Brant accepted Mr. Perot's offer of \$2 million for Vertigo. On the same day Mr. Perot made an offer of \$2.5 million gross for Caliban. On 23rd April Helen Cooper took a letter to Mr. Kelly containing particulars of this offer by Mr. Perot for Caliban. On that occasion, Mr. Kelly asked her if she thought that Mr. Perot would increase the offer: she told him that her feeling was that he would not, but that certainly there was nothing to prevent Mr. Kelly from making a counter-offer.

At no time did Coopers tell Mr. Kelly of Mr. Perot's proposed purchase of Vertigo and it is this fact which has given rise to the present litigation.

Contracts for the sale of Vertigo were exchanged on 14th May 1985 and completed on 16th August. Contracts for the sale of Caliban were exchanged on 17th June 1985 and completion took place on 13th November. The purchaser of Caliban was expressed to be Mr. Perot's son, Mr. Perot junior; at one stage during the negotiation of the contract it was suggested that Mr. Perot's daughters would be the purchasers.

After completion, Mr. Kelly discovered that Mr. Perot and his family had bought both Caliban and Vertigo. He took the view that his agents, Coopers, should have told him of the Perots' interest in both properties, being material information relating to his sale of Caliban. He refused to pay the commission of \$125,000 due to Coopers and proceedings were started by Coopers for its recovery. Mr. Kelly in turn started cross-proceedings against Coopers. The actions were consolidated, Mr. Kelly's action standing as the claim, Coopers claim for the commission being the counterclaim. It is an unfortunate feature of this case that Mr. Kelly conducted this litigation in Bermuda (but not before the Board) in person. As a result the pleadings are confused and the evidence called by Mr. Kelly at the trial inadequate. The trial judge sensibly obtained the agreement of counsel for Coopers to the case proceeding on the basis of defined issues.

For present purposes Mr. Kelly's case can be summarised as follows:

- (1) Coopers were Mr. Kelly's agents for the sale of Caliban and as such owed him contractual and fiduciary duties to disclose to him all material matters concerning the sale so that he would be able to make an informed judgment as to what price to accept for Caliban.
- (2) Coopers were also under a fiduciary duty not to put themselves in a position where their duties to Mr. Kelly were in conflict with their own interests or those of any other of their clients.
- (3) The fact that Mr. Perot had made an offer and agreed to buy Vertigo (subject to contract) was of the greatest materiality. The opportunity to buy two outstanding adjoining properties in that location was extremely rare and the Perots had the opportunity to acquire them both as a family compound. Therefore Caliban had a special value to the Perots.
- (4) In breach of their duties, Coopers failed to disclose that material fact to Mr. Kelly.
- (5) In breach of their fiduciary duties they put themselves in a position where there was a conflict between their duty to Mr. Kelly to inform him and their personal interest in ensuring that they obtained commission on both Vertigo and Caliban.

- (6) As a consequence
- (a) Mr. Kelly was entitled to damages for breach of contract and fiduciary duties;
  - (b) Coopers, being in breach of their fiduciary duties as agents, were not entitled to their commission.

The trial judge found the fact that the Perots were negotiating to buy Vertigo was material since for all practical purposes Vertigo and Caliban were adjacent properties having "effective, if not exclusive, use of a common beach". Mr. Perot was interested in the properties on behalf of himself and his family. Although the two purchases were at no stage legally conditional the one on the other, the obvious inference was that the family were interested in acquiring houses side by side. The judge found that "it was an unusual opportunity, to put it at its lowest, and that it is to be inferred from the evidence that it was one which was of particular interest to the Perot family".

The judge then held that, since the information was material, Coopers, as agents, were under a duty to disclose it to Mr. Kelly. He reached this conclusion notwithstanding the fact that Coopers had received this information as agents for Mr. Brant and that they owed accordingly a duty to Mr. Brant not to disclose the information to others.

As to conflict of interest, the judge held that Coopers had put themselves in a position where their self-interest in obtaining commission on both sales might (not did) conflict with their duty to Mr. Kelly. He exculpated Coopers from any bad faith.

The judge then went on to assess the damages at the figure of \$200,000, being an increase of 8% on the actual sale price of \$2.5 million. He said that, although the actual loss was "necessarily a matter of surmise", the principle was that Mr. Kelly should be compensated for the difference between the price he would probably have got if he had known the full facts and the actual sale price. Mr. Kelly himself did not give evidence, so there was no evidence (as opposed to submissions) as to what Mr. Kelly would have done had he known the full facts. The only valuation evidence was from the valuer called by Coopers (who was not cross-examined) and who put the value of Caliban at between \$2.1 and \$2.3 million.

Finally, the judge held that Coopers, although not guilty of bad faith, had acted in breach of their fiduciary duties and were therefore not entitled to be paid their commission.

On appeal, the Court of Appeal allowed the appeal. As their Lordships understand their reasoning, it was that the two sales were not legally interdependent and that there was no evidence to support the judge's finding that the Perots had a special interest in buying the two adjoining properties. They further held that there was no evidence

to support the judge's assessment of damages and, since Coopers were not in breach of their duty, no ground for depriving them of their commission. The Court of Appeal therefore allowed the appeal, dismissed Mr. Kelly's claim and gave judgment for Coopers on their counterclaim.

Their Lordships are unable to agree with the Court of Appeal that the judge was not entitled to make a finding that it was a material fact that the Perot family were interested in buying Vertigo as well as Caliban. It is of course correct that at no stage was the purchase of either property made legally conditional upon the purchase of the other. But the fact that Mr. Perot was trying to buy both properties simultaneously, and that the family did in fact buy both properties, is quite sufficient ground on which the judge could draw the inference that the Perots might attach importance to acquiring both properties. Mr. Kelly called an expert estate agent who gave evidence that it was a matter of considerable significance to both vendors if there was one purchaser interested in acquiring both properties. Quite apart from this evidence, it is self-evident that, if a purchaser is interested in buying two adjoining properties, there is a special market in which the purchaser may, but not necessarily will, pay over the ordinary price to achieve his objective. Their Lordships therefore consider that Mr. Perot's interest in buying both the properties was a material factor which could have influenced the negotiations for the price at which Caliban was sold.

Was there any contractual duty on Coopers to disclose this material fact to Mr. Kelly? The judge started from the proposition in *Bowstead on Agency*, 15th Edition, page 147:-

"An agent is, in general, under a duty to keep his principal informed about matters which are his concern."

He then sought to reconcile this proposition with the fact that Coopers were also agents for Mr. Brant and it was in the course of that agency, not whilst acting as agents for Mr. Kelly, that the Coopers had learned that Mr. Perot was interested in buying Vertigo. Since, as has throughout been common ground, Coopers were not at liberty to divulge to others information acquired as agents for Mr. Brant, Coopers could not tell Mr. Kelly the true position without breaching their duty to Mr. Brant. As their Lordships understand the judgment, the trial judge found this reconciliation primarily in the decision of Donaldson J. in *North and South Trust Company v. Berkeley* [1971] 1 W.L.R. 470. He regarded that case as deciding that an agent for principal A who has chosen to act for another principal B on whose behalf he acquires information cannot be forced to divulge such information to principal A but can be held liable in damages to principal A for breach of duty.

In the view of the Board the resolution of this case depends upon two fundamental propositions: first, agency is a contract made between principal and agent; second, like every other contract, the rights and duties of the principal and agent are dependent upon the terms of the contract between them, whether express or implied. It is not possible to say that all agents owe the same duties to their principals: it is always necessary to have regard to the express or implied terms of the contract. This fact is fully recognised in the introduction to Chapter 5 of *Bowstead* (pages 137-8): the rest of the chapter, including the proposition on which the judge relied, is dealing with the duties which will arise from the terms normally found in a contract of agency.

In a case where a principal instructs as selling agent for his property or goods a person who to his knowledge acts and intends to act for other principals selling property or goods of the same description, the terms to be implied into such agency contract must differ from those to be implied where an agent is not carrying on such general agency business. In the case of an estate agent, it is their business to act for numerous principals: where properties are of a similar description, there will be a conflict of interest between the principals each of whom will be concerned to attract potential purchasers to their property rather than that of another. Yet, despite this conflict of interest, estate agents must be free to act for several competing principals otherwise they will be unable to perform their function. Yet it is normally said that it is a breach of an agent's duty to act for competing principals. In the course of acting for each of their principals, estate agents will acquire information confidential to that principal. It cannot be sensibly suggested that an estate agent is contractually bound to disclose to any one of his principals information which is confidential to another of his principals. The position as to confidentiality is even clearer in the case of stockbrokers who cannot be contractually bound to disclose to their private clients inside information disclosed to the brokers in confidence by a company for which they also act. Accordingly in such cases there must be an implied term of the contract with such an agent that he is entitled to act for other principals selling competing properties and to keep confidential the information obtained from each of his principals.

Similar considerations apply to the fiduciary duties of agents. The existence and scope of these duties depends upon the terms on which they are acting. In *New Zealand Netherlands Society "Oranje" Incorporated v. Kuys* [1973] 1 W.L.R. 1126 at page 1129 Lord Wilberforce, in giving the judgment of this Board, said:-

"The obligation not to profit from a position of trust, or, as it is sometimes relevant to put, not to allow a conflict to arise between duty and interest, is one of strictness. The strength and indeed the severity of the rule has recently been emphasised by the House of

Lords: *Phipps v. Boardman* [1967] 2 A.C. 46. It retains its vigour in all jurisdictions where the principles of equity are applied. Naturally it has different applications in different contexts. It applies, in principle, whether the case is one of a trust, express or implied, of partnership, of directorship of a limited company, of principal and agent, or master and servant, but the precise scope of it must be moulded according to the nature of the relationship. As Lord Upjohn said in *Phipps v. Boardman* at page 123:-

'Rules of equity have to be applied to such a great diversity of circumstances that they can be stated only in the most general terms and applied with particular attention to the exact circumstances of each case.'

In *Hospital Products International Pty. Limited v. U.S. Surgical Corp.* (1984) 58 A.L.J.R. 587 Mason J. in the High Court of Australia said this, (at page 608):-

"That contractual and fiduciary relationships may co-exist between the same parties has never been doubted. Indeed, the existence of a basic contractual relationship has in many situations provided a foundation for the erection of a fiduciary relationship. In these situations it is the contractual foundation which is all important because it is the contract that regulates the basic rights and liabilities of the parties. The fiduciary relationship, if it is to exist at all, must accommodate itself to the terms of the contract so that it is consistent with, and conforms to, them. The fiduciary relationship cannot be superimposed upon the contract in such a way as to alter the operation which the contract was intended to have according to its true construction."

Thus, in the present case, the scope of the fiduciary duties owed by Coopers to Mr. Kelly (and in particular the alleged duty not to put themselves in a position where their duty and their interest conflicted) are to be defined by the terms of the contract of agency.

Applying those considerations to the present case, their Lordships are of the view that since Mr. Kelly was well aware that Coopers would be acting also for other vendors of comparable properties and in so doing would receive confidential information from those other vendors, the agency contract between Mr. Kelly and Coopers cannot have included either (a) a term requiring Coopers to disclose such confidential information to Mr. Kelly or (b) a term precluding Coopers acting for rival vendors or (c) a term precluding Coopers from seeking to earn commission on the sale of the property of a rival vendor.

Their Lordships are therefore of opinion that Coopers committed no breach of duty, whether contractual or fiduciary, by failing to reveal to Mr. Kelly Mr. Perot's interest in buying Vertigo, since such information was confidential to Mr. Brant. Nor did the fact that Coopers had a direct financial interest in securing a sale of Vertigo constitute a breach of fiduciary duty since the contract of agency envisaged that they might have such a conflict of interest.

This decision is consistent with *Lothian v. Jenolite Limited* (1969) S.C. 111 and does not conflict with any of the other authorities to which their Lordships were referred. The failure of estate agents to communicate material information to their principals which was held to exist in *Keppel v. Wheeler* [1927] 1 K.B. 577 and *Dunton Properties Limited v. Coles, Knapp and Kennedy Limited* (1959) 174EG 723 related to information received by the estate agents in their capacity as agents of the principal who was complaining and was therefore not subject to any duty of confidentiality owed by the agents to other persons.

The *North and South Trust* case (*supra*) raised quite a different problem. The plaintiff was insured under a policy which had been effected by brokers. The insured had made a claim against the insurers. The brokers then accepted instructions from the insurers (i.e. a person having a contrary interest to that of the insured) to obtain a report from assessors. Having obtained such report, the brokers refused to disclose it to their original principals, the assured. Donaldson J. rightly held that this was a breach of duty by the brokers to their principals. In that case, there was nothing in the circumstances to justify the implication of any term in the agency between the assured and the brokers that the brokers should be free to act for the opposing party, the insurers.

Since, in the view of the Board, there was no general obligation in the contract to disclose to Mr. Kelly Mr. Perot's interest in Vertigo, the only question is whether, when Coopers became aware of Mr. Perot's interest in both properties, they came under some other duty to take some step to resolve the difficulty or cease to act. The only possible resolution of the difficulty would have been to obtain the consent of both Mr. Brant and Mr. Kelly to reveal Mr. Perot's interest to the other. Such a case was not pleaded or included in the judge's summary of the issues: the nearest the issues come to such a claim is that if a conflict of interest arose, Coopers "would inform Mr. Kelly of the conflict and, after due consultation with him, resolve it". The allegation does not disclose how the problem was to be resolved and in any event assumes that the difficulty can be solved by an agreement between Mr. Kelly and Coopers whereas the intervention and agreement of Mr. Brant would also have been necessary if any concrete step was to be taken. There was no evidence from Mr. Brant or as to his attitude. In the Board's view it is not open to Mr. Kelly on these pleadings to allege that Mr. Brant would have agreed to Mr. Kelly being told of the offer for Vertigo.

In the circumstances, it is not necessary to consider in any detail the judge's assessment of damages and the right of Coopers to commission. As to damages, the Board agree with the Court of Appeal that there was no evidence to support the judge's assessment. Mr. Kelly did not give evidence, so there is no evidence as to the attitude he would have adopted had he known the facts. There was no evidence as to what the Perots' attitude would have been if they had been asked for more than \$2.5 million for Caliban. The only evidence as to the value of Caliban was that it was worth less than the \$2.5 million in fact paid. In any event, the judge awarded the whole of his estimate of the increased price which would have been obtained whereas the correct measure of damage for a failure to disclose the material facts was the loss to Mr. Kelly of the chance of negotiating an increased price if he had had the information. Although the assessment of damages often has to be based on scanty evidence, in the opinion of the Board the evidence adduced by Mr. Kelly as to damage in this case was inadequate to prove any damage beyond the purely nominal.

As to Coopers' claim for commission, even if a breach of fiduciary duty by Coopers had been proved, they would not thereby have lost their right to commission unless they had acted dishonestly. In *Keppel v. Wheeler* (*supra*) the agents admitted an honest breach of fiduciary duty by mistake and yet were entitled to their commission. In the present case Mr. Kelly did not allege, nor did the judge find, any bad faith by Coopers. Even on the view the judge took therefore there was no ground for depriving Coopers of their commission.

Their Lordships will humbly advise Her Majesty that the appeal ought to be dismissed. Mr. Kelly must pay the respondents' costs.