Estate Agents — Agents?

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The business of real estate agents has changed over the years: formerly it was to manage the estates of the absent owner. Today they still manage properties for owners but many also negotiate the sale of properties. Some only negotiate sales and do not manage properties at all.

The Courts have in the past treated real estate agents as if they are agents and imposed the duties of agents on them.[1] This has also been followed by legislation[2] and by licensing boards set up by legislation.[3] But that legislation has not conferred a cause of action on those who suffer by their acts and this is beyond time. There has been failure to recognise that in negotiating sales of real estate, real estate agents (afterwards called "negotiators") are often in a position of conflict. If, for instance, they obtain a sum of money[4] (to be held as a deposit) from an offeror they hold it pending the making of the contract as agent for the offeror. It is difficult for a man to serve two masters whose interests are, from time to time, in conflict. The negotiation of a sale of land is no exception.[5] An inability to resolve conflicts of duty that the rules engender can only be avoided by accepting that negotiators are when negotiating a sale of land independent contractors and not agents.[6] It follows that the legislation needs to be reconsidered and if a real estate agent is in breach of provision of the code of conduct established by the legislation, then a cause of action ought to be given to the person who suffers as a result of the breach.

The Nature of Agency

Agency is the relationship that exists between two persons when one, called the agent, is considered in law to represent the other called a principal, in such a way so as to be able to affect the principal's legal position in respect of strangers to the relationship by the making of contracts or the disposition of property.[7] If that definition given by Professor Fridman is recognised as being applicable not only to those cases where the relationship of principal and agent is expressly created by consent of the parties but also in all cases where the law as a matter of policy holds that, whatever

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1. *Keppel* v. *Wheeler* [1927] 1 K.B. 577.
2. *Auctioneers & Agents Act 1971* (Qld.).
3. (1987) 61 Law Institute Journal 1003.
4. *Chillingworth* v. *Esche* [1924] 1 Ch. 97, per Sargant L.J.
5. *Rhodes* v. *Macalister* (1923) 29 Comm. Cas. 19, per Bankes LJ. at 24.
6. It is not the purpose of this article to discuss the contractual relationship between owners and negotiators.
7. Fridman's Law of Agency, 3rd edition, p. 8.

the parties say, such a relationship exists,[8] then the essence of the doctrine of agency is that the agent is able to affect the liability of the principal by entering into a contract on his behalf. This issue was at large in *Branwhite* v. *Worcester Works Finance Ltd.*[9] ("*Branwhite's* case"). There the owner of a car (the appellant) sought to trade it in on the purchase of a Sunbeam Rapier car. As he had not the money to meet the difference between the sale price of the Sunbeam Rapier and the amount allowed for his trade-in, he sought to complete the transaction by means of hire-purchase. To achieve this, the dealer sells the car to a hire-purchase company and the company then lets it out on hire to the person who sought to buy giving him an option to buy for a nominal consideration when he has paid all the charges.

What caused the usual tripartite arrangement to be unsuccessful in *Branwhite's* case was the fact that the proprietor of the garage that owned the Sunbeam Rapier inserted in the proposal form for hire-purchase and in a vehicle hire-purchase agreement, both already signed by the appellant, amounts well in excess of what the proprietor and the appellant had negotiated. The proposal was accepted by the respondents and the vehicle hire-purchase agreement formally concluded. Nothing was signed by the garage proprietor.

When the appellant discovered what had happened, he eventually avoided the hire-purchase agreement and sought to recover from the respondents an amount equal to the trade-in value of his former car. One of the grounds upon which he sought to make the respondents liable was that the garage proprietor was their agent. The majority of the House of Lords, Lords Upjohn, Morris and Guest, held that this argument failed. Lord Upjohn approached the problem of agency by stating that the law was correctly enunciated by Pearson L.J. in *Mercantile Credit Co. Ltd.* v. *Hamblin*[10] —

> There is no rule of law that in a hire-purchase transaction the dealer never is, or always is, acting as agent for the finance company or as an agent for the customer. In a typical hire-purchase transaction the dealer is a party in his own right, selling his car to the finance company, and he is acting primarily on his own behalf and not as general agent for either of the other two parties. There is no need to attribute to him an agency in order to account for his participation in the transaction. Nevertheless, the dealer is to some extent an intermediary between the customer and the finance company, and he may well have in a particular case some ad hoc agencies to do particular things on behalf of one or other or it may be both of those two parties.[11]

and then said —

> I cannot see how, in fact, it is possible to spell out of this transaction that in these circumstances the dealer is in any way a general agent for the finance company. He is a principal acting on his own behalf in selling his own car, in taking at a price another car in part exchange and in-

8. *Ex parte Delhasse, in re Megevand* (1878) 7 Ch.D. 511.
9. (1968) 3 All E.R. 104.
10. [1965] 2 Q.B. 242.
11. Ibid., 269.

> submitting the hire-purchase forms to the finance company he is submitting them as proposals on behalf of the would-be hire-purchaser. That is good business on his part.[12]

If a person appears to be furthering actively his own interests in the course of promoting a transaction, agency is unlikely to be established. The judgments of Lords Upjohn and Morris are also valuable for the comment that there is another class of persons who are merely go-betweens.[13] On those persons the law does not confer agency nor, presumably, the duties of agents. Generally the judgments do nothing to detract from the principle of agency set out by Fridman. However they do afford some guidance; agents must be clearly differentiated from principals. In determining whether a person is acting as a principal, the active pursuit of the principal's own business interest is sufficient to exclude agency.[14]

There is also a distinction between agency properly so-called and agency that arises through the application of the maxim, qui facit per alium facit per se. This was recognised in the House of Lords in *Boardman* v. *Phipps*[15] where Lord Cohen said, "it is, in my opinion, plain that no contract of agency which included the purchase of further shares in the company was ever made". Yet a few lines further on he stated that the applicants were agents of the trustees for procuring information about the affairs of Lester Harris Ltd.[16] Whilst an owner may not be liable in contract, he may be liable under a wider vicarious principle. For instance there is little doubt that the wider principle applies where a hire-purchase company, having accepted a proposal, authorises the garage proprietor to deliver the car to the hirer. Here the proprietor is discharging an obligation cast on the company and the company would be liable vicariously for the acts of a garage proprietor. This is clear from *Branwhite's* case.[17]

Application to Real Estate Negotiators

Negotiators do not fall within Fridman's definition. Generally a negotiator (other than an auctioneer[18]) has no authority to bind the

12. [1968] 3 All E.R. 104 at 116. Lord Morris agreed that there was no general rule applicable and said in this case there was little evidence to support the conclusion that agency had been established (at 114).
13. This was also recognised by Lod Wilberforce (ibid., 12). See below and also *Bridle Estates Pty. Ltd.* v. *Myer Realty* (1977) 51 A.L.J.R. 743.
14. Unless perhaps his actions can be separated.
15. [1966] 3 All E.R. 721.
16. Ibid., 741. It was also drawn by Lord Denning M.R. in *Launchbury* v. *Morgans* [1971] 1 All E.R. 642 at 647.
17. (1968) 3 All E.R. 104.
18. An auctioneer has authority to sign a memorandum of sale not only on behalf of the selling owner (*Phillips* v. *Butler* [1945] Ch.D. 358) but also, in certain circumstances, on behalf of a buyer (*Sims* v. *Landray* [1894] 2 Ch.D. 318; *Van Praagh* v. *Everidge* [1903] 1 Ch.D. 434; *Chaney* v. *Maclow* [1929] 1 Ch.D. 461).

owner in contract.[19] It follows that he is not an agent strictly so-called despite the fact that the term "agent" is used not only by negotiators but by judges.[20] And, it is by no means clear that he is acting on behalf of one party. A person looking for a house may very well ask and look to a negotiator for advice.[21] In this instance the only difference from *Branwhite's* case lies in the fact that the negotiator does not own the property. The whole conduct of sales of houses often with competing negotiators vying with others to effect a sale is more consistent with the view that negotiators are principals furthering their own interests. The extent of control that an owner has over a negotiator endeavouring to find a buyer is consistent with this view. In short, they do not appear to be agents within the rule expressed by Fridman or within the principle expressed in the judgment in *Branwhite's* case. Nor does it appear that the principle, qui facit per alium facit per se is applicable. In employing a negotiator the owner is employing him for his services, although the negotiator is under no obligation to do anything.[22] It is the making available of services that suggest that negotitors are independent contractors. The exercise overall conduct of the negotiations; they determine the properties persons are taken to. Further it has never been suggested that a negotiator in taking a person to see a property is the agent of the owner for the purposes of making the owner vicariously liable if the negotiator drives negligently.[23]

Negotiators do not appear to be agents and the principle qui facit per alium facit per se does not generally apply so as to make owners liable.[24] Further it is unlikely that the payer will succeed in recover-

19. *Keen* v. *Mear* [1920] 2 Ch.D. 574; but he may have authority if he is instructed to sell (*Rosenbaum* v. *Belson* [1900] 2 Ch.D. 267 and *Keen* v. *Mear*). Contrast *Wragg* v. *Lovett* [1948] 2 All E.R. 968 where Lord Greene, M.R. giving the judgment of the Court of Appeal, said —

   "We must not be misunderstood as suggesting that when a vendor merely authorises a house agent to 'sell' at a stated price he must be taken to be authorising the agent to do more than agree with an intending purchaser the essential (and, generally, the most essential) term i.e. the price. The making of a contract is no part of the estate agent's business, and, although, on the facts of an individual case, the person who employs him may authorise him to make a contract, such an authorisation is not likely to be inferred from vague or ambiguous language.".

20. Too much unquestioned reliance on negotiators' statements, and admissions in previous cases of clouded an obscure problem (*Goding* v. *Frazer* [1967] 1 W.L.R. 286; *Brodard* v. *Pilkington* [1935] C.P.L. 233; *R.* v. *Pilkington* [1958] 42 Ch.D. App.R. 233; *Ryan* v. *Pilkington* [1959] 1 W.L.R. 403; *Burt* v. *Claude Cousins & Co. Ltd.* [1971] 2 All E.R. 611; and *Barrington* v. *Lee* [1971] 2 All E.R. 1231).
21. A negotiator may be liable for negligent advice (*Dodds* v. *Millman* (1964) 45 D.L.R. 2d 472).
22. *Luxor (Eastbourne) Ltd.* v. *Cooper* [1941] A.C. 108.
23. Take by way of example the owners of Blackacre and Whiteacre asking a negotiator to bring X to look at their properties. If X is injured because of the negligent driving of the negotiator at a point exactly halfway between two properties, can X sue both owners? The answer is surely no; it is the negotiator qua independent contractor who decides who he takes to Blackacre, Whiteacre or other property "on the books".
24. If an owner tells a negotiator to inform persons the house is only five years old when it is ten, the owner is liable, not on the assumed bases of principal and agent (see *Armstrong* v. *Strain* [1952] 1 K.B. 232) but on an ad hoc agency.

ing from the owner what he paid to the negotiator merely by contending that the latter was a stakeholder.

Negotiators as Stakeholders

The essential difference between the function of an agent and a stakeholder is seen in the judgment of Lord Tenterden C.J. in *Harington* v. *Hoggart*[25] where he said –

> There is an essential distinction between the character of an agent and that of a stakeholder . . . If an agent receives money for his principal, the very instant he receives it, it becomes the money of his principal. If, instead of paying it over to his principal, he thinks fit to retain it, and makes a profit of it, he may, under such circumstances, . . . be liable to account for the profit. . . . Here the defendant is not a mere agent, but a stakeholder. A stakeholder does not receive the money for either party, he receives it for both; and until the event is known, it is his only duty to keep it in his own hands.[26]

The payment to a stakeholder implies that there is a three-cornered contract, separate from the contracts (if any) between the owner and the negotiator on the one hand and the owner and the person looking for a property on the other. It is a matter of substance and not of form. It follows that the negotiator can only hold money as a stakeholder where there is a contract in being and the terms of the contract or custom so provide. Whilst the parties are negotiating about terms, the payment to a negotiator of a sum of money cannot bring about a contract of stakeholding.[27] Nor can statements as to how the money is held affect the rights of third parties who have not agreed or perhaps have not been consulted. Stakeholding requires three consenting parties; two are not enough.[28]

Sorrell v. Finch[29]

In *Sorrell* v. *Finch* the owner of a house instructed Levy who had set up business as a negotiator under a trade name. Levy unknown to the owner was an undischarged bankrupt. The house was to be offered for negotiation at £5,500. Nothing was said about any deposit being taken by Levy nor any mention made of commission on the introduction of a willing buyer. Five prospective negotiating "buyers" apart from the respondent paid sums of money to Levy and in the receipts given by Levy the sums were characterised as deposits. The respondent, one of the prospective negotiating

25. (1830) 1 B & Ad 577.
26. Ibid., 586. The judgments of Parke and Patteson JJ at 589 and 592 are consistent with the views expressed by Lord Tenterden.
27. Even though the payment or receipt or both is expressed by one or both of the parties as a stakeholding.
28. *Ryan* v. *Pilkington* [1959] 1 All E.R. 689, Hudson LJ. at 692.
29. [1977] A.C. 728.

buyers, paid him a sum of money which was equal to 10% of the £5,500. Levy gave to the respondent two receipts. They were signed by him and indicated that the sums received were deposits: but, there was no indication of the capacity in which Levy held the money. Both documents contained the words "subject to contract". Being dissatisfied with the progress made towards the creation of a contract and on discovering that Levy had disappeared, the respondents visited the owner who informed them that others had paid sums of money and that they were not the first. The question that the House of Lords had to determine was whether or not the owner was liable to repay the sums of money that they had paid to Levy when there was no contract between the owner and the payers. The House held that it was not in accordance with first principles in this branch of the law to hold that the negotiator in those circumstances was authorised to receive on the owner's behalf a pre-contract sum of money in the absence of express[30] authority so to do even though the owner had acknowledged that a deposit had been received. The House also held that the negotiator, having no authority from the owner to receive a sum of money as his agent, and there being no suggestion of the owner's complicity in any fraudulent misrepresentation, nothing that the negotiator said in order to induce the payment of the sum of money could implicate the owner and that, accordingly the alternative claim in tort failed.

The decision of the House of Lords in many ways reflects that of the earlier decision of the High Court in *Peterson* v. *Moloney*.[31] There the High Court held that real estate agents (negotiators) have no implied authority to receive a deposit or other moneys on the sale of land where the buyer had paid the whole of the purchase money to the real estate agent.[32] In doing so the Court[33] said —

> In connection with sales and purchases of property the word "agent" is apt to be used in a misleading way. The legal conception of agency is expressed in the maxim "Qui facit per alium facit per se", and an "agent" is a person who is able, by virtue of authority conferred upon him, to create or affect legal rights and duties as between another person, who is called his principal, and third parties. When a person is employed to find a buyer of property, he is commonly said to be employed as an agent, and the term "estate agent" is a common description of a class of persons whose business is to find buyers for owners who wish to sell property. But the mere employment of such a person under the designation of agent does not, apart from the general rule that the employer will be responsible for misrepresentations made by him,[34] necessarily create any authority to do anything which will affect the legal position of his employer. He may, of course, be given any express authority[35] which the employer thinks fit to give him, and estoppels may arise, but the law

30. There could of course be a holding out.
31. [1951] 84 C.L.R. 91.
32. Ibid. 95. The decision recognised that it was open to the payer to allege ratification or estoppel if the facts so supported.
33. Dixon, Fullagar, and Kitto, JJ.
34. It is not clear why the owner is liable for misrepresentations that are the result of a fertile mind of an independent contractor.
35. Cf. 1982 Real Estate Institute Queensland contract for the sale of land.

> does not imply from the mere fact of employment to find a purchaser a general authority to do on behalf of the employer anything which may be incidental to the effecting of a sale.[36]

In the later High Court decision of *Brien* v. *Dwyer*[37] there was recognition of the House of Lord's decision by Barwick C.J.[38] More importantly Gibbs J. observed,[39] "the expression 'agent',[40] when used in relation to an estate agent acting for a vendor, is misleading, as has been pointed out by this court in *Petersen* v. *Moloney* and by the House of Lords in *Sorrell* v. *Finch*".[41] The positions in England and Australia correspond.

Duties of agents inappropriate to negotiators

Further support for the argument that negotiators are independent contractors may be found by showing that the rules of agency are inappropriate to the present day methods of selling land which is characterised by negotiators asking and receiving a sum of money from offerors. Such a negotiator is an agent for the offeror and owes a fiduciary duty to the offeror as well as to the owner.[42] It follows that the negotiator has an obligation to inform both parties of the value of the land – that makes a sale difficult.[43] He cannot run with the hares and hunt with the hounds.[44] The practice of asking owners their lowest price and potential offerors their highest[45] suggests that negotiators are not endeavouring to obtain the highest price for owners[46] and the lowest price for potential offerors.[47] If a potential offeror were to ask a negotiator what is the owner's lowest price, how can the negotiator fulfil his duty to both owner and potential offeror if he is subject to a fiduciary duty to both and an obligation to pass on all information to his principal? If he does so to one principal, the potential offeror, he may however lose commission payable by his other principal, the owner. An agent acts in opposition to the interests of his principal by disclosing that price and disentitles himself to commission from that principal[48] who is entitled to the disinterested skill, diligence, and zeal of the agent for his exclusive benefit.[49] If the negotiator offers or is asked to find

36. Ibid., 94 and 95.
37. (1979) 141 C.L.R. 378.
38. Ibid., 385.
39. Ibid., 395.
40. Ibid., 395.
41. [1977] A.C. 725.
42. *How* v. *Carman* [1931] S.A.L.R. 413.
43. Ibid. "No doubt the position of an agent who is employed by both parties is difficult, but the difficulty is one in which he places himself" (Ibid. Richards J., at 415).
44. *Anglo-African Merchants Ltd.* v. *Bayley* [1969] 2 All E.R. 421.
45. As experienced by the writer and others he has spoken to.
46. *Keppel* v. *Wheeler* [1927] 1 K.B. 577.
47. Story, Agency, s. 210.
48. *Andrews* v. *Ramsay & Co.* [1903] 2 K.B. 635.
49. Story, Agency, s. 210. See also *John McCann & Co.* v. *Pow* [1974] 1 W.L.R. 1643.

mortgage funds for a potential offeror, and, in doing so, is informed that the value of the property, the subject-matter of the negotiations, is more than the negotiated price, must the negotiator disclose this information to the owner? On the authority of *Keppel* v. *Wheeler*,[50] the answer must be in the affirmative even though the negotiator was acting as agent of the potential offeror in finding mortgage funds.[51] A negotiator is also likely to find himself being subject to a conflict of interest where land is sold subject to a conditional finance clause and the mortgage offer is only a little short of that specified. Can the negotiator legitimately try to persuade the buyer to go ahead? Surely he can only do so if he is an independent contractor. Certainly the conflict suggests that the rules of agency are indeed inappropriate to the present day method of selling land where a negotiator may act for both parties.[52] Similarly where a negotiator receives a sum of money from a person, the rules governing double commission preclude the negotiator from receiving a commission on sale.[53] Those rules are strictly applied[54] and are wide enough to apply to any benefit that accrues to the negotiator.[55] The owner of land obtains no benefit when a person pays a sum of money to a negotiator. Payment, in the absence of contract, cannot bind, and does not bind, that person; similarly, it does not bind the owner. Neither secures a benefit.[56] Only the negotiator secures a benefit. He secures the opportunity to invest the sum of money and earn interest on it.[57] More importantly the taking of a sum of money is a step towards earning commission. Once paid, a person may be reluctant not to proceed. Such benefit that accrues is secured by the negotiator. Where an agent seeks to earn a second commission out of one transaction, he must make a full disclosure to his principal before taking on the second agency.[58] He must also make plain the position to the second principal,[59] and the onus is on him to disclose the exact nature of his interest.[60] A negotiator would therefore have to explain to the person that he secures no

50. [1927] 1 K.B. 577.
51. In *Anglo-African Merchants Ltd.* v. *Bayley* [1969] 2 All E.R. 421 an "insurance agent" who had obtained a report on damage for the assured was held not to be entitled to withhold the report from the insurers, "his principal", when the insurance was effected. Those rules apply to other remuneration, including salary (*Boston Deep Sea Fishing and Ice Co.* v. *Ansell* (1888) 39 Ch.D. 339).
52. Unless they are viewed as preventing at all times negotiators from taking sums of money. Neither usage nor lax practice of negotiators which is plainly of their own creation for their convenience and advantage is of course relevant (*Robinson* v. *Mollett* (1875) 7 H.L. 802 at 829).
53. In the absence of full disclosure.
54. *Parker* v. *McKenna* (1874) 10 Ch.App. 96.
55. *Fullwood* v. *Hurley* [1928] 1 K.B. 498, Lord Hanworth M.R., at p. 502.
56. The owner may, however, be more reluctant to call off negotiations and sell to another where a sum of money is paid.
57. If his holding is as stakeholder and *Potters* v. *Loppert* [1973] 1 All E.R. 658 is correctly decided; not otherwise (*Brown* v. *I.R.C.* [1965] A.C. 244).
58. *Parker* v. *McKenna* (1874) 10 Ch.App. 96.
59. *Fullwood* v. *Hurley* [1928] 1 K.B. 498.
60. *Dunne* v. *English* (1872) L.R. 10 Eq. 524. It is not enough to disclose that he has an interest or to make a statement such as could put the principal on inquiry.

benefit from the payment of a sum of money during negotiations; and that, in the event of the negotiator holding the money as stakeholder, the payer will have to bear the loss if the negotiator in the events that happen has to return the stake to the buyer but is unable to account for it. There is no evidence[61] that negotiators do this. Negotiators seem to act as if the rules of agency cast no duties on them.

Legislation

Parliaments have for some time legislated to cover the activities of negotiators. But the legislation has failed to recognise that in buying and selling land "real estate agents" are in fact negotiators acting as independent contractors furthering their business by earning commissions. And this is reflected in the notice of the Estate Agents Board published in the Law Institute Journal.[62] After commenting that the Board is aware that some "agents" obtain discounts from tradespersons to and in relation to advertising, the notice reads, "Because of the fiduciary relationship between an agent and his client, an agent may not retain for himself a trade or advertising discount or rebate without the express consent of his client".[63] Such a statement assumes that "real estate agents" are in all their activities acting as agents. But only those who make contracts on behalf of a principal are agents properly so called.[64] Further it is suggested the greatest source of income of negotiators is derived from their activities negotiating sales of land and in doing that they are acting as independent contractors. The relationship between an owner of land and negotiator acting as an independent contractor does not give rise to a fiduciary relationship. Indeed it cannot if there be no duty cast on the negotiator to do anything.[65]

No doubt a negotiator when negotiating sales of real estate is bound by the code of conduct prescribed by the Estate Agents (Professional Conduct) Rules 1981 (Vic.). And rules 5(1), 9, and 11 may be seen as important to owners of land. Rule 5(1) requires a negotiator to use reasonable endeavours to ascertain all available information relevant to the service, etc., to be rendered. Rules 9 and 12 respectively provide that "an agent's first responsibility is service to his principal but not to the extent that he fails to act in a fair and reasonable manner towards any other party to negotiations or a transaction" and "an agent shall complete all work on behalf of his principal as soon as is reasonably possible".[66] Alas rules 9 and 12 are limited to the situations where the owner of land is the principal. But the relationship of owner of land and negotiator is

61. The writer has never had it explained to him; nor does he know of anyone to whom it has.
62. (1987) 60 Law Institute Journal at 1003.
63. Ibid.
64. There they may be ad hoc agents in the manner described.
65. Luxor (Eastbourne) Ltd. v. Cooper [1941] A.C. 108.
66. ibid.

not that of principal and agent and that excludes those rules applying.

Breach of professional conduct rules — cause of auction

More importantly for owners of land and buyers is the question whether a failure to comply with a provision of the Estate Agents (Professional Conduct) Rules 1981 (Qld.) gives rise to a cause of action[67] separate from an action in negligence.[68] In Roots v. *Oentory Pty. Ltd.*,[69] a buyer sued the seller and the negotiator for damages on the grounds that a negotiator had been negligent and in this the buyer succeeded. The buyer also advanced a breach of statutory duty. The argument was met by Thomas, J., in these words — [70]

> This was based firstly upon s. 45 of the Auctioneers and Agents Act 1971-1985,[71] but I do not think that that section (with the "Code" published thereunder) evinces any intention to create substantive duties. It is useful as an indicator of the ethical standards which the representatives of real estate agents endeavour to impose upon members, and is some measure of the standard to which real estate agents are expected to aspire. But I see no reason to find that any statutory duty has thereby been created.

Section 45 of the Auctioneers and Agents Act 1971-1985 is in the following terms:-

(1) The committee may, from time to time, as a guide to the standard of professional conduct expected of real estate agents and real estate salesmen, compile a code of professional conduct of real estate agents.

(2) Such a code shall be submitted to the governor in council for approval and, on approval, be published in the Gazette, and that the production in evidence of a copy of the Gazette containing a code of professional conduct of real estate agents shall be sufficient evidence of the compiling of the code by the committee, the approval of the governor in council thereto, and of the matters contained in the code."

That provision must be compared with the Victorian provisions. There section 10 of the Estate Agents Act 1980 provides —

(1) The Board may —

. . .

(b) with the consent of the Governor in Council make rules for with respect to —

(vii) prescribing rules of professional conduct for agents and sub-agents;

67. The owner must establish damage.
68. A negotiator may be liable to both the owner (*Havas* v. *Cornish & Co. Pty. Ltd.* [1985] 2 Qd.R. 353) and to the buyer (*Roots* v. *Oentory Pty. Ltd.* [1983] 2 Qd.R. 745): see also *Georgieff* v. *Athans* [1981] 26 S.A.S.R. 412.
69. Ibid.
70. Ibid., at 758.
71. Ibid., at 758-759.

. . .".

The Victorian provision cannot be said to be of greater import than the Queensland provisions. Nor can it be said on general principles that a breach of a rule made in pursuance of those provisons can give rise to a cause of action in favour of a third party who suffers as a result of an act done by a negotiator.

The second submission in *Roots* v. *Oentory Pty. Ltd.* concerns whether or not s. 65 also created a statutory cause of action. Subsection 1 of that section, in brief, prohibits an auctioneer from publishing or causing to be published any statement or representation that is false or misleading (whether to his knowledge or not) concerning any real estate property which he has for sale by auction or as a "real estate agent".[72] In relation to the submission that that provision also created a statutory cause of action, Thomas J. said:-

> In the present case, the only publication that appears to be covered by that section is the publication in the Courier Mail. It is ambiguous in that the representations as to takings do not indicate whether they are of past, present or future profits. The conduct of Mr. Cunningham which I regard as misleading in the present case is to be found primarily in his oral statements, and not in the advertisement per se. I therefore am not persuaded that a breach has been established of s. 65. It is unnecessary for me to consider the further question whether s. 65 creates a statutory cause of auction.

It is clear in the context of the observations under s. 45 and the fact that the penalty is prescribed for breaches of s. 65 that it is unlikely that the provisions of that section give a statutory cause of action. In so far as the section deals with false or misleading statements, it would appear that there is an adequate civil remedy in the tort of deceit and hence there is no need to create out of the provisions of s. 65 a statutory cause of action.

Notice issued by Estate Agents Board — Victoria

In the context of the notice issued by the Estate Agents Board, it is doubtful whether the assertion that the failure to disclose could give rise to civil liability as well as criminal liability can apply to a negotiator. The reason for this is that there does not appear to be any general law rules cast upon independent contractors at large and that the legislation in itself is not sufficiently clear so as to create a statutory cause of action.

Further if one turns to s. 50 of the Estate Agents Act 1980 and in particular to ss. 4, one would see that in relation to an advantage that a negotiator obtains in addition to commission, there is a mechanism whereby the Board can order the negotiator to refund any excess or improper money received or retained.[73] In those cir-

72. S. 1A and the other subsections of the section are to similar effect.
73. Even this does not give the aggrieved person a cause of action. If the negotiator does not comply with the order he may expose himself to further disciplinary proceedings.

cumstances it is difficult to infer that there should be a separate cause of action open to an owner who discovers that the negotiator has obtained a discount in relation to the advertising charges which is not credited to the owner on the account rendered by the negotiator.[74] By way of contrast, item 2 of the notice deals with maintenance companies. It relates to negotiators qua agents. But there all the principles of principal and agent apply, particularly those relating to secret commissions. There is little need for the reminder. Assuming that there was, the terms of the notice overlook the provisons of sub-section (5) of section 50 of the Estate Agents Act 1980. That sub-section precludes an estate agent from obtaining more than the maximum rate of commission prescribed. In these circumstances it is purposeless, where an agent is remunerated at the maximum rate, for the negotiator to obtain consent of the principal. It is purposeless because the negotiator is not entitled to retain such a benefit in excess of a prescribed rate. It is only appropriate where the negotiator agreed to a rate of commission less than the maximum amount and the discount etc. obtained through operation of the maintenance companies did not make up the balance so that the total amount paid to the negotiator did not exceed the maximum prescribed for the work performed. Finally the third statement simply reminds that the breach of a statutory fiduciary obligation results in loss of benefits improperly obtained. This can only be directed to negotiators in the sense of agents properly so called. It goes without saying that a negotiator when negotiating a sale of land is not an agent. He is an independent contractor furthering his business of earning commissions when negotiating sales of property. No general fiduciary obligation is cast upon such a person.

Conclusion

In general terms the need to review the activities of those who call themselves what is generally real estate agents has existed for some time. Those that are agents in the proper sense of the word ought to be regulated by one code of conduct and those who are negotiators should be regulated by a separate code. There is no suggestion as yet that the rules relating to fiduciary obligations are inadequate to protect owners of land who engage negotiators as agents to manage their real estate.

On the other hand negotiators who are independent contractors are persons who can at the same time run with the hares and hunt with the hounds.[75] They are the ones in relation to which the Estate Agents (Professional Conduct) Rules 1981 ought to apply. Further the failure to comply with the duties prescribed should give rise to a

74. SS. 5 of that section provides that a real estate negotiator cannot contract out so as to be remunerated by way of commission or otherwise in excess of the maximum rate prescribed.
75. *Anglo-African Merchants Ltd.* v. *Bayley* [1969] 2 All E.R. 421.

cause of action in favour of a person who suffers. There is no reason why those rules should not benefit persons seeking assistance from negotiators when purchasing a property. In short, there ought to be rules that determine the conduct of a negotiator so that he does not run and hunt at the same time. There seems to be no reason why there should not be a different set of rules of conduct for the two functions. But he should not be permitted to do both at the same time. In this regard, rule 9 requires to be redrafted. An independent contractor who is earning commissions by negotiating sales of property to third persons ought to act fairly and reasonably not only to the owner of the land but also to those persons. It is not sufficient to say that provided he acts fairly and reasonably to "a negotiating buyer" then the first responsibility is service to "the principal". This service should be to the community as there is no reason why it should be assumed that the owner is "his principal". A negotiator has no principal but himself and no doubt when he acts in his business his first responsibility is to himself. He decides who he takes to properties and he decides whether he will pass on an offer to the owner. In all manner of aspects of conducting a business as a negotiator, the negotiator is all the time making decisions which further his business. If the owner of property indicates to negotiator that a certain person is interested in looking at the property and invites the negotiator to make arrangements there is no obligation in law on the negotiator to make arrangements. If the negotiator has formed an opinion that the third party is unlikely to purchase the property for whatever reason and does not approach the third party, the owner of land has no cause of action against the negotiator.[76] In the context of the application of that rule to a negotiator who is acting as an agent properly so called (e.g. in relation to the management of real estate) one would doubt whether it was the intention of the legislature to take away from a principal the right to the agent's undivided loyalty. An agent's duty is a fiduciary one to the principal and it seems strange that the rule purports to water down the classic statement of law which regulates and has regulated from time immemorial the relationship of principal and agent.

There is still a compelling need for a complete re-examination of the responsibilities which are to be cast by way of legislation on negotiators. In relation to "real estate agents" qua agents the law is clear and adequate. It was sufficient to incorporate that in a code of conduct and give the Board disciplinary powers. But that is insufficient for negotiators: for them there is a need for provisions to regulate their conduct as independent contractors. Hence there should be a separate code of conduct for them as negotiators and a breach of a provisions of that code should give rise to a statutory cause of action. It is not sufficient for the Estate Agents Board to confuse these two separate concepts and it is misleading and inaccurate to try to generalise in relation of matters of discount, rebates, maintenance companies, or fiduciary obligation. To the

76. *Luxor (Eastbourne)* v. *Cooper* [1941] A.C. 108.

owner of that land it is little consolation that the negotiator has acted in breach of some code of ethic if the owner has suffered loss and has no cause of action.[77]

77. Take the instance in Queensland (known to the writer) where the negotiator hoodwinked an owner into signing a contract where the owner wanted to take it home to think about. The owner was told that she could not do it. The sale price was $80,000 with a deposit of $200! The Queensland Office of Negotiator maintained that the allegation was not substantiated (even though neither the owner Or the negotiator was interviewed). Further, if substantiated, nothing would be done on the grounds that the only action the office could take was to deprive a negotiator of his licence and the conduct was said not to warrant such a course.