The Hon Mr Justice Hane J

THE CAYMAN ISLANDS COURT OF APPEAL
HOLDEN AT GEORGE TOWN, GRAND CAYMAN
CIVIL APPEAL NO. 11 OF 1991.

BEFORE:

THE RT. HON. THE PRESIDENT MR. JUSTICE EDWARD ZACCA, P.C., O.J.
THE HONOURABLE MR. JUSTICE KENNETH HENRY, J.A.
THE HONOURABLE MR. JUSTICE JAMES KERR, J.A.

BETWEEN:

VISTA DEL MAR DEVELOPMENT LTD. — Plaintiff/RESPONDENT

AND:

SEALES & COMPANY LTD. — Defendants/APPELLANTS
THE CAYMAN COVENANT LTD.
DESMOND SEALES

Mr. Norman HILL, Q.C. and Ms. Cherry BRIDGES instructed by Ritch & Conolly for Appellant.
MR. Andrew JONES for Respondent instructed by Maples & Calder.

APRIL 14, 15, MAY 8, 9, DECEMBER 3, 1992.

ZACCA, P.

This is an appeal against a judgment in the Grand Court where the learned trial Judge made the following order:

(1) The Plaintiff has proved its claim;

(2) The Plaintiff be granted an order for a declaration that the Cayman Covenant Ltd holds all its legal and beneficial

interest in all that parcel of land comprising Registration Section West Bay Beach North, Block 10A Parcel 58 upon constructive trust for the benefit of the Plaintiff, Vista del Mar Development Ltd. absolutely;

(3) The Cayman Covenant Ltd. do assign the contract of 2nd November, 1989 to Vista del Mar Development Ltd. upon the capital sum which has so far been paid plus the interest so far paid;

(4) The C.I.$100.00 stamp duty on the assignment be deducted from the total sum which Vista del Mar Development Ltd. is to pay to the Cayman Covenant Ltd.

(5) Seales and Company. Not to be paid its commission on the transaction;

(6) The Plaintiff to have costs against Seales and Company and Cayman Covenant Ltd.

The Defendants are the Appellants and the Plaintiff the Respondent in this appeal.

Guillermo Freytag is associated with a number of companies of which the Respondent Company Vista del Mar Development Ltd. is one of them.

Through the Respondent Company and other Companies he has been investing in real estate in Cayman since 1984. It was his intention to develop these lands to provide golf courses, an international marina and properties for affluent yachtsmen. He has also purchased property for commercial development through a

company called "Firestone".
One of his developments is the Vista del Mar Complex on the North Sound opposite the Seven Mile Beach in Grand Cayman.

Through Vista del Mar he has purchased some 200 acres of land north of the Vista del Mar development. This block of land known as "Vista Norte" is on on the North sound and it is planned to build a hotel and resort facility with a marina on this land.

However for this type of development it is necessary to have access to the sea. The portion of Vista Norte which touches the sea comprises a bluff through which it would be economically viable to cut an access channel. Access to the seas was therefore vital to the development of the Vista Norte land.

Little Salt Creek which is South of Vista Norte could provide the necessary access. However there were two parcels of land standing between Vista Norte and Little Salt Creek. The first parcel West Bay Beach North, Block 10A, Parcel 43 which was then vested in the Government. However, there were proceedings in the Grand Court concerning this parcel of land.

Although the Executive Council in March 1987 had agreed to sub-divide the land and to sell 1.5 acres to Vista del mar, up to September 1989 the sub-division had not been effected. Freytag was concerned as to whether he would get access to Little Salt Creek through Parcel 43.

There was, however, a second parcel of land registered as West Bay Beach North, Block 10A, parcel 58. The appeal concerns this parcel of land. Parcel 58 comprised 3.5 acres and was owned by Harold Dwight Watts who lives in Orlando, Florida, U.S.A. Since 1985 Vista del Mar had been trying to buy parcel 58 through R.C. Bodden realty Ltd. Since 1987 little progress had been made because Freytag was concentrating on the purchase of parcel 43.

Desmond Seales is the sole shareholder of the first Appellant company, Seales and Company Ltd. He is also the sole shareholder of the second Appellant company, The Cayman Covenant Ltd.

Seales Company Ltd. is a real estate firm, dealing in the marketing and sale of real estate and the management of properties.

There were a number of meetings between Freytag and Seales, the first being on 15th September, 1989.

It will be necessary to summarise the facts as presented by Freytag and Seales. There were serious conflicts in the evidence on some of the important issues which had to be decided by the trial Judge.

In his evidence, Freytag stated that Seales visited his office on the 15th September 1989. Seales was planning a trip to the Far East to promote the sale of land in Cayman. Seales was seeking the sponsorship of Freytag and asked for a contribution of $10,000. In return, Seales would present Freytag's interest to potential investors in the Far East.

Freytag said he was impressed by Seales' presentation and asked him to return the following week. Seales returned to Freytag on the 19th September, 1989, accompanied by his associate, Billy Culbert. Also in attendance was Freytag's project manager, Charles Dingler.

At this meeting Freytag explained his intentions regarding the Vista Norte land and the importance of gaining canal access. He suggested that Seales could earn the $10,000 sponsorship by purchasing land for Freytag. Parcel 58 owned by Watts was a priority. It was suggested that in order to keep the price down the owner of the land should not be informed that the purchaser was Vista del Mar.

On the morning of 20th September 1989 Seales and Culbert were taken on a tour of the properties which were being developed by Freytag.

Another meeting took place on 21st September 1989. Dingler was present at this meeting between Freytag and Seales.

Freytag's evidence was that at this meeting he instructed Seales to negotiate on his behalf the purchase of parcel 58 from Watts. Freytag was in the habit of taking notes at these meetings. More will be said later about these notes.

Following this meeting, Seales telephoned Watts in Orlando and also sent him a letter informing Watts that he had a client who was interested in purchasing parcel 58. A price of $101,930.00 which included a seven per cent sales commission for Seales and Company, was suggested as a fair price for the land.

Freytag also stated that on 2nd October, 1989 Seales informed him that Watts wanted US$125,000 net for the land. With $10,000 commission for Seales and 7 1/2% stamp duty, the cost to Vista del Mar would be US$141,570.

On 14th October, 1989, according to Freytag's testimony, Seales was instructed to offer Watts US$100,000 for the land less seven per cent commission to be paid by Watts to Seales and Company. Freytag would pay the stamp duty and $3,000.00 towards the Far East trip.

Subsequently, Seales informed Freytag that Watts had accepted the offer and that Watts was to give Seales his power of attorney to execute the transfer. Freytag then informed his Attorney, Charles Jennings, of the agreement.

In his testimony, Jennings stated that he inferred from the fact that Watts would be paying the commission that Watts was the

client of Seales.

In a letter to Seales, Jennings referred to Watts as Seales' client.

Freytag then left Cayman for Houston, Texas. Whilst there he received a telephone call from Seales informing him that Watts was now asking US$175,000 for the land. Freytag alleges that he told Seales to "put things on hold" until his return to Cayman on 29th October, 1989.

On 30th October, 1989 there was another meeting between Freytag and Seales at Seales' office. Seales was desirous of getting Freytag to agree to using Seales' Company for the sale of Freytag's properties. Freytag testified that he asked Seales about Watts' land. Seales told him that he was interested in purchasing Watts' land to build a house.

He asked Seales how anyone could build a house on that land. Freytag told Seales that he was acting for him and that Seales was now competing with him and putting himself in a conflict of interest. Freytag stated that Seales said "Never mind, I just thought I would ask anyway".

Freytag's evidence was that no one could build a house on parcel 58. There was no water, electricity, and no road within 3000 feet of the land. According to Freytag, Seales told him that he would forget about purchasing the land for himself and that his instructions to Seales was to put negotiations with Watts "on hold". He still considered Seales to be his agent for the purchase of parcel 58. The evidence disclosed that Freytag made notes of the meeting of 30th October, 1989.

The evidence before the trial Judge disclosed that on the 1st November, 1989, Seales telephoned Watts offering to purchase parcel 58 for US$175,000.00 less seven per cent commission. This

offer was accepted by Watts. The land was to be purchased in the name of Cayman Covenant Ltd.

On 2nd November, 1989 Freytag received a letter from Seales asking him to put in writing an authorization for him to offer Freytag's properties for sale. Freytag testified that he was so upset with Seales about the meeting of the 30th October that he did not respond to the letter. However, Seales continued to promote and advertise his properties and he saw him often.

On 2nd April, 1990 Freytag visited Seales' office. In course of conversation he asked about Watts' land. Seales told him that a company had purchased the land. After much questioning Seales informed him that it was his Company which had purchased Watts' land. Freytag testified that he was annoyed and left Seales' office and proceeded to see his Attorney.

Although the land was purchased by Seales on 2nd November, 1989 it was not until 2nd April 1990 that Freytag was aware that Seales had purchased the land. It is to be observed that Seales' wife signed on behalf of the Company and in doing so signed in her maiden name. A caution on the land was registered on 2nd April, 1990 and signed by Seales' wife in her maiden name.

The evidence also disclosed that it was not until December 1989 that the contract was signed for the purchase of the Government lands.

Desmond Seales gave evidence on behalf of the Appellants. His evidence was at variance with the evidence of Freytag on many important issues.

In his evidence, Seales stated that in September 1989 he spoke with Freytag about his proposed trip to the Far East and requested $3,000 sponsorship. He denied that he had asked for $10,000.

The following day they met in Freytags' office when he was asked to enquire if the Watts' land was for sale. He agreed to this request and sent a letter to Watts in which he referred to Freytag as his client. In his letter he included in the price, a seven per cent commission.

Watts was willing to sell the land for $125,000 but Freytag said the price was too high. Subsequently Watts agreed to sell the land for $100,000. Freytag agreed to purchase the land and Seales sent to Watts transfer forms and power of Attorney forms.

As things turned out, Watts changed his mind about the price and was now asking $175,000 for the land. Seales testified that he informed Freytag of this new development and Freytag responded to the effect that the price was too high and was not interested.

On his return from Houston, Freytag and Seales had a meeting. This was the October 30th meeting. Seales' evidence was that at this meeting various matters were discussed and then the conversation turned to Watts' land. Freytag read the letter from Watts in which he was asking $175,000. Freytag said he was not interested in purchasing the land, it was too expensive. Seales informed Freytag that he would be interested in purchasing the land if Freytag was no longer interested. Freytag told him that buying the property would be a mistake.

Seales further testified that he told Freytag that he was putting him on notice that he had mentioned to his lawyer he was interested in the property. He could not remember Freytag making any strenuous objection to his buying parcel 58. Seales denied that Freytag had referred to any conflict of interest and Freytag had not told him to put negotiations "on hold". Seales stated that there was no connection between his trip to the Far East and the Watts' transaction.

Between January and March 1990 Freytag asked him if he had heard

from Watts and he reminded Freytag that he was going to buy Watts' land. In early April 1990 Freytag told Seales that he had acquired the Government land adjacent to Vista Norte. The conversation turned to Watts' land and Seales told Freytag that he had purchased the property for himself through a Company and Freytag left with a huff.

Charles Jennings, Attorney-at-Law, for Freytag, stated in evidence that he was given instructions about the purchase of the Watts' land by Freytag. In a letter to Seales concerning the transaction, he referred to Watts as Seales' client. He was subsequently instructed to cease work on the transaction because Watts was asking for a purchase price higher than a price which was agreeable. He was of the opinion that the transaction had died.

It appears that as far as the meeting on 30th October, 1989 was concerned the only two persons who could testify as to what happened were Freytag and Seales.

The case for the Respondent was that at all material times Seales and Company were acting as its agent in the purchase of parcel 58. That Seales and Company, through Seales, was in breach of its fiduciary relationship as such agent. The Respondent claimed a declaration that the benefit of the contract between Cayman Covenant Ltd. and Watts is held by Cayman Covenant Ltd. upon a constructive trust for Vista del Mar. In the alternative, a declaration that Cayman Covenant Ltd. holds all its legal and beneficial interest in parcel 58 upon constructive trust for Vista del Mar.

The case for the Appellants was that no relationship of principal and agent existed between the parties and certainly not at the time of the purchase of the land by Cayman Covenant Ltd. Seales was asked to enquire if the land was for sale. In any event Seales informed Freytag that he intended to purchase the land and

there was no objection by Freytag on behalf of Vista del Mar.

There was an alternative defence to the effect that if there was a contract of agency it could be performed beyond the period of one year. Reliance was placed on Section 4 of the Statute of Frauds.

The learned trial Judge, after hearing evidence and submissions, made the order referred to above. In relation to the alternative defence with respect to S. 4 of the Statute of Frauds, the learned trial Judge found no merit in the defence and in his reasons for judgment at P. 13 stated:

> " This action is brought upon the agency agreement between Vista del Mar and Seales and Company. It is not brought on the proposed agreement for Vista del Mar to purchase parcel 58. The agency agreement was put into effect within a day or two after its making, that is as soon as Seales commenced making enquires of Watts as to whether he would sell the land. Such agreement was to be performed, and was indeed performed, well within one year from its making ".

We entirely agree with the finding of the learned trial Judge and held that S. 4 of the Statute of Frauds cannot avail the defendants.

On behalf of the Appellants, Mr. Hill argued several grounds of appeal. These were :

1. The learned trial Judge erred in Law in holding that the case turned solely on the credibility of the witnesses and in any event, erred in Law in assessing the credibility of the witnesses in the following respects :-

(1) The learned trial Judge misdirected himself on the evidence and failed to take account of the inconsistencies in the Plaintiff's case which appear in the evidence of Gil Freytag and Charles Dingler, the documentary evidence produced and the Plaintiff's pleadings; whereas the evidence of the Defendants was consistent with the documentary evidence produced and the Defendants pleadings.

(ii) The learned trial Judge misdirected himself on the evidence and failed to draw the proper inferences from the evidence of Gil Freytag's conduct in relation to the acquisition of parcel 58 between the years 1985 and 1987.

(iii) The learned trial Judge misdirected himself on the evidence relating to the date when Gil Freytag knew that the sub-division of West Bay Beach North Block 10A, Parcel 43, into two parcels had taken place in furtherance of the agreement between the Government and Vista del Mar.

(iv) The learned trial Judge misdirected himself on the evidence and failed to draw the reasonable inferences therefrom which misdirections led him to conclude that Gil Freytag was not discredited on cross-examination and that Desmond Seales' story to the Court was unlikely and untrue; in particular the learned trial Judge failed to draw reasonable inferences from the evidence in respect of the following matters :-

(a) the date on which any agreement between the plaintiff and the First and Third Defendants took place;

(b) the consideration for any such agreement;

(c) whether or not the proposed promotional trip to the far East by the First Defendant was to cost $3,000.00 or $10,000.00;

(d) whether the consideration for any agreement included the proposed promotional trip;

(e) the effect of the letter of 15th October 1989 from Watts rejecting Gil Freytag's offer transmitted by the First Defendant and Third Defendants and the unchallenged evidence that Gil Freytag told the third Defendant that he had no intention of paying Watts $175,000.00 for parcel 58;

(f) Gil Freytag's version of the conversation between himself and Seales on 30th October 1989 in light of the notes allegedly taken by him and as to the venue of the meeting on the 30th October 1989;

(g) whether or not a home could be built on parcel 58 in view of the evidence that some of the land comprised high ground and could be built on upon obtaining approval from the Planning Authorities;

(h) whether or not the Third Defendant intended to enrich himself when the when the Second Defendant purchased the land from Watts in light of the unchallenged evidence that Gil Freytag knew by this

time that the parcel through which access was to be gained by Vista del Mar had been subdivided off by the Government and the unchallenged evidence that Seales made no attempt at any time to resell parcel 58 to Gil Freytag or to anyone;

(i) whether or not the First and Third Defendants were or to become the agents of Watts and if so, when and under what circumstances; and further, whether of not the First Defendant's proposal that the Third Defendant execute the transfer forms under a power of Attorney from Watts were ancillary to its duties to purchase the land on behalf of the Plaintiff;

(j) whether or not Gil Freytag's attorney, Mr. Charles Jennings' reference to Watts as Seales and Company's client was a mistake.

2. The learned Trial Judge misdirected himself on the evidence relating to the terms of the alleged agency; in particular that there was an agreement between the Plaintiff and the First Defendant that the First Defendant purchase parcel 58 from Watts on behalf of the Plaintiff.

3. The learned trial Judge, having found that the alleged contract of agency had been performed erred in Law in failing to determine when the performance actually took place and the effect of performance on the alleged contract of agency.

4. The learned trial Judge further misdirected

himself of the evidence and failed to draw the reasonable inferences therefrom, that even if a contract of agency did exist between the Plaintiff and the First and Third Defendants, the learned trial Judge failed to find that the said contract of agency was terminated by performance and by Gil Freytag's refusal to pay $175,000.00 to Watts for Parcel 58 and further the learned trial Judge erred in Law in holding that the First Defendant and Third Defendant had a fiduciary obligation towards the Plaintiff after the alleged agency had been performed and/or terminated or when the Second Defendant purchased the land from Mr. Watts.

5. The learned trial Judge erred in Law and misdirected himself and failed to draw the reasonable inferences therefrom as to the applicability of section 4 of the Statute of Frauds upon any alleged contract of agency which was created or came into existence on 30th October 1989 and continued thereafter having regard to the evidence of Gil Freytag that he did not intend to purchase Parcel 58 at the price of $175,000.00 and that any action in the future was to come from him, that is to say, no offer could be made on the Plaintiff's behalf unless Gil Freytag gave the First and Third Defendants instructions so to do.

6. The learned trial Judge erred in Law in granting the Plaintiff a declaration of constructive trust in respect of the agreement between the Second Defendant and Watts in view

of the fact that the Plaintiff had suffered no damage since it had acquired access to the North Sound as a result of the purchase of Parcel 192 situated adjacent to Parcel 58 from the Government.

The main submissions of Mr. Hill may be summarised thus:

(1) The learned trial Judge was in error in finding that Mr. Freytag was a credible witness having regard to many inconsistencies in the evidence and specifically having regard to the documentary evidence;

(2) There was no agency;

(3) If there was an agency, this was terminated on the 30th October 1989;

(4) There was no fiduciary relationship between the Plaintiff and the First and Third Defendants.

Two main issues had to be decided by the trial Judge:

(a) Did Freytag tell Seales to put negotiations "on hold" on 30th October 1989

(b) Did a fiduciary relationship exist prior to and subsequent to the 30th October 1989?

In considering the evidence relating to the meeting of the 30th October, 1989 the learned trial Judge made the following observation at p.5 of his judgement:

> " Freytag who is a habitual note taker, was assisted in his recollection of this part of the evidence, as with his other evidence, by a contemporaneous note he made of the meeting."

Mr. Hill strongly urged the Court to find that the credibility of Freytag was destroyed by the fact that in his note of the 30th October, 1989, there is not recorded any mention of putting negotiations "on hold". He argued that the evidence of Seales to the effect that he was never told to put negotiations "on hold" and that Freytag told him that the price was too high and he was not interested in purchasing the parcel of land at the price, should have been accepted by the learned trial Judge.

Mr. Jones submitted that the findings of facts of the learned trial Judge should not be disturbed on appeal. There was a conflict of evidence, the resolution of which turned largely on an assessment of credibility. The Court should only interfere with a trial Judge's findings of facts if such findings are plainly unsound.

In Watt or Thomas v. Thomas [1947] A.C. 484,

Lord Thankerton in considering the duty of an Appellate Court in regard to the decision of a Judge sitting without a jury on a question of fact, stated at p. 487:

> "I do not find it necessary to review the many decisions of this House, for it seems to me that the principle embodied therein is a simple one, and may be stated thus:
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> I. Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the Judge, an Appellate Court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage

> enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion;
> II. The Appellate Court may take the view that without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence;
> III. The Appellate Court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the Appellate Court. It is obvious that the value and importance of having seem and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question".

It is clear that the meeting of the 30th October, 1989 was an important meeting in so far as it related to the evidence of putting negotiations "on hold". The trial Judge is making reference to Freytag as a habitual note-taker, observed that Freytag was assisted in his recollection of the events which transpired on the 30th October, 1989 by the note which he had taken on that day.

The trial Judge, however, in his findings, makes no reference to the fact that the note did not disclose that Freytag had told Seales to put negotiations "on hold".

In assessing the credibility of Freytag, in particular as to whether he had told Seales to put negotiations "on hold", the omission of a note of such an important material particulars should have had the attention of a trial Judge. The case for the Plaintiff rested heavily on the evidence of Freytag that he told Seales to put negotiations "on hold".

It is on the basis of this aspect of the evidence that the Respondent alleges that the fiduciary relationship continued after the 30th October, 1989.

In our view the failure of the trial Judge to consider the absence of the note in assessing the credibility of Freytag, was a serious error in view of the importance of the evidence.

This Court cannot say that the trial Judge would have come to the same conclusion as to the credibility of Freytag, if he had taken into account the absence of the note "to put negotiations on hold".

Indeed the absence of such a note should have led the trial Judge to approach the evidence of Freytag on this important issue with caution. The motive of the Appellants in purchasing the land may very well be in question and may appear suspicious, but that in itself, may no longer be important if the Respondent did not instruct Seales to put negotiations "on hold".

In our view the failure of the trial Judge in these circumstances would enable this Court to interfere with the findings of the trial Judge having regard to the principle laid down by Lord Thankerton in Watt v. Thomas and in particular the third principle.

The evidence disclosed that Freytag acquired access to the sea which was necessary for the development of Vista Norte land in December, 1989 when the purchase of the Government land was concluded.

In cross-examination, Freytag stated that as a result of obtaining access through parcel 43 (Government land) the Watts' land became less valuable to him. Whilst he was in Houston, he was telephoned by Seales and told that Watts now wanted $175,000.00 for the land. He stated that he told Seales that he was not interested in buying

the land at that price for the time being. He considered the price excessive.

Watts had originally wanted $125,000.00 for the land. An offer of $100,000.00 was at first accepted but as events turned out, Watts' changed his mind and was now demanding $175,000.00 for the land.

Freytag also testified that since October 30th, 1989, he never spoke to Seales about Watts' land until April 2nd, 1990.

The documentary evidence which is referred to by the learned trial Judge and on which Freytag's recollection is based is more consistent with the evidence of Seales that he was not told to put things "on hold".

That evidence taken along with the evidence of Freytag that he expressed the view that the price was too high and the fact that he made no mention of the Watts' land to Seales from October 30, 1989 to April 4, 1990, and that of Charles Jennings his Attorney that from the instructions which Freytag gave him he was of the opinion that the transaction had died, may have led the trial Judge to draw the inference that Freytag did not tell Seales to put things "on hold".

At no time did Freytag express a desire to offer more than $100,000.00 for Watts' land.

In these circumstances, we are of the view that this Court can and should interfere with the findings of the trial Judge on the question of whether Seales was told to put negotiations "on hold".

Accordingly we find that the reasonable inference to be drawn from all the evidence is that Freytag did not tell Seales to put negotiations "on hold'.

In these circumstances if there was a fiduciary relationship up to

30th October, 1989, this fiduciary relationship ended on the 30th October, 1989. Therefore there was no breach of fiduciary relationship existing on November 2, 1990 when Seales, through his Company, bought Watts' land.

We propose to consider what the position would be if in fact Freytag had told Seales to put negotiations "on hold".

There is an abundance of evidence to show that Freytag introduced the Watts land to Seales and instructed Seales to negotiate the purchase of the land. Seales regarded Vista del Mar as his client and was acting on behalf of Vista del Mar in the negotiations to purchase the land.

The learned trial Judge was correct in finding that an agency had been created. Certainly such an agency existed up to 30th October, 1989. The question for decision is whether the agency continued after the 30th October, 1989 on the assumption that Freytag told Seales to put negotiations "on hold". Was there an agency existing after 30th October 1989?

In finding that the agency was not terminated the learned trial Judge in his reasons at page 12 stated:

> "I do not believe that Freytag, or Vista del Mar, terminated the agency; neither do I believe Freytag indicated he was no longer interested in parcel 58; rather I accept that he instructed Seales, for Seales and Company, to put negotiations "on hold", thereby continuing the agency agreement. I do not believe that Freytag did not express disapproval at Seales' declaration that he was interested in the parcel of land for himself; rather I believe he firmly told Seales that he

did not approve of Seales putting himself into competition for the same parcel of land.

It is trite law that an agent must employ the materials and information obtained by reason of his agency solely for the purposes of the agency and must not use them himself in unfair competition with his principal. Similarly he must not put his duty as agent in conflict with his interest and must not enter into any contract likely to produce that result without his principal's assent. Seales and Company could not act for Watts or undertake anything which brought about a conflict of interest. Most certainly Seales and Company could not deal itself with parcel 58, without Vista del Mar's permission; neither could Seales, who was acting for Seales and Company, so deal with parcel 58. From the evidence that is exactly what Seales did. The reason why he did so does not affect the outcome of the suit, but I am satisfied it was not for the purpose of providing himself with land upon which to build a home. It was because of what he had been told by his principal. This was a speculative purchase and Seales intended thereby to enrich himself".

In deciding whether a fiduciary relationship existed after the 30th October, 1989, reference may be made to the speech of Lord Upjohn in Phipps v. Boardman [1967] 2 A.C. 46.

In the case of Industrial Development Consultants Ltd. v. Cooley [1972] 1 W.L.R. 443, Roskill, J at p. 449 referred to Lord Upjohn's speech and stated:

> "A more recent statement of the highest authority will be found in the speech of Lord Upjohn in Phipps v. Boardman [1967] 2 A.C. 46, 123 onwards :
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> "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. The relevant rule for the decision of this case is the fundamental rule of equity that a person in a fiduciary capacity must not make a profit out of his trust which is part of the wider rule that a trustee must not place himself in a position where his duty and his interest may conflict. I believe the rule is best stated in Bray v. Ford [1896] A.C. 44, 51 by Lord Herschell, who plainly recognised its limitations:
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> "It is an inflexible rule of a court of equity that a person in a fiduciary position, such as the respondent's, is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict. It does not appear to me that this rule is, as has been said, founded upon principles of morality. I regard it rather as based on the consideration that, human nature being what it is, there is danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than by duty, and thus

prejudicing those whom he was bound to protect. It has, therefore, been deemed expedient to lay down this positive rule. But I am satisfied that it might be departed from in many cases, without any breach of morality, without any wrong being inflicted, and without any consciousness of wrong-doing. Indeed, it is obvious that it might sometimes be to the advantage of the beneficiaries that their trustee should act for them professionally rather than a stranger, even though the trustee were paid for his services".

It is perhaps stated most highly against trustees or directors in the celebrated speech of Lord Cranworth L.C. in Aberdeen Railway v. Blaikie [1854] 1 Macq. 461, 471, where he said: "And it is true of universal application, that no one, having such duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect". The phrase "possibly may conflict" requires consideration.

"In my view it means that the reasonable man looking at the relevant facts and circumstances of the particular case would think that there was a real sensible possibility of conflict; not that you could imagine some situation arising which might, in some conceivable possibility in events not contemplated as real sensible possibilities by any reasonable person, result in a conflict".

And at p. 451, Roskill, J. stated:

> "Later Lord Upjohn stated four propositions as follows, at p. 127 :
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> 1. The facts and circumstances must be carefully examined to see whether in fact a purported agent and even a confidential agent is in a fiduciary relationship to his principal. It does not necessarily follow that he is in such a position.
> 2. Once it is established that there is such a relationship, that relationship must be examined to see what duties are thereby imposed upon the agent, to see what is the scope and ambit of the duties charged upon him.
> 3. Having defined the scope of those duties one must see whether he has committed some breach thereof and by placing himself within the scope and ambit of those duties in a position where his duty and interest may possibly conflict. It is only at this stage that any question of accountability arises.
> 4. Finally, having established accountability it only goes so far as to render the agent accountable for profits made within the scope and ambit of his duty".

What did Freytag mean when he told Seales to put negotiations "on hold". It could only mean that Seales was not to continue any negotiations on behalf of Vista del Mar with Watts and could only do so if in the future Freytag requested him to do so.

Freytag had indicated that the price was too high. This price was far in excess of what Freytag considered a reasonable market price. Bearing in mind that Freytag was expecting to purchase the Government's land at a less price, one can readily understand Freytag's reluctance to purchase Watts' land at such a high price.

After October 30, 1989, it was certainly open for Seales to sell Watts' land to any purchaser other than Freytag if Watts requested him to do so. Equally, it was open to Watts to sell his land to anyone who was interested in purchasing it.

Putting negotiations "on hold" did not preserve the right of purchase by Vista del Mar.

Seales purchased the land at what could be regarded as fair market value or at a price above market value. There is no evidence that by this purchase he would be able to enrich himself. He did not attempt to sell the land to Freytag after his Company purchased it.

As events turned out, Freytag was able to conclude the purchase of the Government's land. There is no evidence that the Plaintiff suffered any loss by reason of the last opportunity to acquire the property. However, this was not an issue before the trial Judge. If a fiduciary duty existed after the 30th October, 1989 the Respondent would have been entitled to a judgment.

Assuming that Freytag did tell Seales to put negotiations "on hold", we find that in so saying he terminated the agency. His subsequent actions showing a total lack of interest in the land until 2nd April 1990 tended to support such an interpretation. In our view when Seales purchased the land on the 1st November, 1989, he owed no fiduciary duty to Freytag, the agency having been terminated on 30th October, 1989.

In conclusion we find that Freytag did not tell Seales to put

negotiations "on hold" at the meeting on 30th October, 1989. That the agency which existed prior to that date was terminated on the 30th October, 1989.

In the alternative, even if Freytag had told Seales to put negotiations "on hold", the agency which existed up to the 30th October, 1989 was terminated as putting "on hold" in the circumstances of this case was not sufficient to continue the agency and therefore no fiduciary relationship existed after the 30th October, 1989.

For these reasons the appeal will be allowed and the judgment of the trial Judge set aside. There will be judgment for the defendants with costs below and the costs of the appeal to the appellants to be agreed or taxed.

I have read the Draft of the judgment of Zacca, P. I am in agreement with his reasoning and conclusion that the appeal be allowed.