

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN.

CAUSE #171 of 1990

24-06-91

BETWEEN:	VISTA DEL MAR DEVELOPMENT LTD	PLAINTIFF
AND:	SEALES AND COMPANY LTD	
AND:	THE CAYMAN COVENANT LIMITED	
AND:	DESMOND SEALES	DEFENDANTS

Mr. Jones for the Plaintiff.
Mr. N. Hill Q.C. with Ms. C. Bridges for the Defendants.

JUDGMENT

Guillermo Freytag has been investing in real estate in the Cayman Islands since 1984. He has purchased with a view to development, in the names of various companies, well over fifty plots of land. His main focus of development has been the creation of golf courses, an international marina and properties for affluent yachtsmen. He has also acquired some property for commercial development in the name of a company called "Firestone". He has, through the plaintiff company ("Vista del Mar"), been responsible for the development of the Vista del Mar complex on the North Sound opposite the Seven Mile Beach in Grand Cayman. Through Vista del Mar he has purchased, from various owners and plot by plot over a period of about five years, some 200 acres of land north of the Vista del Mar development. This block of land, to which I shall refer as "Vista Norte", is on the North Sound, and the intention is to build a hotel and resort facility with a marina on it. Of course for this type of development access to the sea is necessary, but the portion of Vista Norte which abuts the sea comprises a bluff through which it would not be economically viable to cut an access channel even

if Government were to give the necessary permission for it. Access to the sea is vital to the development of Vista Norte and, according to Freytag, the land would double in value once such access was obtained.

Just south of Vista Norte lies Little Salt Creek which would provide the sea access which Vista Norte requires. However in September 1989 two plots stood between Vista Norte and Little Salt Creek. One was a large portion of land registered as West Bay Beach North, Block 10A, parcel 43, which had vested in the Government but about which there were proceedings pending in this Court. In March 1987 the Executive Council had given instructions to the Lands and Survey Department to sub-divide that parcel and sell 1.5 acres to Vista del Mar. However that sub-division was not effected by September 1989 and Freytag, according to his evidence, was beginning to despair that he would ever get access to Little Salt Creek through parcel 43.

The second parcel standing between Vista Norte and Little Salt Creek was registered as West Bay Beach North, Block 10A, parcel 58. This land is central to this suit. The parcel, comprising 3.25 acres, was owned by Harold Dwight Watts who lives in Orlando, Florida, U.S.A. Vista del Mar had been endeavouring to purchase parcel 58 since 1985. Initially Freytag had used the services of R.C. Rodden Realty Ltd. in his attempts to persuade Watts to sell the land, but from late 1987 he had made little, if any, movement towards the purchase of parcel 58 because he was concentrating on the purchase of part of parcel 43.

Desmond Seales has several businesses one of which is the first defendant Seales and Company Ltd. Seales is the sole shareholder and director of Seales and Company. Seales and Company is a real estate firm, dealing in the marketing and sales of real estate and the management of properties. Seales is also

the sole shareholder and director of the second defendant, the Cayman Covenant Ltd.

Freytag's evidence is that on the 15th September 1989 Seales visited his office and presented him with a programme and brochure for Seales' projected trip to the Far East. The trip was a promotional tour on which Seales would present Cayman's business potential and on which he offered to present Freytag's interests to potential investors, in return for which Seales asked for \$10,000 sponsorship. Freytag said he was impressed by Seales' presentation and asked him to return the next week. Seales did so, in the afternoon of 15th September 1989, and he was accompanied by his associate, Billy Culbert. Freytag's project manager, Charles Dingler, was with him at the meeting. According to Freytag his intentions regarding the Vista Norte land were explained to Seales at that meeting and the importance of canal access was emphasized. Freytag told Seales he was interested in purchasing five parcels of land of strategic importance to him and suggested that Seales earn his \$10,000 sponsorship for the Far East trip by purchasing one or more of these parcels for Freytag or his companies. Among these properties, indeed according to Freytag first on the list, was parcel 58 belonging to Watts. It was important in any negotiations that the owner of the land did not know that the intended purchaser was Vista del Mar, so that the price would not be pushed up.

On the morning of the 20th September Seales and Culbert were taken on a tour of the properties which Freytag was developing. There was then a further meeting between Freytag and Seales, with Dingler in attendance, on the afternoon of the next day the 21st September. According to Freytag and Dingler at that meeting Seales was instructed to negotiate the purchase of parcel 58 from Watts and was also given instructions regarding the purchase of other parcels unconnected with this suit.

As a result Seales telephoned Watts in Orlando and followed that telephone call with a letter from Seales and Company to the effect that they had a client who had expressed interest in purchasing such a plot of land as parcel 58. The letter suggested that \$101,930 was a fair selling price, which would include seven per cent sales commission (for Seales and Company) making a net selling price to Watts of US\$94795.

On 2nd October 1989 Freytag received a telephone call from Seales to the effect that Watts wanted US\$125,000 net for the land. Freytag worked that out, with \$10,000 commission to Seales and Company, and 7 1/2% stamp duty, to involve a total outlay by Vista del Mar for the land of US\$141,570.

On 4th October, according to Freytag's evidence, Freytag and Seales had a telephone conversation. Seales was instructed to offer Watts US\$100,000 for parcel 58, less 7% sales commission to be paid by Watts to Seales and Company. Freytag was to pay the stamp duty and undertook to pay a further US\$3000 towards Seales' trip to the Far East. The next communication from Seales to Freytag was to the effect that Watts had accepted that offer. Watts was to give Seales his power of attorney to execute the transfer forms. Freytag visited his attorney, Charles Jennings of Maples and Calder, and told him of the agreement and asked him to contact Seales to work out the details of the transaction. Jennings was instructed that they were proceeding straight to transfer of the property and that commission was payable to Seales and Company by Watts. The purchaser was Vista del Mar. Jennings testified that he inferred from the fact that Watts was paying the sales commission that Watts was the client of Seales and Company, and in his letter to Seales of 6th October he referred to Watts as Seales and Company's client.

Shortly thereafter Freytag left the Island for Houston, Texas. Whilst he was there he received a telephone call from Seales informing him that Watts had decided to increase his

asking price to US\$175,000. It seems that this was probably as a result of Watts speaking to his wife and thereafter obtaining further advice on land values in Cayman. Be that as it may, Freytag told Seales to 'put things on hold' until his return to Cayman on 29th October, 1989.

On 30th October Freytag visited Seales at his office. There were various matters to discuss between them. Seales was anxious to get Freytag to agree to use his company for the sales of other of Freytag's interests and had shown a potential purchaser the Vista Norte land when Freytag had been away in Houston. Eventually the conversation turned to the Watts' transaction. Freytag, who is an habitual note-taker, was assisted in his recollection of this part of his evidence, as with his other evidence, by a contemporaneous note he made of the meeting. He testified that Seales said he has two little boys and that he could not afford to buy a lot in Vista del Mar. He said he was interested in purchasing Watts' land because he always wanted to live on the North Sound. Freytag's testimony was that he asked Seales how anyone could build a house on that land. Freytag reminded Seales that he was acting for him and that Seales was now competing with him and putting himself in a conflict of interest situation. Freytag said that Seales then said "Never mind, I just thought I'd ask anyway." Freytag's evidence was that no one could build a house on parcel 58. There is no water, electricity and no road within 3000 feet of the land. There are dyke roads but a truck would only be able to reach the land through roads built by Vista del Mar on their property. According to Freytag Seales indicated he would forget about purchasing the land for himself and that Freytag's instructions were to put negotiations with Watts 'on hold'. After that meeting Freytag still considered Seales and Company to be his agent in connection with the transaction.

On 1st November 1989 Seales telephoned Watts offering to purchase parcel 58 for US\$175,000 less 7% commission. He

followed that telephone conversation with a letter of the same date and such offer, which involved a ten per cent deposit and instalment payments over thirty-six months, was accepted. The land was to be purchased by the Cayman Covenant Ltd. Subsequently problems were encountered with the instalment payments. By letter dated 15th March 1990 Watts agreed to accept a renewed proposal for payment. Payments on that new agreement have been made to date.

According to Freytag he was unaware of these agreements until much later in the day. On 2nd November 1990 he received from Seales a letter asking that he put in writing some form of authorization for him to offer Freytag's other properties for sale. Freytag testified that he was so upset with Seales about the meeting of 30th October that he did not respond to the letter. Nevertheless Seales did a great deal of work for him in the area of promotions and advertising and he saw him often.

On 2nd April, 1990, Freytag visited Seales' office to congratulate Seales on some promotional material he had put out. In the course of conversation, according to Freytag, he asked about the Watts land and Seales told him a company had purchased the land. Eventually Freytag prised from Seales that Seales' company was the purchaser. Thereupon, Freytag testified, he became annoyed and eventually left the office to go straight to his attorney.

Seales' testimony was somewhat at variance with Freytag's. Seales testified that in the second half of 1989 his company had successfully marketed and sold a number of parcels of commercial land in George Town and he and his associate, Billy Culbert, were looking for another opportunity to market and sell commercial land. They noticed the "Firestone" sign on the West Bay Road and he spoke to Charles Dingley who told him that Freytag was off the Island but that he, Dingley, would raise the matter with Freytag. At that time Seales was unaware of the

extent of Freytag's holdings.

When in September, 1989, Seales was planning his trip to the Far East to promote properties in Cayman he produced a promotional brochure for potential sponsors inviting sponsorship in the sum of \$3000 per participant. Seales sent a copy to Freytag. A meeting was scheduled, Seales cannot remember at whose behest, at Freytag's office for the morning of 20th September, 1989. The purpose of the meeting was to discuss their offer to market the Firestone properties. Billy Culbert went with Seales, Seales testified that it is quite possible they discussed the Far East trip at that meeting, but he asked for \$3000 and not \$10,000 towards the trip. Freytag described all his properties and Seales concluded that he was trying to get their market opinion of what the properties were worth. After their discussion Dingler took Seales and Culbert to view all the properties.

The next day he met Freytag in Freytag's office. Freytag asked Seales of his impressions of the properties. The Vista Norte land was discussed and Seales mentioned there was someone visiting the Island who may be interested in acquiring the land for development. Freytag produced three extracts from the land register and said he would be interested in acquiring the three parcels of land to which they related. One parcel was the Watts' land, parcel 58. Freytag asked Seales if he would enquire of the owners of the parcel if they were interested in selling and Seales agreed to do so. Freytag asked for copies of his letters to ascertain Seales' style. Seales testified that he wanted to impress Freytag because he wanted to be appointed the selling agent for the Firestone property, so he drafted a letter in which he referred to Freytag or Vista del Mar as his client. Seales' testimony was that by using the word 'client' he meant that Freytag was someone he was intending to develop as a client. Seales asked Freytag if he could include the 7% sales commission in the letter he sent to Watts because he had no mandate from

anyone and it is usual for his company to get its commission from the vendor.

Watts telephoned Seales and asked for \$125,000 for the land and Seales communicated that to Freytag who said the price was too high. It is possible, he said, that they talked about the price Freytag was prepared to pay and it is also possible they still talked in terms of \$100,000.

Then, during a telephone conversation, Watts indicated that Seales could proceed to sell the land to the person interested for \$100,000. Seales spoke to Freytag and he was prepared to pay that amount, so Seales prepared a letter to Watts sending transfers of land forms and power of attorney forms. Freytag knew when he sent the letter that Watts was going to pay the commission and Freytag had not confirmed his sponsorship of Seales' Far East trip.

Subsequently Watts prevaricated and finally sent a letter dated 15th October, 1989, indicating that his selling price would be \$175,000. Seales telephoned Freytag with this information and, according to Seales, Freytag said the price was too high and he was not interested.

At this stage there was no formal agreement for Seales and Company to list any of Freytag's properties for sale. During Freytag's absence from Cayman in Houston Seales and Company had shown the Vista Norte land to a potential purchaser.

Freytag and Seales then met on Freytag's return to Cayman. They discussed various matters before they turned to the Watts land. They discussed Watts' letter and Seales said if Freytag was not interested in buying parcel 58 he would be. Seales read Watts' letter and said the land was too expensive and it was a bad deal, or something of the kind. Freytag said he was not interested in purchasing the land, it was too expensive.

Freytag said that buying the property would be a mistake and suggested an alternative purchase. Seales 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. Seales said he cannot remember Freytag making a strenuous objection to him buying parcel 58 and Freytag did not refer to any conflict of interest. Freytag did not tell Seales to put negotiations "on hold".

Seales testified that Freytag had not made a commitment for Seales to earn \$10,000. In relation to the Watts' transaction Seales was to be paid by Watts and no other remuneration was promised or agreed to. There was no connection between the \$3,000 for the trip to the Far East and the Watts' transaction.

Between January and March 1990 Freytag asked him if he had heard from Watts and, according to Seales, he reminded Freytag that he was going to buy Watts' land. In early April 1990 Freytag told Seales, for the first time, that he had purchased a portion of the Government land adjacent to Vista Norte although the transaction had been negotiated and completed earlier. Then the conversation turned to parcel 58 and when Seales told Freytag he had bought the property for himself, through a company, Freytag left in a huff.

Vista del Mar claims that at all material times Seales and Company was acting as its agent in the proposed purchase of parcel 58. That Seales and Company, through Seales, was in breach of its fiduciary relationship as such agent and seeks a declaration that the benefit of the contract between Seales' company, Cayman Covenant Ltd., and Watts is held by Cayman Covenant Ltd. upon constructive trust for Vista del Mar, or alternatively a declaration that Cayman Covenant Ltd. holds all its legal and beneficial interest in parcel 58 upon constructive trust for Vista del Mar. A prayer for an enquiry as to damages

was abandoned at the hearing.

Seales' case is that no relationship of principal and agent existed between the parties at the time of Cayman Covenant's purchase of the land. That Seales and Company had no general mandate from Freytag or Vista del Mar to purchase parcel 58 and if ever a relationship of principal and agent existed it was of a very limited nature, for the purpose of ascertaining if Watts would sell the land. By the time parcel 58 was purchased no fiduciary relationship existed between the parties which prevented Seales from dealing with the land without Vista del Mar's permission. It is Seales' case that in any event he informed Freytag that he intended to purchase the land and Freytag did not object on behalf of Vista del Mar. There is an alternative defence that the contract of agency, if there was one, was a contract which could be performed beyond the period of one year from the making thereof. By section 4 of the Statute of Frauds such a contract is unenforceable unless the agreement is evidenced by some memorandum or note in writing, which is absent in this case.

I shall first of all deal with credibility for, indeed, the determination of this suit depends upon it. Freytag gave a straightforward explanation of events in a straightforward manner. He was not discredited on cross-examination. He has maintained an interest in parcel 58 from 1985. Sometimes he has blown warmer than others depending upon the progress of negotiations for the purchase of part of the Government land, and it seems to be part of his negotiating technique that he does not want to appear over-eager to purchase lest he pushes up the price. But it cannot be gainsaid that parcel 58 is a worthwhile acquisition for Vista del Mar. Freytag's projected development for the Vista Norte land would be better served by his company's ownership of parcel 58 than by having such parcel owned by someone else. Seales gave an unlikely story to the Court which did not improve in its telling. It is unlikely that he would be

interested in the purchase of this parcel for the purposes of building a family home without himself or his family first viewing it to see if it is suitable for their purposes. He did not even bother to ascertain whether there were Government restrictions which would affect its value. And from the evidence it is clear that Seales did not have money to waste. Other parts of Seales' evidence did not have the ring of truth about them and quite frankly he did not impress me as a witness of truth. Taking the evidence in its totality, including the evidence of Dingler and Culbert as to the earlier meetings between the parties, I am satisfied that Freytag was giving a truthful and accurate version of events. I am satisfied that when Freytag's attorney Mr. Jennings referred to Watts as Seales and Company's client he was making an inaccurate inference.

I am satisfied that Freytag on behalf of Vista del Mar instructed Seales and Company to negotiate the purchase of parcel 58 and that when acceptance of Vista del Mar's offer was communicated to Seales, Seales and Company was acting as Vista del Mar's agent. I am satisfied of that on Freytag's evidence and I am fortified in my view by a reference to the letters passing between Seales and Company and Watts which shows Seales referring to Vista del Mar as "my client" and Watts' reply to Seales and Company referring to "your client". The consideration passing to Seales and Company on the creation of the agency was an opportunity to earn commission from Watts or if that failed, from Vista del Mar. I cannot accept that Freytag merely requested Seales to communicate to Watts his interest in the land and from then on Seales became the agent of Watts. Seales and Company's duties and responsibilities were to Vista del Mar. Of course Seales and Company could undertake such tasks as the execution of the transfer forms under a power of attorney from Watts, but those tasks did not involve a conflict of interest. Such tasks were ancillary to its duties to purchase the land on behalf of the principal, Vista del Mar.

I cannot accept the defence contention that the dealings in this land must be separated into different elements of the transaction. It is contended that, even if at first Seales and Company was acting as a gratuitous agent to ascertain whether Watts would sell the land, subsequently the Company became Watts' agent in the actual transaction to purchase. I accept Freytag's evidence that he instructed Seales and Company to act as Vista del Mar's agent and that such Company continued to be Vista del Mar's agent.

I cannot accept that Freytag would permit Seales and Company to set the transaction up whilst permitting Seales to owe allegiance to another principal. I do accept that Seales and Company was to look for its commission to Watts; but that did not make Seales and Company Watts' agent. The consideration for the creation of the agency was the possibility of Seales and Company earning a commission and I accept that if Watts had refused to pay such commission then Vista del Mar would have done so. I am also satisfied from Freytag's evidence that Vista del Mar's sponsorship of Seales' trip to the Far East was linked to the Watts' transaction.

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.

Turning now to the alternative defence which rests upon construction of Section 4 of the Statute of Frauds, I find no merit in such defence. The relevant portion of the statutory provision relied upon reads:

"No action shall be brought upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorised."

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 enquiries 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.

The plaintiff has proved its claim. I make a declaration

that Cayman Covenant Ltd. holds all its legal and beneficial interest in all that land comprising registration section West Bay Beach North, Block 10A, parcel 58 upon constructive trust for the benefit of Vista del Mar Ltd absolutely. I order that Cayman Covenant Ltd assign the contract of 2nd November, 1989 to Vista del Mar Ltd upon the capital sum which has so far been paid plus the interest so far paid. Although Vista del Mar argues that it should have to pay no interest, strictly I have no evidence that it would have paid immediately for the land. The \$100 stamp duty on the assignment will be deducted from the total sum which Vista del Mar is to pay Cayman Covenant Ltd. The total sum payable is therefore US\$46,012.73. Seales and Company sought to persuade me that I ought to add to that sum its commission on the transaction. That appeared an impertinent suggestion, given that to make such an order I would necessarily have to find Seales and Company in breach of its fiduciary duty. Be that as it may, the agreement between Cayman Covenant Ltd and Watts did not refer to any commission, so that argument is untenable.

Costs will go to Vista del Mar as against Seales and Company and Cayman Covenant Ltd.



Schofield

24th June, 1991