See paras. 20-22, 33, 39, 55-73

Walsh v Shanahan and others

Agent - Fiduciary duty - Purchaser of land - Remedy for misuse of confidential information - Claimant being approached by two of three defendants to enter into property purchase - Defendants' company acting as agent for claimant - Claimant withdrawing from purchase - Defendants forming Third Defendant company and purchasing property for themselves - Defendants using legal advice and valuation report prepared for and paid for by claimant - Claimant alleging breach of fiduciary duty - Judge holding no agency relationship after withdrawal from transaction - Judge awarding damages - Claimant appealing - Whether judge erring in finding fiduciary duty having ended - Whether judge erring in not awarding account of profits

[2013] EWCA Civ 411, (Transcript: Wordwave International Ltd (A Merrill Communications Company))

CA, CIVIL DIVISION

LAWS, HALLETT, RIMER LJJ

29, 30 JANUARY, 25 APRIL 2013

25 APRIL 2013

G Andrews QC and S Johnson for the Appellant

R Wilson QC and G Mellon for the Respondents

Richard Slade and Co; Butcher Burns LLP

RIMER LJ:

INTRODUCTION

[1] The Appellant is Matthew Walsh, the First Claimant. The Defendants (now Respondents) are John Shanahan, James Leonard and SLH Properties Ltd, a company of which Mr Shanahan and Mr

Leonard are directors and shareholders. Mr Walsh appeals against the order made on 8 March 2012 by His Honour Judge Pelling QC, sitting as a Judge of the Chancery Division. The judge thereby dismissed his claims for a declaration that the Respondents were in breach of fiduciary duty and for an account of profits made by them in consequence of their breach of confidence. He did, however, award Mr Walsh damages of £16,965, plus interest of £10,188.54, as compensation for their breach. Mr Walsh asserts that the judge was wrong not to order an account of profits rather than the payment of damages. Geraldine Andrews QC and Simon Johnson represented Mr Walsh, as below. Richard Wilson QC and Grainne Mellon represented the Respondents, as also below.

[2] Despite Mr Walsh's ostensible win, the judge ordered him to pay (i) 90% of the Respondents' costs down to and including 13 October 2010, and (ii) all their costs thereafter, subject to a detailed assessment. That liability was significant, shown by the fact that Mr Walsh was ordered to pay £105,000 on account of costs estimated at £162,000. The costs order meant that Mr Walsh's victory was akin to that of King Pyrrhus at the battle of Heraclea. Mr Walsh also appeals against limb (i) of the order. He does not challenge limb (ii), which resulted from his rejection of the Respondents' offer under CPR Pt 36. In the event, the oral argument on the main ground of appeal, the "account of profits" issue, occupied the whole of the available time and the court adjourned the costs appeal until after it had given its judgments on the substantive appeal. This is my judgment on that appeal.

[3] The Second Claimant, Brentford Commercials Ltd, is Mr Walsh's company. It was joined as a co-claimant in order to meet a contingency that he thought might arise, but in the event did not. The judge made no order as regards Brentford, which is not an Appellant and to which little further reference is needed.

[4] The appeal arises in a second round of litigation spawned by events that took place in 1999. Mr Shanahan and Mr Leonard were, at the material times, shareholders and directors of Allied Business & Financial Consultants Ltd ("Allied"). Mary O'Donnell was also a shareholder and director of Allied. In 2006, she presented an "unfair prejudice" petition in the Chancery Division, Companies Court, under what was then s 459 of the Companies Act 1985 against Mr Shanahan, Mr Leonard and Allied. Her petition was tried over 11 days before Richard Sheldon QC, sitting as a deputy judge of the Chancery Division. The outcome of his 263-paragraph judgment, delivered on 7 August 2008, was a dismissal of the petition: see *Re Allied Business and Financial Consultants Ltd, O'Donnell v Shanahan and others* [2008] EWHC 1973 (Ch), [2009] 1 BCLC 328, [2009] BCC 517. Ms O'Donnell appealed to the Court of Appeal, where the outcome of the judgments (I wrote the lead one, with which Aikens and Waller LJJ agreed) was that the appeal was allowed in part and certain issues were remitted to the trial judge for trial: see [2009] EWCA Civ 751, [2009] 2 BCLC 666.

[5] Ms O'Donnell's 2006 petition was based in part on the same conduct by Mr Shanahan and Mr

Leonard that was destined to be the subject of Mr Walsh's claim, which he commenced in 2010. The *O'Donnell* judgments were included in the bundles, but were not referred to in argument. That was not surprising since they were concerned with different issues. Judge Pelling also noted, rightly, that they gave rise to no issue estoppel between the parties to these proceedings and he chose not to read them. The transcripts of the evidence in the *O'Donnell* proceedings (in which the witnesses included Messrs Walsh, Shanahan and Leonard) were, however, used in the cross-examinations of the witnesses in this case; and Judge Pelling referred to certain inconsistencies between the evidence in the two sets of proceedings.

[6] The only other point I would make about the *O'Donnell* proceedings at this stage is that, in my judgment on the appeal, I summarised certain of the facts found by Mr Sheldon, which related in part to events I am about to summarise again, this time by reference to the facts found by Judge Pelling. It is possible, although I have not checked, that the summary that I am about to provide may not precisely match that in my previous judgment. If so, it is irrelevant. This appeal turns on the consequences of the facts found by Judge Pelling, not on the consequences of those found by Mr Sheldon. Whilst the same facts cannot change from case to case, different judges may make different findings as to what they are depending upon the evidence before them.

[7] In what follows, I shall: (i) summarise the facts found by the judge, supplemented in part by reference to the documents; (ii) explain his reasoning for the substantive orders he made and refused to make; and (iii) deal with the "account of profits" appeal. The supplementing is largely to incorporate references to documents relating to a particular factual issue that Ms Andrews argued before us, being documents which were also before the judge but to which he did not refer in his judgment.

THE FACTS

A. The Story Down To Sunday 16 May 1999

[8] In early 1999, Mr Sulaiman contacted Mr Shanahan and told him he wished to sell the leasehold interest in the fifth floor of Aria House, 23 Craven Street, London WC2 ("the property"). He was representing the proposing vendors and understood that Mr Shanahan might have clients who would be possible buyers. The freehold and head lease of the building were owned by Sulaiman Trading Ltd, and Cordelia Holdings Ltd owned the long lease of the property. Mr Sulaiman had instructed solicitors, Richard Peat & Co ("Peat"), to act for the vendors in the proposed sale. Mr Sulaiman and Mr Shanahan agreed that Allied would receive a commission of £30,000 if it arranged a sale of the property.

[9] Mr Shanahan had met Mr Walsh in 1993. In March 1999, Mr Shanahan telephoned him to ask whether he was interested in buying the property. That led to a meeting at a London hotel between Mr Shanahan and Mr and Mrs Walsh. Mr Walsh indicated his interest in buying the property, which he explained was stimulated by the possibility that planning permission could be obtained for its residential use, which Mr Shanahan said was a realistic prospect. Mr Walsh wanted to buy the property for investment purposes. Mr Walsh (alternatively, Mr and Mrs Walsh, but the alternative matters not) appointed Allied (and, as the judge found, *only* Allied, and not Mr Shanahan or Mr Leonard personally) to act for him in relation to the arrangements for the purchase, to include liaising with relevant professionals and procuring the offer of any necessary finance, all in consideration of an all-in fee of £30,000 subject to the completion of the purchase. By the end of March 1999, agreement as to price had been reached, subject to contract. If the transaction completed, Allied stood to earn fees of £60,000 (£30,000 from each of Mr Sulaiman and Mr Walsh).

[10] Mr Walsh held money deposited with the Irish Permanent Building Society in the Isle of Man, which he proposed to use towards the purchase. On Mr Shanahan's advice, he decided to make the purchase through an Isle of Man company to be set up for that purpose. Mr Shanahan contacted ECS International Ltd ("ECS"), Isle of Man accountants and tax consultants experienced in setting up and administering offshore companies and trusts; and in early April, Mr Bailey of ECS met Mr and Mrs Walsh, Mr Shanahan and Mr Leonard and provided advice about the proposed structure. The decision was made that the property would be acquired by an Isle of Man company to be formed by ECS, who would provide its officers. Mr Shanahan was to liaise with ECS with regard to implementing that decision.

[11] On 6 April, Mr Leonard instructed Jacobsens, solicitors, to act for the proposing purchaser, which he informed them would be an offshore entity. On 12 April, on Allied paper, Mr Shanahan wrote to the vendors' solicitors, Peat, and told them that the purchaser would be "Harlequin Resources Ltd, c/o [ECS]", whose Isle of Man address was given. Mr Shanahan also provided Mr Bailey's contact details and informed them that the purchaser's solicitors would be Jacobsens. Harlequin Resources Ltd (hereafter "Harlequin IoM") had not yet been incorporated.

[12] On 14 April, Mr Shanahan wrote to Mr Sulaiman to confirm their agreement in a prior telephone conversation that the price for the property was to be £1.35m plus a payment to Mr Sulaiman personally of £100,000, which the judge found to be "ostensibly for fixtures and fittings" and out of which Allied was to be paid its agreed fee of £30,000 on exchange of contracts.

[13] Harlequin IoM was incorporated on 19 April. On 23 and 26 April, Allied approached two banks with proposals for the advance of finance to Harlequin IoM to enable it to buy the property. On 26 April, Mr Shanahan instructed Matthews & Goodwin ("M&G"), surveyors and valuers, to

inspect the property and produce a valuation report that was to be used to generate offers of finance for the purchase. They inspected the property on 29 April and produced their report on 6 May. It was sent to Anglo Irish Bank, which on 13 May indicated its willingness to provide a facility to Harlequin IoM of up to £1m towards the purchase and refurbishment of the property, including £630,000 towards the price. On the same day, Jacobsens faxed Mr Shanahan the details of his firm's client account into which the deposit for the purchase could be paid.

[14] By Friday 14 May, Jacobsens had carried out significant legal work in relation to the purchase. Exchange of contracts was expected to happen during the second half of the following week. On Sunday 16 May, Mr Shanahan sent Mr Walsh's office a fax dealing mainly with the service charge payable in respect of the property. At about this time, Mr Walsh's right-hand man, Mr Turner, prepared a financial analysis of the merits of the proposed purchase. He explained in it his conclusion that the "deal cannot reasonably, in our opinion, be considered viable".

[15] On 16 May, Allied sent Mr Bailey at ECS various documents Mr and Mrs Walsh had provided a few days earlier, which were directed at meeting a request from Mr Bailey in his letter of 6 May. They included a document headed "New Client Information", which described Mr Walsh as the client and gave his address and telephone number. It described the "source of the Initial Funds" as Bridget O'Sullivan, of New York, but also said that "the assets introduced into the new arrangement" were owned by Mr Walsh. The documents included a "Management Agreement" between (1) Mr and Mrs Walsh and (2) ECS, which the former had signed. It required ECS to hold the shares in Harlequin IoM and provide directors, with the shares to be held on trust for Mr and Mrs Walsh. ECS was also to "cause the shareholders to account to [Mr and Mrs Walsh] for dividends and other money received in respect of" the shares. The agreement reflected that instructions in relation to the affairs of the company were to be provided to ECS by Mr and Mrs Walsh. ECS received the documents on 20 May. On the other hand, an ECS "company profile" for Harlequin IoM (dated 24 May 2001 on the copy in evidence) records Mr Shanahan as the "contact for this company"; and, whilst it described the clients as Mr and Mrs Walsh, it added that they are "not to be contacted without permission from [Mr Shanahan]". We were not referred to any evidence showing when that note was first entered into the profile.

B. The Events Of And Subsequent To 17 May 1999

[16] During a telephone conversation between Mr Walsh and Mr Shanahan on 17 May, Mr Walsh stated, without further ado, that he was withdrawing from the proposed purchase. Mr Shanahan was badly shaken by that intelligence. He was anxious to maintain the income-earning opportunity represented by the transaction, on which he had spent much time and effort. Mr Leonard promptly contacted John Holleran, an Allied client, and offered him the opportunity to buy the property.

[17] On 18 May, Mr Holleran expressed his willingness to buy, but only via a joint venture under which he and his brother Joseph would have a 50% share, and Mr Shanahan and Mr Leonard the other 50%. That was agreed. On the same day, Peat, unaware of the events of 17 May, wrote to Jacobsens pressing for an exchange of contracts by 5.30pm Friday 21 May and warning that otherwise "the papers will be withdrawn".

[18] Following the agreement with the Holleran brothers, Mr Shanahan and Mr Leonard moved fast. On 19 May, using the services of accountants, they acquired an English company called Harlequin Resources Ltd ("Harlequin UK") as the joint venture company. The judge recorded that it was common ground that Mr Shanahan and Mr Leonard had not taken any steps to acquire Harlequin UK *before* 19 May. They hoped to use that company in substitution for Harlequin IoM as the purchaser of the property; and they named it as they did with a view to deceiving Mr Sulaiman into thinking that the transaction was proceeding as originally planned and that the purchaser was still Harlequin IoM. The judge also recorded that there was no evidence, nor any suggestion, that Mr Shanahan and Mr Leonard had considered taking over the acquisition of the property at any time before the telephone conversation of 17 May: the idea was only conceived afterwards. The proposed substitution of Harlequin UK for Harlequin IoM as purchasers had financial consequences. First, the £30,000 commission payable by Mr Walsh if Harlequin IoM had completed the purchase was no longer payable; second, the Hollerans were only prepared to participate if the sum for the fixtures and fixtures separately payable to Mr Sulaiman was reduced to £70,000.

[19] On 20 May, Jacobsens replied to Peat, explaining why their deadline of 21 May for the exchange of contracts was inappropriate, and identifying the outstanding matters on which they required information.

[20] On 21 May, Mr Holleran sent Jacobsens his and his brother's contribution to the deposit for the purchase, and the judge found that:

> "32 . . . thereafter Jacobsens represented the new purchaser, that is to say Harlequin UK, using as a springboard for the progress of the transaction the work that they had already done for Harlequin IoM and [Mr Walsh]. Further, the Defendants made use of the valuation report in order to obtain finance from National Westminster Bank. [Mr Shanahan] accepts that the Defendants derived a benefit from the valuation report and the legal work used in the way I have just described."

[21] Harlequin UK later changed its name to SLH Properties Ltd ("SLH": Shanahan, Leonard, Holleran), the Third Defendant/Respondent. Jacobsens knew about Mr Walsh's withdrawal from the purchase, since on 18 May they produced his bill (one addressed to his company, Brentford) for £10,398.71 for their "professional services in connection with abortive acquisition of property". I presume that thereafter their instructions continued, as before, to come from Allied, and on behalf

of a company called Harlequin Resources Ltd, although that was not of course the same company as had previously been the proposing purchaser.

[22] It is the use by the Respondents of the two matters referred to in the passage quoted in para 20 above that formed the basis of Mr Walsh's claim against the Respondents for breach of confidence. Such use was without prior reference to, let alone the consent of, Mr Walsh. The Respondents' nerve in taking over that work became the starker when on 21 May Mr Walsh gave Mr Shanahan cheques (a) in settlement of the fees for the work done for him by Jacobsens and M&G, and (b) for £3,000 for the work Allied had done for him. Mr Shanahan and Mr Leonard had no qualms about accepting the cheques in payment for the work whose fruit they were secretly appropriating for the purposes of their own acquisition of the property.

[23] Contracts for the purchase of the property by Harlequin UK were exchanged on 26 May. On 11 June, Harlequin UK changed its name to SLH. The purchase was completed on 8 July. National Westminster Bank financed the purchase to the tune of £700,000. Ms Andrews informed us that the property was subsequently developed into flats and suggested that Mr Shanahan's and Mr Leonard's half share of the profit after costs could be in excess of £1m.

[24] In the meantime, ECS had set up Harlequin IoM and a discretionary settlement called the Harlequin Discretionary Settlement ("the settlement") whose assets were to include the beneficial ownership of its shares, and they had arranged for the opening of bank accounts to fund the settlement. On 26 May, Mr Bateson of ECS wrote to Mr Shanahan at Allied confirming that "everything is in place in respect of" Harlequin IoM and the settlement. He enclosed copies of formal documents relating to their establishment, confirmed that he had received money totalling £1,868.62, from which the invoices for such establishment had been paid and said that the "rest of the monies will be left in the Isle of Man accounts we have opened on behalf of the Trust". He said he was also opening accounts for Harlequin IoM and the settlement with Irish Permanent (Isle of Man) Ltd. He added that "we do not have contact details for the client and I would be grateful if you could inform me of these for our records". In fact, ECS did have Mr Walsh's contact details: they were in the "New Client Information" that Mr Walsh had earlier completed, which Mr Shanahan had sent on to ECS and which they had received on 20 May. That ECS wanted Mr Walsh's "contact details" perhaps suggests that they did not regard Allied as the sole point of contact. Allied did not respond to that letter. I summarise below further communications that ECS sent to Allied, to which Allied also did not respond.

[25] On 15 June, Allied submitted an invoice to ECS for its £500 fee for "acting on behalf of [Harlequin IoM] in connection with Banking Matters", and ECS promptly paid it. On 16 June, ECS wrote to Mr Shanahan at Allied saying that it trusted that Allied had received the £500 "commission payment", which Mr Shanahan explained in his oral evidence was Allied's "introducer's

commission". ECS's letter included the numbers for the two accounts it had set up for Harlequin IoM and the settlement and concluded by saying:

> "Hopefully this will make life easier for when the client wishes to go ahead and transact business in the future.
>
> Everything is now up and running and I look forward to receiving further instructions from you in the near future."

Mr Shanahan's evidence was that the inference was that he had by then told ECS that Harlequin IoM was not proceeding with the purchase of the property; and Ms Andrews, both on the transcript of Mr Shanahan's evidence and before us in argument, agreed with the drawing of that inference.

[26] The documentary evidence includes an invoice dated 7 October 1999 from ECS to Harlequin IoM for fees of £634.38, but it is not apparent that it was sent either to Mr Walsh or to Allied. A further ECS invoice, dated 29 October, for £736.93 was addressed to the settlement at an address in Gibraltar. On 4 November, ECS wrote to Mr Shanahan at Allied asking him to "contact the client" to ask him to transfer money to the settlement bank account, there being an outstanding invoice of £736.93. Allied did not respond to that letter.

[27] On 15 November, ECS wrote to Mr Shanahan at Allied asking for two cheques to meet "Responsibility Fees" and "Annual Government Fees" in relation to Harlequin IoM. On 2 December, ECS wrote to him again, enclosing a further invoice for trustee services in relation to the settlement. Like letters from ECS for fees in relation to Harlequin IoM or the settlement were sent on 5 April 2000 and 10 May 2000. Again, Allied did not respond to any of these letters.

[28] On 3 July 2000, Mr Bateson of ECS wrote to Mr Shanahan at Allied and referred to his understanding "from our telephone conversation that [Harlequin IoM] is now no longer required". He wrote that he would arrange for it to be dissolved. He said that the total fees outstanding in respect of both the company and the settlement (including the expected cost of the dissolution) amounted to £2,968.91. He suggested that the client should arrange to pay about £5,000 to ECS. He wrote that "I understand that the trust is to be used for holding monies in the future". The company was not dissolved (at any rate not then), and bank statements in evidence show that £2,500 (made up of payments of £1,500 and £1,000) was paid into the settlement's account in October 2000. The inference is that the payments were made, or arranged, by Mr Walsh, but he denied that they were, and the production of his bank statements did not show otherwise. Mr Shanahan's evidence was that he knew nothing about them and we were not shown any evidence explaining how they came about. The judge made no finding as to whether Mr Walsh has a mystery benefactor.

[29] On 5 November 2001, Mr Bailey of ECS wrote to Mr and Mrs Walsh at the address provided

in their "New Client Information" and accompanying documents that Allied had sent ECS on 16 May 1999 (see para 15 above). He said ECS had tried to contact them through Mr Shanahan "but apparently [he] has not had any success in meeting with you this year to progress the matters that we have previously discussed". He said ECS was owed fees totalling £1,919.66 in respect of Harlequin IoM and the settlement and sought instructions in respect of both. He received no response from Mr or Mrs Walsh. He sent a reminder letter on 20 November 2001, but received no response to that either. Mr Walsh said in cross-examination that whilst both letters were correctly addressed, he had received neither.

[30] The judge said that Mr Walsh asserted in evidence that he made attempts to find out from Mr Shanahan what had become of Harlequin IoM, but got no information and eventually gave up. Harlequin IoM was struck off the register on 27 October 2003. The judge made no finding that Mr Walsh had made such attempts.

[31] Ms O'Donnell presented her "unfair prejudice" petition in 2006. She advanced five heads of complaint, of which one was that the opportunity that Messrs Shanahan and Leonard had taken to buy the property had come to them in their capacity as directors of Allied, of which she was a member, and they had diverted it for their own benefit and in breach of their fiduciary duties as such directors and had in consequence unfairly prejudiced her as a member of Allied. In September 2007, Mr Shanahan contacted Mr Walsh to ask him whether he would give evidence helpful to him and Mr Leonard in the O'Donnell proceedings. That was likely to lead to an inquiry by Mr Walsh as to what had become of the property and, at a meeting at which Mr Leonard was also present, Mr Shanahan told Mr Walsh that they had bought it with the Hollerans. Mr Walsh responded by asserting that "You have shafted me." Mr Walsh did give evidence in the O'Donnell proceedings, but not for Mr Shanahan and Mr Leonard. In 2010, he brought his own claim against them.

[32] The judge found that, upon Mr Walsh's withdrawal from the purchase on 17 May, the agency relationship between him and Allied thereupon ended: upon such withdrawal, there was no continuing basis for an agency relationship. The judge noted that Allied continued to receive correspondence from ECS concerning Harlequin IoM and the discretionary settlement, and that Allied at no stage wrote to ECS saying they were no longer involved and that such correspondence should in future be forwarded to Mr Walsh. He did not regard this as evidencing any continuing agency but said it was "more likely to be because anything to do with [Mr Walsh] was not income earning and thus was simply ignored".

THE JUDGE'S DECISION

[33] In an impressive 87-paragraph judgment, the judge clearly identified the issues before him

(many more than those before us) and explained his conclusions. Mr Walsh's primary claim was for an account of the profits made by the Respondents by their acquisition and development of the property, the basis for that being that they had made improper use of his confidential information for the purposes of its acquisition. The confidential information was (i) the fruit of the legal work carried out by Jacobsens for Mr Walsh down to 17 May, and (ii) the report produced by M&G on 6 May for Mr Walsh, which the Respondents used for obtaining offers of finance. There was no dispute that this information was confidential and was used by Mr Shanahan and Mr Leonard in breach of a duty of confidence they owed Mr Walsh.

[34] The first issue for the judge was whether the information was so used at a time when Allied and/or Mr Shanahan and Mr Leonard owed *fiduciary* duties towards Mr Walsh. By "fiduciary" duties I mean, as did the judge, duties arising under a relationship of trust and confidence of which the distinguishing obligation is that of loyalty (see *Bristol and West Building Society v Mothew* [1998] Ch 1, at 18, [1996] 4 All ER 698, [1997] 2 WLR 436, per Millett LJ). The judge held that the information was not so used. Allied had, as was admitted, owed a fiduciary duty towards Mr Walsh during the currency of the agency relationship. That duty came to an end, however, with the termination of the agency on 17 May 1999; and this was not a case in which the agency had been terminated by the agent with a view to avoiding the "no profit" or "no dealing" principles to which the agent was subject during the agency relationship. In these circumstances, the judge held that, after 17 May, Allied was under no continuing fiduciary relationship with Mr Walsh. In addition, even if it could be said (and the judge did not decide whether it could) that Mr Shanahan and Mr Leonard, as directors of Allied, owed separate fiduciary duties of their own to Mr Walsh during the currency of Allied's agency, those duties must also have ended with the termination of its agency. There was therefore no claim against either Mr Shanahan or Mr Leonard for an account of profits on the basis that they had made their profit in breach of their duties of loyalty as fiduciaries.

[35] Even though the fiduciary relationship inherent in Allied's agency terminated on 17 May, Allied remained subject to a continuing duty to preserve the confidentiality of confidential information belonging to Mr Walsh that it had acquired during the agency. So did Mr Shanahan and Mr Leonard, who had continuing access to the information and knowledge of its confidentiality. So long as such confidentiality lasted, a breach of that duty would entitle the former principal, Mr Walsh, to an appropriate remedy. That remedy was not, however, for the breach of a fiduciary duty of the nature discussed in *Mothew's* case. The breach of a duty of confidence will trigger a range of possible remedies, including an account of profits or damages, and the identification of the appropriate one will depend on the facts.

[36] As to the appropriate remedy for the breach of confidence in this case, the judge held that it would be "manifestly disproportionate and in excess of the just response" to order an account of profits. He concluded that the correct remedy was an award of damages to be assessed by reference to the "likely nominal cost of purchasing the assignment of the valuation report and the benefit of

the use of the solicitor's work product". He was, therefore, assessing the damages by reference to the notional reasonable price for a release by Mr Walsh of his rights. On that approach, the parties agreed that Mr Walsh should recover the fees paid by him for the work done by Jacobsens and M&G. There was a difference between them as to what should happen to the £3,000 fee that Mr Walsh also paid Allied. The judge held that the giving up by Mr Walsh of his rights to the relevant material in order to allow the Respondents to take it over for themselves and so proceed with the transaction would be on terms that he could walk away without a stain on his purse. He therefore included the £3,000 fee as part of the recoverable damages. The result was a damages award of £16,965.

THE "ACCOUNT OF PROFITS" APPEAL

A. Preliminary

[37] There is no dispute that down to the telephone conversation on 17 May 1999, when Mr Walsh instructed Mr Shanahan that he was withdrawing from the purchase of the property, Allied had acted as an agent for Mr Walsh and as such owed him fiduciary duties, including a duty of loyalty. There is, as follows, no dispute that if, during the currency of that fiduciary relationship, Allied had appropriated for its own profitable use confidential information belonging to Mr Walsh, it would in principle have been answerable, at Mr Walsh's election, to account to him for the profits it had made by such use. As Millett LJ explained in *Bristol and West Building Society v Mothew* [1998] Ch 1, at 18A, [1996] 4 All ER 698, [1997] 2 WLR 436:

> "The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations."

The ordinary remedy against a fiduciary who breaches such obligations and makes a profit out of his trust is an account of profits. I referred to the authorities in this field in my judgment in *O'Donnell v Shanahan and another* [1998] Ch 1, [1996] 4 All ER 698, [2009] 2 BCLC 666, at para 51ff. They included *Parker v McKenna* (1874) 10 Ch App 96, 44 LJ Ch 425, 23 WR 271, in which James LJ, at 124, expressed the view that the rule that no agent in the course of his agency can be allowed to make any profit without the knowledge of his principal "is an inflexible rule, and must be applied inexorably by this court . . .". Had Allied, breached that duty, it would no doubt have been so accountable.

[38] The judge, however, found that this was not a case in which any such fiduciary duty had been breached. That is because the effect of the 17 May telephone conversation was immediately to

terminate Allied's agency and with it the fiduciary duty that Allied had owed Mr Walsh during the currency of the agency; and if, which the judge did not decide, Messrs Shanahan and Leonard had, as directors, and during the currency of Allied's agency, owed separate fiduciary duties of their own to Mr Walsh, such duties must also have come to an end with the termination of Allied's agency. Mr Walsh was, by the telephone call, disclaiming any continuing interest in purchasing the property and was informing his agent, Allied, that its role in arranging its purchase was at an end. He thereupon ceased to be a client of Allied and promptly paid Allied for the work it had done for him, and also for the work done by Jacobsens and M&G. If the judge was right that Mr Walsh's telephone call brought Allied's agency to an end, I would agree with him that neither Allied nor either of Messrs Shanahan and Leonard thereafter owed Mr Walsh any continuing fiduciary duty. Lord Millett put it thus in *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 2 AC 222, at 235C, [1999] 1 All ER 517, [1999] 1 BCLC 1, in a passage quoted by the judge:

> "Where the court's intervention is sought by a former client, however, the position is entirely different. The court's jurisdiction cannot be based on any conflict of interest, real or perceived, for there is none. The fiduciary relationship which subsists between solicitor and client comes to an end with the termination of the retainer. Thereafter the solicitor has no obligation to defend and advance the interests of his former client. The only duty to the former client which survives the termination of the client relationship is a continuing duty to preserve the confidentiality of information imparted during its subsistence."

That provides the key to the judge's disposal of the case: the only question was as to the remedy, if any, to which Mr Walsh was entitled by reason of the misuse by the Respondents of his confidential information.

[39] There was no dispute that the use by the Respondents for their own benefit of the valuation report produced by M&G and the legal work done by Jacobsens, involved a breach of the duty of confidence to which the Respondents continued to be subject in respect of such information. That is because they used it without the informed consent of those (including Mr Walsh) to whom the duty was owed. The central question before this court has been whether the judge was correct that the appropriate remedy was damages rather than an account of profits. Before coming to that question, I must, however, first deal with a logically prior issue argued before us by Ms Andrews: namely, whether Mr Walsh's telephone call on 17 May 1999 *did* bring Allied's agency to an end.

B. Did Allied Continue To Owe Mr Walsh A Fiduciary Duty After 17 May 1999?

[40] Ms Andrews submitted that the judge was wrong to find that the fiduciary duty admittedly owed by Allied to Mr Walsh down to the 17 May telephone conversation terminated with that conversation. Although it is accepted that Mr Walsh thereby terminated Allied's retainer to act as Mr Walsh's agent in the purchase of the property, it is said that he did not also terminate Allied's retainer as agent in connection with the setting up, and conduct of the future affairs, of Harlequin IoM and the settlement ("the IoM entities"). It is said that Mr Shanahan had been named as the sole

contact for all matters concerning those entities and that ECS had been instructed that Mr and Mrs Walsh were not to be contacted without Mr Shanahan's permission (see the Harlequin IoM profile referred to in para 15 above). It is said that, when Mr Walsh pulled out of the proposed purchase on 17 May, he gave no instructions to Allied to tell ECS to forget about the IoM entities, nor did he tell Mr Shanahan that henceforth he would deal with ECS directly. Mr Walsh's case is that it followed that Allied owed Mr Walsh a continuing fiduciary duty as his agent in relation to the affairs of Harlequin IoM, and so, contrary to the judge's finding, this was not a case in which there had been a complete severance on 17 May of the fiduciary relationship that had hitherto been owed to Mr Walsh. If so, it is said that this was a case in which Messrs Shanahan and Leonard, as the human agents of Allied, should also be regarded as fiduciaries who had profited from their position of trust and ought, as a matter of course, to account for their profit to Mr Walsh.

[41] The like point was put to the judge, who disposed of it, perhaps somewhat summarily, as follows:

> "65 The question that remains is whether the agency relationship continued [after 17 May 1999]. In my judgment the answer to this question must clearly be that it did not. The relationship between [Mr Walsh] and Allied was one that was exclusively concerned with the acquisition of the property to which all other matters were collateral. Once [Mr Walsh] had withdrawn from that transaction, there was no continuing basis for an agency relationship. [Mr Walsh] relied on the fact that [Allied] continued to receive correspondence from ECS concerning the offshore trust and company. That is so, and it is also the case that Allied did not at any stage write to ECS saying that they were no longer involved and that any such correspondence ought to be forwarded to the Claimants.
>
> 66 I am not persuaded, however, that this was the result of a belief on the part of Allied or its directors that there was a continuing relationship, much less a continuing agency between Allied and [Mr Walsh], for there was none. It is more likely to be because anything to do with the Claimants was not income earning and thus was simply ignored. It was not to disguise the fact that [Mr Shanahan and Mr Leonard] had embarked on the acquisition of the property with Mr Holleran, for if that was so [Mr Shanahan] would not have told [Mr Walsh] what the position was in 2007."

[42] I have summarised the documents created after 17 May 1999 relating to such contact as there was (or was not) between Mr Walsh, Allied and ECS. That documentation is all essentially one way: from ECS to Allied. Mr Shanahan, in cross-examination, agreed that between 21 May 1999 (when he was given the cheques referred to in para 22 above) and September 2007 (when he had the meeting referred to in para 31 above), he neither met, nor corresponded with Mr Walsh. He did, however, claim to have made a single telephone call to Mr Walsh in about the middle of 2000, in response to the many letters he had received from ECS (which he said he had forgotten about), the purpose of his call being to tell Mr Walsh that if "some money [was] not put into that trust and offshore company, it will be struck off". Mr Walsh, however, denied there had been such a call, and the judge made no finding on that issue. If that call was made, it was the only contact there was between Mr Walsh and Mr Shanahan from May 1999 to September 2007.

[43] Mr Shanahan agreed in his evidence that, at any rate originally - that is, up to the formation of the IoM entities - he was the channel of communication from Mr Walsh to ECS. But he said that Mr

Walsh had ceased to be his client on 17 May 1999 and the subsequent single telephone call made about a year later was made simply as a matter of courtesy. It appears, however, that he at no point told ECS he was no longer acting for Mr Walsh; nor did he pass on to Mr Walsh the letters he had received from ECS. His and Allied's preferred stance appears to have been to do nothing. The judge asked Mr Shanahan twice why, once he had ceased to act for Mr and Mrs Walsh, he did not respond to ECS's correspondence by saying so. Mr Shanahan's first response was that he must have told ECS that at some stage, but could not remember when. His second response was that "I just didn't. I didn't do it . . . I think it's the case that the file got forgotten and was just left there, that's all." To the judge's supplementary point that the file could not have been forgotten as the correspondence continued to come and be placed in it, Mr Shanahan said "Well, let's call it a dormant type file. It was just there, and one of many we would have had. It wasn't an active file."

[44] Ms Andrews submitted that the judge was wrong to find that following the termination of Allied's agency in relation to Harlequin IoM's purchase of the property, Allied's agency did not continue in relation to the affairs generally (if any there were to be) of the IoM entities. It is said that Allied continued to act at least in this reduced capacity as an agent; and Ms Andrews relied on the fact that ECS continued to regard it as such an agent, since they continued to write to it as such. As Allied continued to act as Mr Walsh's agent, it continued also to owe a fiduciary duty to Mr Walsh, which duty was breached by the disloyal appropriation by the Respondents of the confidential information they used for the purposes of the purchase by SLH of the property. If so, Ms Andrews submitted that such breach opened the door to a well-founded claim that the Respondents must in consequence be accountable for the profits they made by the acquisition and development of the property.

[45] If such a fiduciary duty did so continue, it may be that the claimed consequence would follow, although I express no view on it. In my judgment, however, this court is in no position to adopt a different view on the "no continuing agency" point from that expressed by the judge. I consider that he was entitled to come to the view that he did, namely that Allied's role as an agent came to an end on 17 May 1999.

[46] The story relating to the post-17 May 1999 period is unsatisfactory. What is clear, however, as the judge found, is that on 17 May 1999 Allied's agency in relation to the purchase of the property by Harlequin IoM came to an end. The setting up of IoM entities had been exclusively for the purpose of such purchase; there is no suggestion that Mr Walsh had any wider plans for the IoM entities, and Mr Walsh's subsequent inactivity towards them shows that he did not. He made no suggestion that, following the 17 May telephone conversation, he gave Allied or Mr Shanahan a single instruction with regard to them. As Allied and Mr Shanahan had no instructions, neither was in a position to give ECS any instructions with regard to the IoM entities. Mr Walsh does not suggest that, after 17 May 1999, he spoke to either Mr Shanahan or ECS about the IoM entities. He appears simply to have closed his mind to them.

[47] In my view, it makes little sense for Mr Walsh to assert that Allied continued to be his agent with regard to the IoM entities: what, without instructions from him, did he imagine Allied was to do? The events of 17 May 1999 can be regarded as having brought to an end the only agency for which Allied had been retained, namely one in relation to the proposed purchase. If Mr Walsh wished Allied to continue to act as his agent in relation to the IoM entities in the different "no purchase" world that began on 18 May, he needed to agree that with Mr Shanahan. Instead, he did nothing. Moreover, if Allied continued as Mr Walsh's agent after 17 May 1999, on what terms was it retained? The original arrangement had been that Allied's reward would be a commission of £30,000 payable on completion of the purchase of the property. The inference is that any such commission was intended to be Allied's reward for all it would by then have done in achieving the purchase. If, as is now contended, Allied was to continue to act as an agent for Mr Walsh for an indefinite period afterwards, on what terms as to remuneration was it retained? Allied does not work on a voluntary basis; and the answer is that no such terms were so much as mentioned. Following 17 May 1999 telephone conversation, Mr Walsh paid Allied £3,000 for its efforts. Whether Allied was in fact entitled to any such payment may be questionable, but Mr Walsh nevertheless made it. Nothing, however, was said as to the terms of any continued retainer by Mr Walsh of Allied; and the inference is that the £3,000 payment was marking the end of the relationship between them.

[48] Ms Andrews informed us (without referring us to it) that Mr Walsh's evidence was that his right-hand man, Mr Turner, had tried without success to ascertain from Mr Shanahan what had happened to the IoM entities, but had no success and eventually gave up asking. There was no evidence from Mr Turner, who died some years ago. Mr Shanahan disputed Mr Walsh's evidence as to Mr Turner's alleged endeavours and the judge made no finding as to that dispute. If, however, Mr Walsh had really wanted to know about what was (or was not) happening in the Isle of Man, or wanted to unwind that connection, he knew perfectly well where to find Mr Shanahan and could have contacted him about it. Nothing that Mr Walsh did after 17 May 1999 is consistent with any perception on his part that Allied continued to act as agent either for him or the IoM entities. His generalised assertion in his re-examination that Mr Shanahan was dealing with the IoM entities can only be read as relating to the initial period of the story, when Allied was indisputably acting as an agent with regard to the proposed purchase and - exclusively in that connection - with the setting up of the IoM entities.

[49] Mr Walsh's inactivity in relation to the IoM entities over the period following 17 May 1999 was matched by like inactivity by Allied and Mr Shanahan. The evidence shows a flow, if not a torrent, of correspondence from ECS to Allied, usually asking for fees, which Allied ignored. Even if it was not an agent, Allied ought to have either (i) written to ECS to say "we are no longer involved, please address all communications to Mr Walsh", or else (ii) to have forwarded the letters to Mr Walsh and ask him to deal with ECS. Instead, with a lack of professionalism of unusual dimensions, it did nothing. Just as the nothing that Mr Walsh did points away from the inference that Allied continued to act as his agent after 17 May 1999, so likewise does the nothing that Allied

did. Each was doing nothing vis-à-vis the other because neither expected anything of the other.

[50] Ms Andrews submitted that the judge was wrong to regard the existence (or not) of a continuing agency relationship as determined by what Allied *believed* the position to be, rather than by how they behaved and by whether trust and confidence was still being reposed in them. I would not be as dismissive as Ms Andrews as to the relevance of what Allied believed, since its belief is likely to have been fathered by what, if any, arrangements it had (or had not) come to with Mr Walsh as to what its position was to be; and in fact it had come to none. I disagree that its behaviour supports the conclusion that there was a continuing agency relationship. Just as Mr Walsh was asking nothing of Allied by way of agency duties, so was Allied doing nothing by way of such duties - and such bilateral nonfeasance continued until Harlequin IoM was struck off in October 2003.

[51] As for the claimed reposing of trust and confidence in Allied to deal with ECS during the post-17 May 1999 period, Ms Andrews relied on answers given by Mr Shanahan at the end of his cross-examination in which he agreed with her that Mr Walsh trusted him to deal with ECS on his behalf and that that "continued in [sic] all the time that you were dealing with ECS". Ms Andrews' submission appears to me to attach a breadth to Mr Shanahan's answers that is inconsistent with the overall thrust of his evidence in relation to the IoM entities. First, after May 1999, he was *not* dealing with ECS: he was ignoring them. Second, he made it clear that he denied that Mr Walsh continued to be his client after 17 May 1999: and so he could not have been intending to say that Mr Walsh nevertheless continued to repose trust in him as regards the IoM connection. Third, the more likely interpretation of the passage upon which Ms Andrews relies is that Mr Shanahan was simply referring to the period prior to 17 May 1999, when he *was* dealing with ECS, was doing so on Mr Walsh's instructions when the proposed purchase was still on, and when he recognised that Mr Walsh trusted him to do so in his best interests.

[52] Finally, Ms Andrews also placed considerable weight on the fact that ECS continued to write to Allied on the basis that it was an agent. I would not attach any weight to that. ECS may well have thought that Allied continued to be an agent and that no doubt explains their continued correspondence. What counts, however, is not what ECS thought but what agency arrangements, if any, had been made between Mr Walsh and Allied, as to which it appears that, once the purchase was abandoned, there were none. There is perhaps an element of selective inconsistency in Ms Andrews' submission: she advanced ECS's apparent belief as to the existence of an agency as material evidence supporting it, yet criticised the judge for having regard to Allied's different belief denying it. The real question was whether an objective consideration of the relationship between Mr Walsh and Allied following 17 May 1999 conversation justified a finding that Allied continued to be retained as Mr Walsh's agent in relation to the IoM entities.

[53] In my judgment, the judge's finding in paras 65 and 66 was one of fact that he was entitled to make on the evidence. This court is not in a position to second guess him on that, and nothing that has been put before it satisfies me that there was any flaw in the judge's conclusion. I would reject the submission that, following the telephone conversation of 17 May 1999, Allied remained Mr Walsh's agent or, therefore, continued to owe him any fiduciary duties as such. Nor therefore, in my judgment, can Messrs Shanahan and Leonard have continued to owe him any fiduciary duties: the judge found that they had never been *separately* retained as agents, and, following 17 May 1999 there was no basis on which it can be said that they nevertheless continued to owe Mr Walsh the fiduciary duties of agents.

[54] The question, therefore, is whether the Respondents' admitted breach of confidence in making the unauthorised use they did for their own purposes of Jacobsens' work and the M&G report entitled Mr Walsh to an account of profits they made by their purchase and development of the property. I turn to that.

C. An Account Of Profits Or Damages?

[55] The relationship of trust and confidence which formerly existed between Allied and Mr Walsh had, as the judge found, come to an end on 17 May 1999. The fiduciary duties that Allied had owed as such (together with such duties, if any, as Messrs Shanahan and Leonard as directors separately owed during the currency of the agency) thereupon came to an end. Mr Walsh had, therefore, no case against any Respondent for breach of fiduciary duty. All he had was a case in tort arising out of their misuse of information belonging to him, being information that they knew or ought to have known was confidential, namely (a) the benefit of the legal work done by Jacobsens in connection with the proposed purchase, and (b) the M&G report, which the Respondents used to obtain finance for the purchase. The tort for which Mr Walsh sued was, as Lord Nicholls of Birkenhead explained in *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22, [2004] 2 AC 457, para 14, [2004] 2 All ER 995, one which had firmly shaken off the limiting constraint of the need for an initial confidential relationship and was "better encapsulated now as misuse of private information".

[56] Ms Andrews submitted that the judge was wrong to refuse Mr Walsh an account of profits. The thrust of her argument was that, on the facts, Mr Walsh was *entitled* to such an account; alternatively, if that was to put it too high, that the judge was wrong in his discretion to confine Mr Walsh to a remedy in damages. Ms Andrews advanced her arguments with energy and enthusiasm but I regard the path she had to tread as a difficult one.

[57] Ms Andrews' first problem is that the authorities show that, whilst the remedies for the misuse of private information can include an account of profits or damages, the appropriate remedy in any

particular case will be a matter for the determination of the court. Whilst a successful Claimant can *ask* for an account of profits, he will not be entitled to an account as of right.

[58] In *Seager v Copydex Ltd* [1967] 2 All ER 415, [1967] RPC 349, [1967] 1 WLR 923 (hereafter "*Seager No 1*"), the Plaintiff, Mr Seager, had invented and patented a carpet grip. He negotiated unsuccessfully with the Defendant, Copydex, for its marketing, during which negotiations he disclosed features of the grip and suggested an alternative type of grip with different features. Copydex knew this information was given to them in confidence. Following the breakdown of the negotiations, Copydex made a carpet grip which did not infringe the patent but did embody the suggestion of the alternative grip; and they even gave their grip a name very similar to that which Mr Seager had mentioned during the negotiations. They sold it in large quantities with great financial success. Mr Seager sued Copydex for breach of confidence and claimed an injunction, an inquiry as to damages, alternatively an account of profits. Buckley J dismissed the claim. The Court of Appeal (Lord Denning MR, and Salmon and Winn LJJ) allowed the appeal, holding that Copydex had infringed the duty of confidence it owed Mr Seager (although also holding that it had only done so unconsciously).

[59] Lord Denning said, at 931E:

> "The law on this subject . . . depends on the broad principle of equity that he who has received information in confidence shall not take unfair advantage of it. He must not make use of it to the prejudice of him who gave it without obtaining his consent. The principle is clear enough when the whole of the information is private. The difficulty arises when the information is in part public and in part private . . . . When the information is mixed, being partly public and partly private, then the recipient must take special care to use only the material which is in the public domain. He should go to the public source and get it: or, at any rate, not be in a better position than if he had gone to the public source. He should not get a start over others by using the information which he received in confidence. At any rate, he should not get a start without paying for it. *It may not be a case for an injunction, or even for an account, but only for damages, depending on the worth of the confidential information to him in saving him time and trouble* . . . . I would allow the appeal and give judgment for Mr Seager for damages to be assessed." (Emphasis supplied)

[60] The inquiry as to damages the court directed was on the basis of "reasonable compensation for the use of the confidential information". It is fair to note that, whilst Mr Seager had asked for an account of profits in his pleadings, the report does not disclose whether there was any argument as to the appropriate remedy at the hearing of the appeal, in which he was in person. Nevertheless, Lord Denning's statement made clear his view that the determination of the remedy was a matter for the court; and whilst Salmon and Winn LJJ did not refer to this point in their judgments, neither expressed a different view.

[61] In 1969, the case returned to the same constitution of the Court of Appeal for clarification as to how the damages were to be assessed: *Seager v Copydex Ltd (No 2)* [1969] 2 All ER 718, [1969] RPC 250, [1969] 1 WLR 809 ("*Seager No 2*") Whilst this decision is not relevant to the "account of profits" versus "damages" issue, it is helpful in relation to the quantification of damages, and the

judge's award in this case can be said to be have reflected the guidance in it. Lord Denning MR said, at 813A:

> ". . . the damages . . . are to be assessed . . . at the value of the information which the Defendants took. If I may use an analogy, it is like damages for conversion. Damages for conversion are the value of the goods. Once the damages are paid, the goods become the property of the Defendant. A satisfied judgment in trover transfers the property in the goods. So here, once the damages are assessed and paid, the confidential information belongs to the Defendants . . . .
>
> The value of the confidential information depends on the nature of it. If there was nothing very special about it, that is, if it involved no particular inventive step, but was the sort of information which could be obtained by employing any competent consultant, then the value of it was the fee which a consultant would charge for it: because in that case the Defendants, by taking the information, would only have saved themselves the time and trouble of employing a consultant. But, on the other hand, if the information was something special, as, for instance, if it involved an inventive step or something so unusual that it could not be obtained by just going to a consultant, then the value of it is much higher. It is not merely a consultant's fee, but the price which a willing buyer - desirous of obtaining it - would pay for it. It is the value as between willing seller and willing buyer . . . .
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> . . . if Mr Seager is right in saying that the confidential information was very special indeed, then it may well be right for the value to be assessed on the footing that in the usual way it would be remunerated by a royalty. The court, of course, cannot give a royalty by way of damages. But it could give an equivalent by a calculation based on a capitalisation of a royalty."

Salmon and Winn LJJ agreed, the former saying, at 814, that the "damages . . . are equal to the market value of the confidential information wrongly taken by the Defendants - the market value, that is to say, as between a willing buyer and a willing seller."

[62] In *Attorney-General v Blake (Jonathan Cape Ltd Third Party)* [2001] 1 AC 268, [2000] 4 All ER 385, [2000] 3 WLR 625, Lord Nicholls of Birkenhead (with whom Lord Goff of Chievely and Lord Browne-Wilkinson agreed) uttered some observations that I regard as in line with Lord Denning's observations in *Seager No 1*, although that decision was not apparently cited to the House. The relevant passage is in a section in which Lord Nicholls is discussing the remedies available at law and in equity for interference with rights of property, in which he includes remedies for breach of confidence. He dealt first, at 278D to 279E, with the awards of financial recompense at law for such interference, and explained how, although damages are traditionally assessed by reference to the Claimant's loss rather than the Defendant's gain, the common law had pragmatically recognised that there were situations in which this would not do justice between the parties; and he referred to cases, in particular cases of trespass to land, detention of goods or patent infringement, in which the damages were assessed by reference to the benefit received by the wrongdoer. Lord Nicholls continued, at 279E:

> "Courts of equity went further than the common law courts. In some cases equity required the wrongdoer to yield up all his gains. In respect of certain wrongs which originally or ordinarily were the subject of proceedings in the Court of Chancery, the standard remedies were injunction and, incidental thereto, an account of profits. *These wrongs included* passing off, infringement of trade marks, copyrights and patents, and *breach of confidence*. Some of these subjects are now embodied in statutory codes. An injunction restrained the continuance of the wrong, and the wrongdoer was required to account for the profits or benefits he had obtained from breaches or infringements which had already occurred. *The court always had a discretion regarding the grant of the remedy of an account of profits, and this remains the position . . .*". (Emphasis supplied)

[63] In my view, that makes the position clear: the award of an account of profits is a discretionary matter. More recently, Sales J reviewed the authorities relating to the remedies for breach of confidence in *Vercoe and others v Rutland Fund Management Ltd and others* [2010] EWHC 424 (Ch), [2010] Bus LR D141. He rejected the Claimants' assertion that, in a breach of confidence case, they had a right to elect either for compensatory damages for their loss or for an account of profits. He regarded *Seager No 1* as showing there was no such right, an approach expressly supported by Lord Nicholls's quoted observations in *Blake.* He offered this rationalisation of Lord Nicholls's further observations:

> "339 In my view, Lord Nicholls's speech in *Blake's* case has opened the way to a more principled examination of the circumstances in which an account of profits will be ordered by the courts and where it will not. His reasoning at p 285C-E, comparing remedies available in contract and for breach of confidence in relation to the same underlying facts, flows in both directions. It both opens up the possibility of an award for an account of profits in relation to breach of contract relating to confidential information and also opens up the possibility for a more principled debate about when an account of profits should be refused in relation to a breach of confidence, and a damages award (typically assessed by reference to a notional reasonable price to buy release from the Claimant's rights, similar to the award made in *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 789 and *Seager v Copydex Ltd* [1967] 1 WLR 923) made instead. Both in cases of breach of contract and in cases of breach of confidence, the question (at a high level of generality) is, what is the just response to the wrong in question . . .?"

[64] I respectfully agree with those observations. An account of profits is, like all equitable remedies, a discretionary remedy. That is what the authorities show and that is what one would expect from a principled system of civil law in which the aim is to do justice that is fair to both Claimant and wrongdoer. The objective in any case is to identify the appropriate remedy for the circumstances of the wrongdoing - to make the remedy fit the tort. As Sales J put it, it is to find the "just response to the wrong in question". In my judgment, Judge Pelling was correct to hold that he had a discretion as to whether the appropriate remedy was an account of profits or damages.

[65] Ms Andrews did not question that an account of profits is an equitable remedy, which the court has a discretion to grant or withhold. Her submission, however, was that when Lord Nicholls stated that "the court always had a discretion regarding the grant of an account of profits, and this remains the position" he was doing no more than referring to the court's discretion to withhold an equitable remedy if the Claimant has so acted as to disentitle himself to it: because, for example, he had come to equity "with unclean hands". Lord Nicholls was, said Ms Andrews, to be taken as recognising that in all other cases the Claimant who elected for an account of profits was *entitled* to an account.

[66] I disagree that Lord Nicholls can fairly be read as having so narrowly prescribed the class of cases in which an account may be refused. He was obviously saying no more than that an account of profits, like all equitable remedies, is discretionary and that, on the facts of any particular case, it may be inappropriate to grant it. There are many cases in which an equitable remedy will be refused on a discretionary basis even if the Claimant has not disentitled himself to it by misconduct: for example, a Claimant for an interim injunction may be refused one because damages are regarded as

an adequate remedy. Lord Nicholls was, in my judgment, saying nothing different from what Lord Denning MR had said in *Seager No 1*. Ms Andrews' submission as to the *Seager* decisions was that the court's order in that case was, in substance, equivalent to an account of profits. It was not. It was an award of damages, the court's apparent view being that the case was one that only merited damages.

[67] A further part of Ms Andrews' argument was that the judge's decision in the present case to favour an award of damages was anyway unprincipled. If, immediately *before* the agency had been terminated, the Respondents had, in breach of the fiduciary duty to which she asserted they were then subject, used information confidential to Mr Walsh in connection with the diversion to themselves of the opportunity to buy the property, they would, she submitted, have been made accountable for their profit as a matter of course. Yet this was a case in which, the diversion being made immediately *after* the fiduciary duty came to an end, the judge considered that he had a discretion as to whether to order an account. Ms Andrews submitted that such a distinction lacked any coherent rationale.

[68] I disagree with that submission as well. An agent who departs from his fiduciary duty of loyalty to his principal for the purpose of achieving a profit for himself is always met with a rigorous judicial response requiring him to account for his profit (see again the authorities referred to at the end of para 37 above). In this case, assuming that Messrs Shanahan and Leonard owed like duties of loyalty during the currency of Allied's agency, such duties came to an end with the termination of the agency. I can see no justification for judging their conduct as if it involved a breach of a duty they did not owe. They of course remained under an obligation not to misuse Mr Walsh's confidential information, and were answerable to him if they did. That, however, was the limit of the liability that could be levelled at them; and the authorities show that the judge had a discretion as to the remedy to be ordered against them. He was not required to subject them to a remedy that might have been appropriate for a different wrong that they did not commit.

[69] As to whether the judge exercised his judgment correctly in concluding that in the circumstances of the case, the appropriate remedy was an award of damages, I consider that he did. To express it perhaps more appropriately, the decision was one for him, and I am not persuaded that he misdirected himself in arriving at it. His decision cannot be said to have been "wrong" and so there is no basis for a successful appeal against it: see CPR Pt 52.11(3).

[70] The essence of the judge's decision as to remedy (which I draw from paras 5 and 85 of his judgment) was that the only confidential information that the Respondents appropriated was the benefit of the professional work from Jacobsens and M&G, being work they could have commissioned at their own expense. On the other hand, the account of profits sought was in respect of a property acquisition/development venture in which all the investment and risk had been taken

by SLH (representing Messrs Shanahan, Leonard and the Hollerans), a project from which Mr Walsh had unequivocally withdrawn on 17 May 1999. The judge no doubt had in mind, as is implicit in what he said, that the Respondents' knowledge of the opportunity to acquire and develop the property was not itself information in respect of which they owed a duty of confidence to Mr Walsh. On the contrary, it was Allied who had informed Mr Walsh of that opportunity. Once the fiduciary duty owed by Allied to Mr Walsh came to an end, as it did on 17 May, Allied was entitled to offer the same opportunity to its other clients; and Allied was in principle also entitled to take the opportunity up itself. So also, subject to making a full disclosure to Allied and obtaining its consent, were its directors, Messrs Shanahan and Leonard. It was their alleged omission to do so that resulted in the O'Donnell proceedings, in which it was asserted that their acquisition and development of the property breached the "no profit" and "no conflict" duties that they owed Allied and had unfairly prejudiced Ms O'Donnell's interest as a member of Allied. Whether Messrs Shanahan and Leonard were or might be answerable to Allied for their conduct was not, however, a question that Mr Walsh was entitled to ask.

[71] In those circumstances, the judge concluded that it "would be manifestly disproportionate and in excess of the just response required" to direct an account of profits. He instead awarded damages and, in para 1 of his "assessment of damages" judgment, said they should be assessed "by reference to the likely nominal cost of purchasing the assignment of the valuation report and the benefit of the use of the solicitor's work product". He then recorded, in para 2, that it was "in effect, common ground . . . that if this approach is adopted then that leads to the conclusion that" Mr Walsh should recover the whole of the professional fees he had paid. To that, the judge added the £3,000 that Mr Walsh paid to Allied.

[72] The judge's approach in making that assessment mirrors the approach explained by Lord Denning MR in *Seager No 2),* supra, at [1969] 1 WLR 809, at 813: see para 61 above, although the judge did not refer to it (he did, however, refer to Lord Denning's judgment in *Seager No 1*). His approach was, by inference, to quote again Lord Denning's words, that the confidential information that the Respondents had wrongfully misused:

> ". . . involved no particular inventive step, but was the sort of information which could be obtained by employing any competent consultant, then the value of it was the fee which a consultant would charge for it: because in that case the Defendants, by taking the information, would only have saved themselves the time and trouble of employing a consultant."

[73] In my judgment, subject to the point raised in the next paragraph, the judge's conclusion was unimpeachable. He exercised his discretion in a way not open to rational challenge. For my part, I find it difficult to see on what basis Mr Walsh considered that he had a claim of any merit to a share in the profits of the acquisition and development of the property: he had expressly spurned the opportunity of making such profits himself, and the making of such profits by the Respondents did not involve their misappropriation of any proprietary interest of his in the property, since he had

none. Ms Andrews made the point that if the maximum liability of the Respondents is to pay professional costs which, had they acted properly, they would have incurred anyway, the judge's order can have had no deterrent effect. Compensation for civil wrongs as developed by the principles of the common law and equity is not, however, ordinarily assessed with an eye on deterrence. Cases in which awards of exemplary damages are appropriate provide an exception, and there may be others, but compensation is ordinarily assessed with the aim of providing the Claimant with just redress for the wrong suffered, neither more nor less: it is not directed at penalising the wrongdoer *pour encourager les autres.* We also had some discussion in argument as to whether there is a general principle that wrongdoers like the Respondents should always be stripped of their profits. There is not. Such a principle cannot co-exist with the recognition in the authorities that an account of profits is discretionary.

[74] The point referred to at the beginning of the preceding paragraph is this. In opening Mr Walsh's appeal, almost the first point that Ms Andrews made was that when the Respondents appropriated for themselves the relevant professional work, they either were, or thought they were, at risk of losing the purchase opportunity unless they moved with speed, since otherwise Mr Sulaiman (who was said to be desperate to sell) might pull out of the proposed sale. Why such pulling out would solve his alleged desperation, there being no evidence of another purchaser in the wings ready to exchange and complete at the drop of a hat, was unexplained. Ms Andrews' point was, however, that this feature of the case meant that the confidential information that the Respondents misappropriated represented the key to the unlocking of the acquisition of the property: they had no choice but to appropriate it since otherwise they risked losing the purchase opportunity altogether.

[75] Ms Andrews' submission was based exclusively on two short passages in Mr Shanahan's cross-examination, in which he said (in relation to about the third week of May 1999) that Mr Sulaiman was "penniless", was "desperate for exchange [of contracts] and his cash", was "pretty desperate to get this done" and "he was getting very panicky at this point. That is all I can say . . . . I saw there was a risk at this point that needed to move along quickly".

[76] Ms Andrews advanced the point as a consideration pointing towards an account of profits since, contrary to the underlying assumption in the judge's assessment of damages, it was not in practice open to the Respondents to go out and buy their own professional advice: the appropriation of the confidential information was critical to the exploitation of the purchase opportunity.

[77] No reference to this point is to be found in the judge's thorough judgment. To the court's question to Ms Andrews as to whether she made this point to the judge in support of the claim for an account of profits, she replied that she did not put it "that high". To the supplementary question of how high she did put it, she advanced a candid explanation of which a fair summary is that she

did not advance the point at all. The reason, therefore, that the judge does not deal with this "timing" point is that it was not advanced to him as a consideration that he should take into account.

[78] It is right to record that Ms Andrews' timing point generated quite a head of steam in the course of argument before this court. Having reflected on the matter further, I consider that it is not a point to which this court either can or should pay any regard. The point was not deployed before the judge. He received no submissions as to what findings he should make in relation to it as a result of Mr Shanahan's evidence about Mr Sulaiman's alleged "desperation" and he therefore made no such findings; and, to state the obvious, this court cannot know what findings he would have made had he been asked. In addition, a further observation made by Mr Shanahan in the same part of his cross-examination was that the pressure to exchange was coming from the vendor "who had claimed there was another interested party on the scene" as to which Mr Shanahan expressed his scepticism in his evidence, saying "It's a ploy they use all the time to get you to hurry along and exchange contract". It was put to him that he "did not seriously think there was somebody else there", to which he replied "I didn't, no, but you know, I'd be suspicious". Those observations were also relevant to an assessment as to whether there was any substance in the timing point.

[79] It follows, in my view, that the point cannot now be deployed before this court. The only purpose of its claimed deployment was with a view to showing that the judge was wrong in failing to take account of it in his decision as to remedy. But the judge was not wrong to fail to take it into account. It was not for the judge to take this point of his own motion and make findings on it. It was for Mr Walsh to make clear to the judge what factual findings he was inviting the judge to make and what he said their legal consequences were. As Mr Walsh made no representations to the judge in relation to the timing point, the judge was not required to take any account of it: and his judgment reflects that he had many other points that he was required to deal with. Again, his omission to deal with this point cannot be regarded as "wrong" for the purposes of CPR 52.11(3). There is, therefore, no basis for allowing Mr Walsh's appeal by reason of his failure to consider it.

[80] That said, I anyway regard it as far from clear that the point, if taken, would have made any difference to the judge's determination of the "account of profits v damages" issue. It might, though, perhaps have made a difference to the assessment of damages. Reverting to *Seager No 2* (in particular, the quotation from Salmon LJ in para 61 above), it would perhaps have been open to Mr Walsh to argue that the market value of the confidential information was not simply equal to the professional cost of obtaining it, but that it had an additional value referable to the consideration that the Respondents were (or perceived themselves to be) at least at some risk of losing the purchase opportunity altogether if they were compelled to instruct other professionals of their own and to start again from scratch. What that additional value might be would, however, have had to be a matter of evidence.

DISPOSITION

[81] In my judgment, there is no basis for disturbing the judge's order as to remedy. I would dismiss the appeal against his refusal to award Mr Walsh an account of profits.

HALLETT LJ:

[82] I agree.

LAWS LJ:

[83] I also agree.

Appeal dismissed.