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A Critical Review of the Agent's Commercial Duty to Refrain from Making Secret Profits at The Expense of His or Her Principal: Repercussions for Breach of Duty

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ABSTRACT

There are numerous instances under which an agent may be held liable for breaching his or her common law duty of an agency relationship. An agent owes certain fiduciary duties towards his or her principal and the former should therefore ensure that he or she does not commit a breach of duty in order to avoid possible claims that may arise as a result of such breach of duty. The broad and overarching duty of honesty plays a crucial part in any agency relationship. This duty of honesty is comprised of the agent's responsibility to avoid conflict of interest, duty to refrain from making secret profits, duty not to disclose the principal's information to any other parties.² The central notion of this paper is to critically review the agent's commercial duty to refrain from making secret profits at the expense of his principal. The paper further seeks to investigate the underlying reason why the law strictly prohibits an agent from benefiting from the secret profits he or she makes or gains at the expense of his or her principal.

I. INTRODUCTION

Agency relationship is a pivotal and viable tool in the business environment for the purposes of convenience because it assists individuals to conduct business activities through the use of other services because they (principal) are unable to personally conduct a business undertaking with a third party due to a variety of reasons. In reviewing the agent's fiduciary duty not to make secret profits to the detriment of his principal, it is important to define the following key elements:

- (i) Agency: The concept of agency may be defined as a contract by which a person referred to as an agent concludes a juristic act [being a contract] on behalf of another person

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² The duty owed by the agent to act in the interest of his principal takes preference over the agent's personal interest.

referred to as the principal, which juristic act creates legal rights and obligations between the principal and the third party.³

- (ii) Contract: Loosely defined, a contract is an agreement entered into between two persons, which creates rights and obligations regarding the subject-matter of the agreement.⁴
- (iii) Fiduciary: A fiduciary is someone that is legally authorised and required by law to act in the interest of another.⁵ Concerning the agency relationship, an agent is a fiduciary and is required to observe the fiduciary duties owed towards his or her principal.

Gibson states that a contract is a legal agreement, concluded between two or more persons who have the necessary contractual capacity, with the solemn intention of creating a legally binding obligation, which intention is communicated to each other, and that their parties should agree on the subject matter and the performance to be delivered by each of them.⁶ In terms of our law a contract can be express in words, verbally agreed, be implied by law or inferred from the surrounding circumstances or conduct of the parties.⁷ Regardless of the manner of concluding a contract, such a contract will be binding as long as the intent of the parties have been communicated to each other and provided that all other requirements of a valid contract have been met. The animus contrahendi requirement is the predominant feature that must be present before parties can create a binding contract, giving rise to rights and obligations.⁸ There are various forms of contracts and parties to a contract set out their rights and obligations in a contract concluded between them. Examples of contracts include insurance contracts, employment contracts, agency contracts, contracts of sale and contracts of lease to name a few. Every contract has to comply with the essentials of that particular type of contract. For example, a contract of sale must disclose the parties to the contract, being the purchaser and the seller, the merx or object of the sale, the purchase price and delivery of the merx.

Subsequent to understanding the meaning of the term 'contract' and various types of contracts, it is important to comprehend the meaning and operation of commercial agency, being a type of contract. Agency may be referred to as a contract in terms of which the agent is lawfully authorised by the principal to negotiate a contract with a third party for the benefit of the principal.⁹ One of the reasons why a person may decide to make use of an agent in concluding

³ Havenga, et al. *General Principals of Commercial Law* 7 ed. (Juta and Co 2010) 295)

⁴ Gibson, et al. *South African Mercantile and Company Law* 8 ed. (Juta and Co 2003) 9)

⁵ Dharmarante, 'A consideration of whether directors should stand in a fiduciary relationship with the company's related or inter-related companies' (2016) University of Witwatersrand, Johannesburg available at <http://www.cgblaw.co.za/fiduciary-relationship.pdf>, accessed on 6 May 2016 p.3

⁶ Gibson, et al. (Juta and Co 2003) 9)

⁷ Havenga, et al. (Juta and Co 2010) 97)

⁸ Contract of agency is a contract like any other contract and it must equally observe the intention requirement. See Havenga, et al. (Juta and Co 2010) 51-52) with regard to the intention requirement.

⁹ Gibson, et al. (Juta and Co 2003) 200)

a contract is for the sake of convenience¹⁰, for example where the person wishes to conclude a contract with someone in another city or country, he or she may make use of agent located in that city or country to save on time, travelling cost and so forth.

If a principal concludes a contract with an agent, an agency relationship is created and the parties acquire rights and incur obligations. Agency relationship is to a larger extent founded upon and governed by common law principles. The continued 'good' relationship between the agent and the principal depends on the conduct of the parties. It is therefore required that parties should obey the duties they incur as a result of forming an agency relationship.

II. AGENCY RELATIONSHIP

(A) General overview

Agency can arise in four different ways. It can be established by agreement (expressly or impliedly). Agency can also be created through the operation of law, even though there is no express or implied agreement between the parties.¹¹ A principal may be estopped from escaping liability where he or she has indicated to a third party that an agent is authorised to perform a certain juristic act and the third party acted on the strength of indication.¹² Thus estoppel is a form of establishing an agency relationship. In some situations, an agent performs a juristic act without the authority of his or her principal. In such circumstances, the principal will only be bound by the contract or the juristic act purported to be performed on his behalf and with his authorisation if the principal ex post de facto ratifies the conduct and thus ratification is also a manner in which agency can be established.¹³ Various forms of creating an agency relationship are equally valid in our law. But the main focus of this paper is on the agency created through an agreement, whether express or implied.

The agency agreement comprises of various elements. It is of cardinal importance that all these elements are present before one can speak of an agency relationship or a breach of an agency duty. The first element relates to consent. An agent must agree or otherwise consent to perform as directed by his principal.¹⁴ The second essential element of agency is that the relationship created by agency is that of fiduciary. An agent is thus expected to act at all times on behalf of and in the interest of the principal.¹⁵

The three Latin concepts of *fiduciarius*, *fides* and *fiducia* form the basis of the concept of

¹⁰ Havenga, et al. (Juta and Co 2010) 299

¹¹ Stone, *Law of Agency* (Cavendish Publishing Limited 1996) 19)

¹² Stone (Cavendish Publishing Limited 1996) 20)

¹³ Fouche, et al. *Legal Principles of Contracts and Commercial law* 7 ed. (LexisNexis 2012) 251)

¹⁴ Rasmusen 'Agency law and Contract formation' (2001) para 323 *Discussion Paper* (4)

¹⁵ Rasmusen (2001)(323) *Discussion Paper* (4)

fiduciary. Fiduciarius means holding in trust; whilst fides and fiducia mean faith and trust respectively.¹⁶ This three concepts clearly shows that the basis of fiduciary relationship rests on the notions of utmost good faith, honesty and the central idea of loyalty.¹⁷ Fiduciary relationship can be created in numerous ways. However, it is beyond the scope of this paper to discuss all other ways in which fiduciary relationship may be established and hence the manner of establishing a fiduciary relationship relevant to the discussion is the relationship of agency.¹⁸ Thus every person that stands in an agency relationship with the principal is required to observe the duties of utmost good faith, honesty and loyalty.

The commercial agency requires that one person must act on behalf of the other person in negotiating a contract on behalf of his principal. One of the questions that arise about to agency relationship is whether the same person can act as an agent of both parties to a contract. Several contrasting views have been levelled against the issue of whether one person can be an agent of two different principals. On one hand, it is argued that a person cannot negotiate a contract on behalf of the principal with himself whilst acting as a representative of another person. On the other hand, it is accepted that a representative may contract with himself in another representative capacity if from the facts one is able to deduce that the representative expressed two separate wills.¹⁹

Arguably, an agent may be prevented from acting in his capacity as an agent for both the principal and the third party. The reason for this is to avoid conflict of interest. The principal and the third party both have interest worthy of protection and therefore, at times these conflicting interest may stand against each other. For instance, the principal being the seller of immovable property may desire to sell his property at the highest possible price to make a profit. The third party as a potential buyer of the immovable property will desire to buy the property at the lowest possible price. If one person should act as an agent for both the seller and the buyer, he should see to it that he honours the desires of both the seller and buyer in the same deal which may lead to a conflict of the agent's common law duty to act in the interest of his principal.

(B) Forms of agents

The law of agency sets out various kinds of agents and therefore, it suffices to briefly outline

¹⁶ Dharmarante, K 'A consideration of whether directors should stand in a fiduciary relationship with the company's related or inter-related Companies, University of Witwatersrand, Johannesburg www.cgblaw.co.za/fiduciary-relationship.pdf Last accessed on 6 June 2016 p.1.

¹⁷ Dharmarante, (p.1).

¹⁸ Dharmarante, (p.2).

¹⁹ Gibson, et al. (Juta and Co 2003) 200). This view was cited with approval in the South African case of *Samcor Manufacturers v Berger* 2000 (3) SA 454 at 460-461.

various kinds of agents.

1. Brokers

The first group of agents relates to a broker. A broker is found in a contract of sale. He or she may be appointed by the seller or buyer to negotiate a contract of sale on behalf of his principle. Hence the task of a broker is to negotiate and not to bind the parties.²⁰ A broker receives a commission for negotiating a contract between the buyer and the seller and this commission is referred to as 'brokerage'. However, it is required from the broker to prove the existence of the agency relationship that entitles him or her to claim his or her brokerage.²¹ Ordinarily, if the broker fails to establish the agency relationship he or she will be unable to succeed in his claim for commission. Put it differently, for a broker as an agent to be successful in his claim for a commission, he or she must establish the existence of a contract of agency.

2. Factor

Similar to a broker, a factor is also an agent found in the contract of sale. A principal consigns goods to the factor and authorises the latter to sell such goods on behalf of the principal who remains the seller in respect of the sale although the factor sells the goods in his or her own name.²²

3. Auctioneers

An auctioneer is also an agent who in terms of the contract negotiates a sale of property upon authority and against remuneration of the principal.²³ The key distinguishing aspect concerning to auctioneers is that the sale takes place at a public auction. In the case of an auction, the auctioneer remains the agent of the seller during the period when the negotiations are being carried out and as soon as the sale is concluded, the auctioneer may also act as agent of the buyer for the purposes of recording the transaction or business deal in writing.²⁴ Strictly speaking, the auctioneer remains the agent of the seller, he or she simply facilitate the process of the sale by recording the transaction.

4. Estate agent

An individual who wishes to sell immovable property may employ an agent to carry out the sale on its behalf. Generally, persons are pre-occupied with other equally important operations or are located in a different city and therefore may desire to make use of an agent to assist in

²⁰ Gibson, et al. (Juta and Co2003) 213)

²¹ Gibson, et al. (Juta and Co 2003) 213)

²² Gibson, et al. (Juta and Co 2003) 214)

²³ Nagel, *Basic Principles of South African Business Law* 1 ed (Lex Patria Publishers 1997) 88)

²⁴ Gibson, et al. (Juta and Co 2003) 211)

concluding a sale on behalf of the principal. Thus, an estate agent is an agent hired and authorised by the principal to negotiate a sale or purchase of immovable property.²⁵ As an estate agent may be authorised to negotiate the sale or purchase of sale, it is clear that an estate agent may either be an agent of the buyer or the seller. The moment he or she negotiates a sale, he or she will be said to be the agent of the seller and similarly, if he or she negotiates a purchase, he or she will be an agent of the buyer.

5. Directors of Companies

A director is a person who is duly authorised to act on behalf of a company and in acting on behalf of the company, a director is expected to uphold the interests of the company and value the interest of the company more important than his or her personal interests.²⁶ Thus a director of a company stands in a fiduciary relationship towards the company.

6. Attorney-client relationship

An additional form of an agency relationship was well illustrated in the case of *Witvlei Meat (Pty) Ltd and Others v Disciplinary Committee for Legal Practitioners and Others*²⁷. The principle about the attorney-client relationship was formulated in this case as follows: the duty of loyalty necessitates a legal practitioner to act diligently and in the interests of his or her client. Hence an agency relationship can also be found in an attorney-client relationship, calling upon legal practitioners, to be honest in its dealings with and on behalf of his or clients.

(C) Agent's authority to act

Regardless of the type of agency an agent must have the authority to negotiate or act on behalf of the principal. If the agent lacks authority there can be no agency relationship, except in instances where ratification takes place.

There are various ways in which the agent may receive authority from the principal to legally act on behalf of the principal. Authority may be given expressly or impliedly. An express authority may be given orally or in writing whilst implied authority may be inferred from the conduct of the parties. Another equally important manner in which the agent may be said to have authority to bind the principal is referred to as an ostensible authority. In the case of an ostensible authority, the authority is not expressly or impliedly given to the agent. However, the third party whom the agent entered into a contract with on behalf of the principal may be entitled to hold the principal liable on the contract based on representation.²⁸ It must

²⁵ Gibson, et al. (Juta and Co 2003) 215)

²⁶ Dharmarante, (p.3).

²⁷ (SA 9/2012) [2013] NASC 19 (15 November 2013).

²⁸ Gibson, et al. (Juta and Co 2003) 205)

undoubtedly be clear that the principal represented by his conduct or words that the agent had the authority to bind him and secondly the third party acted on the faith of representation.²⁹

If one is unable to establish the existence of the agency relationship either through the express terms of the contract, implied agreement or representation, then there is no agency affiliation and therefore neither the principal, agent nor third party may successfully raise a claim based on an agency relationship.

III. AGENT'S OBLIGATIONS

Once the contract of agency is established certain rights and obligations flows from such an agency relationship. The agent has the following duties in respect of the agency contract:

(A) Performance

An agent is hired by his or her principal for a specific task or mandate and therefore an agent is required to perform his or her mandate completely and faithfully. The principal is entitled to withhold the payment of commission and claim damages in the event the agent fails to perform his mandate as per the agreement between the parties.³⁰

(B) Care, skill and diligence

It is common cause that a principle will hire the services of the agent for a particular purpose. One of the reasons for which an agent may be hired is because of his knowledge and skills. Therefore it is required and expected of an agent to use skill, care, diligence and knowledge as may be necessary for the due and proper performance of his or her mandate.³¹ In any dispute regarding the use of care skill and diligence, the Courts objectively apply the reasonable or prudent man test.³² The question asked by the Courts is whether the reasonable man in the same or similar circumstances would have used the care, skill or diligence as was required from the agent. If the answer is in the affirmative, then the agent is in breach of his or her duty to use care, skill and diligence and thus the principal may be entitled to claim common law remedies available to an aggrieved party for a breach of contract of agency.

(C) Duty of honesty

The underlying feature of the duty of honesty is that a contract of agency creates a fiduciary relationship between the parties being the principal and the agent. The agent is therefore

²⁹ *Monzali v Smith* 1929 (382) para 385

³⁰ Gibson, et al. (Juta and Co 2003) 219)

³¹ Sharrock, *Business Transactions Law* 8 ed (Juta and Co 2011) 314)

³² Gibson, et al. (Juta and Co 2003) 223)

expected to show forth the duty of utmost good faith in his or her dealings with the principal.³³ In terms of the duty of honesty, an agent is prevented from making secret profits at the expense of the principal furthermore, an agent is precluded from placing himself or herself in a position where his or her personal interests conflicts with that of the principal.³⁴ Lastly, an agent may not as a matter of principle disclose any information of his or her principal's undertakings, which he or she acquired during the course of the agency if such disclosure will be to the disadvantage of the principal.³⁵ A classic example is where a legal practitioner is required to act in the interests of his or her client, provided that the legal practitioner may be entitled to terminate his or her client's mandate if the mandate expects him or her to commit an offence.

IV. PRINCIPALS RELATING TO THE AGENTS DUTY NOT TO MAKE SECRET PROFITS

(A) The central notion

An agent is entitled to conduct his business in a manner that affords him or her an opportunity to generate profit or income. In Namibia, individuals are allowed to freely carry out any lawful business undertaking as the supreme Constitution affords all persons freedom of trade so long as there is no reasonable restriction placed on such freedom of trade. The logical question that therefore follows is why then is an agent precluded from enjoying any profits he might make in the scope of the agency.

It is noteworthy that before an individual is expected to observe and obey a fiduciary duty, ipso facto, it must be clear that there is an existing fiduciary relationship between the parties. If there is no such relationship between the parties, an agent will not be said to have breached any fiduciary duty because there is no relationship that gives rise to such a duty. The question of whether a fiduciary relationship exists will depend on the facts and circumstances of each particular case.³⁶ The presence of such a duty and its nature are issues to be deduced from a proper consideration of the substance of the relationship and surrounding circumstances which has a bearing on the operation of that relationship.³⁷

Assuming an office as a fiduciary places certain obligations on an agent. A person who assumes an office of a fiduciary such as an agent has a primary duty to protect the interests of another and such a person is precluded from making a secret profit at the expense of his or her principal.³⁸ There is only one way in terms of which an agent may lawfully be entitled to benefit

³³ Gibson, et al. (Juta and Co 2003) 219)

³⁴ Gibson, et al. (Juta and Co 2003) 220)

³⁵ Gibson, et al. (Juta and Co 2003) 220-223)

³⁶ *Eric M Phillips v Fieldstone Group Africa (Pty) Ltd and Fieldstone Private Capital Group* (2003)

³⁷ *Eric M Phillips*

³⁸ *Eric M Phillips*

from the profits made on behalf of his or her principal and that is, where the principal gives his or her free consent upon a full disclosure made by the agent.³⁹

The Court formulated the principles regarding the agent's duty to refrain from making secret profits in the leading case of *Robinson v Randfontein Estates Gold Mining Co Ltd*⁴⁰ as follows; 'Where one man stands to another in a position of confidence involving a duty to protect the interests of that other, he is not allowed to make a secret profit at the other's expense or place himself in a position where his interests conflict with his duty. The principle underlies an extensive field of legal relationships. A guardian to his ward, a solicitor to his client, an agent to his principal, afford examples of persons occupying such a position...It prevents an agent from properly entering into any transaction which would cause his interests and his duty to clash.'

An agent occupies a fiduciary office and therefore binds himself to the obligations imposed by the agency agreement. It is of fundamental importance that the agent obeys the duties incurred from the agency agreement in order to avoid been accused of breach of duty irrespective of the manner of obtaining or receiving profits.

(B) Manner of making secret profit

Under common law, it is a well-established principle that an agent may not be allowed or permitted to make a secret profit at the expense of his or her principal. A director of a company who represents such a company in commercial undertakings, or an estate agent who negotiates a sale of property on behalf of the principal, all stands in a position to make a profit or gain on behalf of the principal. But what is important is what such an agent do with the profit or gain placed at its disposal. An agent may not be allowed to take advantage of the profits made on behalf of the principal unless the principal has knowledge of such action and the latter agrees thereto. If the agent benefits from the gains made on behalf of the principal, the agent is expected to hold the benefits (or profits) on trust for the principal and to fully account to the principal for it.⁴¹

According to the law of agency an agent may act in various ways to make a secret profit. An agent may use the property belonging to the principal and make such gains from such property. A classic example of where an agent may make a secret profit from the property entrusted to him or her is where he or she is given a certain sum of money to carry out a specific act and the agent decides to invest the money entrusted in his care and decides to take ownership of

³⁹ *Eric M Phillips*

⁴⁰ *Robison v Randfontein Gold Mining Co Ltd* 1921 AD 168

⁴¹ Stone (Cavendish Publishing Limited 1996) 67)

the interest accumulated on the invested money without paying over such interest earned to the principal.⁴² An agent should pay over any interest made or proceeds received in the scope of his agency to the principal because the principal is the dominus of the interests or proceeds made and property itself being used to make interests or proceeds.

Certain position in life may entitle the holder thereof an opportunity to achieve or gain certain benefits. This equally holds for those persons who stands in a fiduciary position. An agent as a fiduciary may as an example obtain a discount on a purchase deal he or she negotiates on behalf of the principal. In such cases agent's, if they take cognisance of the fact that they may save a large sum of money because of the discount granted may decide to enter into transactions personally to receive the discount rather than acting in the interest of the principal. If an agent fails to inform the principal of the discount so received, it may amount to a breach of duty to refrain from making secret profit.

The agent should always bear in mind that he is not acting for himself or herself but he or she is rather employed to act in the interest of his or her principal. Therefore there is a need for an agent to keep proper and complete accounts of his or transactions completed for or on behalf of the principal.⁴³ The fundamental reason for requiring an agent to disclose his dealings to the principal is because all transactions entered into with the third parties binds the principal and thus makes him a party to the transactions. Thus, it is common cause that the principal should be aware of the transaction, in particular, the rights acquired and obligations incurred. Without the proper knowledge of his rights and obligations, the principal will neither be able to carry out his obligations nor be able to enforce or take benefit of his or her rights.⁴⁴ Furthermore, through holding the agent against the duty to account for the transactions entered into will the principal be able to establish whether or not the agent conveys correct amounts flowing the transaction concluded.⁴⁵ Agent's failure to convey correct information to the principal may pose repercussions for the principal, especially where money is involved. Any subsequent decisions to be taken by the principal depends on the outcome of the earlier action and consequence. For example, whether the principal will decide to invest more money will depend on whether or not he or she made a good profit from the first investment. If the agent after obtaining interest from the first investment decides not to disclose this fact to the principal, the principal believing that no sufficient profit resulted from the investment may decide not to make any further investments. In the end, the principal may lose out financially by taking a

⁴² Stone (Cavendish Publishing Limited 1996) 62)

⁴³ Stone (Cavendish Publishing Limited 1996) 67)

⁴⁴ Stone (Cavendish Publishing Limited 1996) 68)

⁴⁵ Stone (Cavendish Publishing Limited 1996) 68)

decision that has detrimental effects on its finances based on the actions of his or her agent. Therefore, an agent's conduct is very important, because of the principal basis the decisions of his future dealings on the outcome of the agent's conduct.

(C) Free consent by principal

The concept of consent is the basis of the law of contract. No contract can be said to be valid and legally enforced if the parties in the contract fail to reach consensus. Tantamount to the common law principles governing the law of contract, section 14 of the Indian Contract Act⁴⁶ provides that a consent given by one of the contractants is freely given if such consent is not obtained through coercion, undue influence, misrepresentation or mistake. An agent's conduct in making secret profits can be justified only if the principal gives his or her free consent upon the agent's full disclosure.⁴⁷ In other words, the consent given by the principal should not be based on mistake, misrepresentation, undue influence or coercion. For example, if the agent informs the principal that he or she obtained an interest of N\$500.00 for the benefit of the principal and the principal gives his or her consent to the agent for the latter to use the interest so gained for his or her personal use and it later transpires that the true value of the interest received was N\$5000.00 and not N\$500.00 as was alleged by the agent, the principal's consent in such instance was not freely given as the agent gave a wrong figure to the principal thereby misrepresenting the latter.

(D) Prevention of making secret profits

The underlying purpose of any business or commercial undertaking is to make a profit. Any business whether a sole trader or large company engages in a business venture for the purposes of making a profit. A seller of immovable property or a person who hires a broker, are all interested in making a profit. No business wants to operate on a loss or deficit. If an agent is allowed to make secret profits at the expense of his principal, he or she will impoverish the principal and the latter will lose out on the profits he would have received, had the agent obey his duty of honesty and refrain from stealing from the principal through making secret profits. Therefore it suffices to state that fundamental reason an agent is prevented from making secret profits is to disallow an agent from impoverishing his or her principal and at the same time uphold his integrity.

Encouraging an agent not to make secret profits is crucial becomes it assist the agent in upholding his or her integrity. The fact that an agent holds a fiduciary position and owes a

⁴⁶ Indian Contract Act 9 of 1872

⁴⁷ Stone (Cavendish Publishing Limited 1996) 68)

fiduciary duty towards his or her principal means that the very moment the agent helps himself with the profits obtained on behalf of the principal he or she breaches a duty of trust. Breaching a duty of trust has adverse effects on the relationship of the parties, being the principal and the agent. The effects of the breach of trust are two-fold. Firstly, the principal loses the trust and confidence he had in his or her agent. Breaching a duty of trust hence tarnishes the relationship of the parties. Secondly, the breach of trust places the reputation of the agent at stake. An agent's career will be destroyed or negatively affected once the agent's reputation and integrity become questionable because of his dishonest transactions. Taking advantage of the profits received on behalf of the principal without the latter's consent and approval is tantamount to stealing. It goes without saying that no one wants to be associated with a 'theft'. The on-going relationship of the parties depends on the ethical conduct of the parties and thus it is of fundamental importance that an agent should refrain from helping himself or herself with the profits earned on behalf of the principal so that the good working relationship between the principal and the agent may not be destroyed.

V. PRINCIPAL'S REMEDIES IN THE EVENT AN AGENT BREACHES HIS OR HER DUTIES

Whether an agent's action has resulted in gaining secret profits is a factual issue and therefore any dispute based on breach fiduciary duty of honesty should ipso facto be determined. If the principal establishes and proves that there was a breach of duty, there is no need to prove that the trust has suffered a loss.⁴⁸ Put it differently, a principal will succeed in his claim based on a breach of duty by the agent if he or she proves a breach of duty without any further burden to prove any loss in a trust-based on the agent's conduct.

Different judges have expressed various views on the issue of the agent's duty not to make secret profits. Of course, all the judgements or decisions made by judges in cases regarding the breach of an agent's duty is based on the facts of a given case even though the law remains the same.

The case of *Eric M Phillips v Fieldstone Group Africa (Pty) Ltd and Fieldstone Private Capital Group*⁴⁹ underscores an employee's duty to account to his or her employer for any secret profits gained by such an employee through the opportunity that arose during the scope and course of his or her employment. The only defence available to an agent who is alleged to have breached his or her duty not to make secret profit is that he or she has fully disclosed such profits to the

⁴⁸ *Eric M Phillips*

⁴⁹ *Eric M Phillips*

principal and the latter agreed that the agent may help himself or herself with the profits so made.

In the event of breach of a fiduciary duty, both equitable and legal remedies are available to the principal. The legal remedies include damages while equitable remedies comprise of account of profits and compensation.⁵⁰

(A) Account for Profits and Compensation

An account for profits is an equitable remedy place at the disposal of a principal for a breach of duty not to make secret profits at the expense of the principal. This remedy directs an agent to give to the principal the monetary value of what he or she has improperly obtained.⁵¹ The remedy of compensation on the other hand requires an agent to restore the monetary value of the loss which he or she has caused to the principal.⁵²

The case of *Regal Hastings Limited v Gulliver*⁵³ provides a clear example of instances where the Court can call upon an agent to account for the profits which initially belonged to the principal. What transpired, in this case, is that the company wished to purchase certain shares but due to financial constraints was unable to do so. Consequently, the directors purchased the said shares with their own monetary shares and resold such shares, thereby making a profit. The House of Lords, holding that the directors owing a fiduciary duty to the company committed breach of fiduciary duty, ordered the directors to account to the company for all the profits so made.

(B) Cancellation as a remedy

An agent is employed by his or her principal and automatically when the agent comes on board with the principal he or she acquires knowledge and certain information about the business of his or her principal. If the business deal of the principal seems favourable and there is a possibility to gain some benefit from such a deal an agent may decide to place himself or herself in the shoes of the third party and engage in a commercial transaction with the principal without the latter's knowledge. An agent who contracts with a principal in a capacity of a third party to gain profits breaches his fiduciary duty of honesty and thus entitles a principal to repudiate a contract. In the case of *Robison v Randfontein Gold Mining Co Ltd*⁵⁴ it was held that the remedies available to a principal who learns that his agent has sold his (agent's) property to the principal will not be bound by the contract. A principal may thus decide to either repudiate the

⁵⁰ Mariani, 'Understanding Fiduciary Duty' (2010) 84(3) *Florida bar Journal* 20)

⁵¹ Denis, 'Breach of Fiduciary Duty' (1999) 11(2) *The Alternative Remedies Bond Law Review* 344)

⁵² Denis, (1996) 11(2) *The Alternative Remedies Bond Law Review* 344)

⁵³ (1942)[1967]2 AC134n.

⁵⁴ *Robison*

contract or confirm it. Repudiation is the notice given by the debtor that he will not comply with the obligations of the contract.⁵⁵ In terms of the common law of contract, repudiation is a breach of contract. However, where an agent has breached his or her fiduciary duty by contracting with a principal in a capacity of a third party, the principal will be entitled to repudiate a contract without inviting any claims from his or her agent. In the true since the principal will be entitled to cancel the contract so entered with the agent in the form of a third party and claim damages.

(C) Damages

Damages is a common law remedy available to a contractant who suffers some monetary loss as a result of his or her co-contractant's conduct. It is a sum of money paid to the aggrieved or innocent party to compensate him or her for financial losses incurred as a result of the guilty party's action in breaching the contract.⁵⁶

Flowing from the aforementioned description of the concept of damages one cannot disagree with Fouche, M.A when he articulates that there are certain requirements that an innocent party, being the principal in this case should allege and prove in order to succeed in his claim for damages based on the breach of contract (duty). Firstly, the damage or loss suffered must be the direct result of the breach of contract. Secondly, the damages suffered must result in financial losses. Thirdly, the guilty party should have foreseen the damages or it should have been foreseeable. Finally, the innocent party must as a matter of principle take positive steps to mitigate the extent of the losses sustained.⁵⁷

Subsequent to the aforementioned remedies, a further consequence a legal practitioner as an agent may suffer for breaching trust is that he or she may be suspended or struck off the roll. This means that for any dishonest conduct a legal practitioner places his or her career in jeopardy.

VI. CONCLUDING REMARKS

The duties an agent owes towards his or her principal are governed by common law principle of *uberrima fides*, which calls for an agent to fully observe the duty of trust which he or she owes to the principle and not engage in any activity that will negate his or her duty of honesty. In this research, the author has endeavoured to critically review the agent's duty of honesty with the primary focus on the prohibition of secret profits at the expense of the principal. The law of agency is to the larger part governed by common law and thus common law imposed

⁵⁵ Fouche (LexisNexis 2012) 116)

⁵⁶ Fouche (LexisNexis 2012) 122)

⁵⁷ Fouche (LexisNexis 2012) 122)

certain fiduciary duties that the parties to an agency relationship are expected to observe and perform.

Even though agent's fiduciary duties are clear from common law, the contract of agency must succinctly set out the rights and duties of the agent to ensure that the agent is fully aware of what is expected of him and all activities expressly prevented. The aim is to ensure that an agent exactly knows what is specifically required from him or her and which actions he or she must refrain from while acting in the scope of his or her agency. The principal can easily hold the agent to his or her duties if such duties have been outlined in the contract and brought to the attention of the agent. If the agent fails to obey the lawful instructions of the principal and in particular should the agent fails to obey the duty of honesty by making secrets without the consent of the principal, such an agent commits a breach of contract and places the other in a position to claim damages or any other remedy available for breach of trust.

The first part of the paper gives a concise description of what amounts to a contract. It is not every agreement that constitutes a contract. For a legally binding contract to be formed certain essential requirements should be met. The law of contract founded on the element of consensus requires the parties to have a common intention with regard to the subject matter and manner of performance in respect of the contractual obligations.⁵⁸

The second part of the paper highlighted the establishment and the essence of an agency relationship. In this section, the author particularly outlined the elements of an agency relationship and also set out various forms of agents, such as a broker, estate agent, a factor and a director of a company. All agents regardless of the form, are in a fiduciary relationship with the principal and are therefore under an obligation to perform their fiduciary duties. The principal bears the onus to prove that an agency relationship was established between the latter and an agent. If the principal is unable to prove such a relationship he or she may not succeed in his claim in the even where there is alleged breach of duty.

In the third part of the paper, the author outlined the duties of an agent with great brevity. As clear from common law, an agent is expected to obey the duty of honesty, care, skill and performance. The primary reason why an agent is hired is to perform a particular act or provide a particular service. An agent is thus required to be honest in the transactions concluded on behalf of the principal and should exercise the skills for which he or she is hired.

Fourth part lies at the heart of this paper. This part discussed the principles relating to the agent's duty to refrain from making secret profits. There are different ways in which an agent may benefit from the agency relationship without the knowledge and the authorisation of the

⁵⁸ Fouche (LexisNexis 2012) 251)

principal. For instance, the agent may use the resources made available by the principal for his or her personal use and thus profit therefrom. It can be argued that although nothing justifies breach of contract, one of the reasons why an agent may decide to breach the duty of honesty and ‘steal’ the profits of his or her principal is when the principal is reluctant in paying an agent a commission after an agent has fully performed the agreed transaction. The principal, therefore, has a reciprocal duty to pay agents commission as soon as it’s due and payable to avoid and discourage the agent from ‘eating from the fruits’ that legally belong to the principal. In any event, an agent is not allowed to make secret profits and benefit from the same without the principals’ consent upon full disclosure. If the giving of consent is influenced in one way or the other a dispute may arise and it should be established that consent was freely given by the principal.

In its final analysis, the paper concludes by observing that breach of trust destroys the agency relationship created between the parties. This has adverse consequences on the good name and reputation of an agent. People normally hesitate to hire persons whose integrity is questionable irrespective of their expertise. Agency work requires a high display level of excellence and exceptional work and therefore an agent should be a person of good character and uncompromised integrity. It is legally and morally wrong for an individual to benefit from the secret made on the expense of others and therefore an agent should ensure that he or she does not fail to observe a fiduciary duty. Law of contract affords remedies which are at the disposal of an aggrieved party should a guilty party breach a contract. The principal as the aggrieved party may pursue equitable or legal remedies. This is, of course, important in formulating prayers in the particulars of claim. If an agent fails to comply with its contractual obligations, the principal may be entitled to cancel the contract and claim damages. The author of this paper agrees with Fouche, when he states that a contract can be cancelled where an essential term of the contract has been breached.⁵⁹ Agent’s failure to obey the duty of honesty, in particular, the duty to refrain from benefiting from the secret profits amounts to a breach of an essential term of the contract and thus warrant cancellation.

⁵⁹ Fouche (LexisNexis 2012) 121)

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