

## IMPLIED TERMS OVERRIDE AGENT'S DUTY TO OBTAIN BEST POSSIBLE PRICE

*Horace Brenton Kelly v Margot Cooper & Another*<sup>1</sup>

*Failure of estate agents to communicate material information  
to their principals*

IT has been established in previous cases that the duty of estate agents engaged upon the sale of a property must be, in broad terms, to do all they can as professional men to get the best possible price.<sup>2</sup>

Sargant LJ in the case of *Keppel v Wheeler*<sup>3</sup> expanded by way of example what was necessarily inherent in this general obligation of estate agents. The learned Lord Justice stated:<sup>4</sup>

if in the interval they (the agents) receive information – whether, as in this case, from some one with whom they had originally communicated on behalf of their principal, or from some outside source, which tends to show that the value of the property was greater than had been supposed, or is otherwise of a nature to influence materially the judgment of their principal in going on with, or ceasing to go on with, the contract which was being originally negotiated, they are bound to communicate that information to their principal; and if they do not do so, they are guilty of a breach of their duty as agents.

The general obligation of estate agents to do their best to get the best price for the principals for whom they act must now be reconsidered in the light of the recent decision of the Privy Council in *Kelly's* case.<sup>5</sup> In this case the plaintiff instructed the defendants, a firm of estate agents, to

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<sup>1</sup> [1993] AC 205.

<sup>2</sup> *Dunton Properties Ltd v Coles Knapp & Kennedy Ltd* (1959) 175 EG 723, *Keppel v Wheeler* [1927] 1 KB 577.

<sup>3</sup> [1927] 1 KB 577.

<sup>4</sup> *Ibid*, at 593.

<sup>5</sup> *Supra*, note 1.

sell his house and agreed to pay them a percentage of the selling price as a commission. The owner of an adjacent house also instructed the defendants to sell his house. The defendants showed both houses to a prospective purchaser, whose offer to purchase the adjacent house was accepted. He then offered to buy the plaintiff's house. The defendants did not inform the plaintiff of the agreement to buy the adjacent house. The plaintiff accepted the purchaser's offer. The sale of both houses was completed. The plaintiff then instituted proceedings against the defendants claiming damages for their breach of duty in failing to disclose material information to him and placing themselves in a position where their duties and interests conflicted.

The Privy Council found that the judge at first instance was entitled to make the finding that it was a material fact that the purchaser's family was interested in buying the two adjacent properties (*Vertigo & Caliban*) although at no stage was the purchase of either property made legally conditional upon the purchase of the other. The fact that the purchaser was trying to buy both properties simultaneously, and that the family did in fact buy both properties, was held to be quite sufficient ground on which the judge could draw the inference that the purchaser did attach importance to acquiring both properties. Their Lordships were of the view that it was self-evident that, if a purchaser is interested in buying two adjoining properties, there is a special market in which the purchaser may, but not necessarily will, pay more than the ordinary price to achieve his objective.

In the view of the Privy Council the resolution of this case depended upon two fundamental propositions. First, agency is a contract made between principal and agent; and secondly, like every other contract, the rights and duties of the principal and agent are dependent upon the terms of the contract between them, whether express or implied. It is not possible to say that all agents owe the same duties to their principals. It is always necessary to have regard to the express and implied terms of the contract.<sup>6</sup>

It was emphasised by their Lordships<sup>7</sup> that different agency contracts will have different terms. For example, normally agents should not act for competitors. However, in the case of estate agents there is an assumption that the agent is acting for competing principals and despite this conflict estate agents must be free to act for competing principals otherwise they will not be able to perform their function. In this instance the court took the view that it is not sensible to imply a term that the agent must disclose information which is confidential to another principal, *ie*, the law must recognise market practice in considering what terms can be implied into an agency contract. Therefore different agency relationships may warrant

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<sup>6</sup> *Boustead on Agency* (15th Ed, 1985), at 137-138.

<sup>7</sup> *Supra*, note 1, at 214.

different terms and these implied terms can be varied by express terms.

In *Kelly's* case Lord Browne-Wilkinson reiterated the above principle and laid down what terms the estate agency contract could not have included by stating as follows:<sup>8</sup>

Thus in the present case, the scope of the fiduciary duties owed by the defendants to the plaintiff (and in particular the alleged duty not to put themselves in a position where their duty and their interest conflicted) are to be defined by the terms of the contract of agency. Applying those considerations to the present case, their Lordships are of the view that since the plaintiff was well aware that the defendants would be acting also for other vendors of comparable properties and in so doing would receive confidential information from those other vendors, the agency contract between the plaintiff and the defendants cannot have included either (a) a term requiring the defendants to disclose such confidential information to the plaintiff or (b) a term precluding the defendants acting for rival vendors or (c) a term precluding the defendants from seeking to earn commission on the sale of the property of a rival vendor....

Their Lordships were of the opinion that the defendants committed no breach of duty, whether contractual or fiduciary, by failing to reveal to the plaintiff the purchaser's interest in buying *Vertigo*, since such information was confidential to the owner of that property. Nor did the fact that the defendants had a direct financial interest in securing a sale of *Vertigo* constitute a breach of fiduciary duty since the contract of agency envisaged that they might have such a conflict of interest.

Thus in the present case it was held that the scope of the fiduciary duties owed by the defendants to the plaintiff (and in particular the alleged duty not to put themselves in a position where their duty and interest conflicted) are to be defined by the terms of the contract of agency. Applying this principle it was held that in the case of estate agents, it is their business to act for numerous principals: Where properties are of a similar description, there will be a conflict of interest between the principals each of whom will be concerned to attract potential purchasers to their property rather than that of another. Yet, despite this conflict of interest, estate agents must be free to act for several competing principals otherwise they will be unable to perform their function.

It cannot sensibly be suggested that an estate agent is contractually bound to disclose to any one of his principals information that is confidential

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<sup>8</sup> *Supra*, note 1, at 215.

to another of his principals. Accordingly in such cases there is to be an implied term of the contract with such an agent that he is entitled to act for other principals selling competing properties and to keep confidential the information obtained from each of his principals.

Everyone (including solicitors) should look at the situation in practical terms. Imposing a higher standard of disclosure would prevent the estate agent from serving the interests of the client in obtaining a sale, as the agent would have to disclose to the principal all other conflicting principals and their transactions, for which he would need and would probably not be able to obtain the consent of all the other principals who are potential competitors for the same purchaser.<sup>9</sup>

### Conclusion

The Privy Council in *Kelly's* case<sup>10</sup> sought to distinguish the cases of *Keppel v Wheeler*<sup>11</sup> and *Dunton Properties*<sup>12</sup> by stating that the failure of estate agents to communicate material information to their principals which was held to exist in these cases related to information received by the estate agents in their capacity as agents of the principal who was complaining and was therefore not subject to any duty of confidentiality owed by the agents to other persons.

No doubt the facts of the two previous cases showed that the agent was only acting for one principal unlike the facts of *Kelly's* case. However, the general obligation of estate agents was stated in broad terms, *ie*, to do their best to get the best possible price. No where in the judgment of the two previous cases was it discussed that the fiduciary obligations of estate agents are in fact dependent upon the terms of the particular contract of agency (express or implied). After *Kelly's* case it seems that there is to be implied in every contract with an estate agent that the estate agent is entitled to act for competing principals and to keep confidential the information obtained from each of these principals. This duty whilst not displacing the duty of estate agents to get the best possible price must surely be overridden by the implied duty of confidentiality, where estate agents are acting for competing principals.

The decision in *Kelly's* case certainly accords with commercial reality, as the business of estate agents necessarily involves acting for competing

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<sup>9</sup> As emphasised above the Privy Council pointed out terms which cannot be incorporated into this agency contract. The court also held that there was no evidence that the other principal would have consented to disclose, *supra*, note 1, at 216.

<sup>10</sup> *Supra*, note 1.

<sup>11</sup> *Supra*, note 3.

<sup>12</sup> *Supra*, note 2.

principals and if the duty to get for their principals the best possible price is applied in this conflict of interest situation it will make it practically impossible for them to carry out their business.

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