13 pages.

**ROYAL COURT**
**(Samedi Division)** 218A.

**4th December, 1997**

**Before: Sir Peter Crill KBE, Commissioner**
**and Jurats A. Vibert and M.A.Rumfitt**

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|---|---|---|
| Between | Hotel Savoy Limited<br>Trading as Hotel Savoy | First Plaintiff |
| | Swansons Hotel (1993) Limited<br>Trading as Swansons Hotel | Second Plaintiff |
| And | Destination Specialists Ltd. | First Defendant |
| | Margaret Anne Devoy | Second Defendant |
| And | Barclays Bank plc | First Party Cited |
| And | Lloyds Bank plc | Second Party Cited |

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**Advocate P.C.Sinel for the plaintiffs**
**Advocate A.D.Hoy for the defendants**

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**JUDGMENT**

**THE COMMISSIONER:** Mr. Jose Lora is the beneficial owner of the Plaintiff companies, Hotel Savoy Limited, trading as Hotel Savoy and Swansons Hotel (1993) Limited, trading as Swansons Hotel. Miss M.A.Devoy is the beneficial owner of the first defendant, Destination Specialists Ltd., whose business is that of a tour operator. It works under the umbrella of Channel Islands Travel Services Ltd. because it lacks the essential membership of the Association of British Travel Agents and does not hold an Air Transport Organizer's Licence. The two companies, that is to say the first defendant and CITS Ltd., put together package holidays to Jersey using ITX flights as the most economical. Included in such packages are the accommodation, travel, transport between the airport/ harbour and the hotels, hire car charges where applicable, and insurance. Not every package is identical but the essential, and indeed the obvious, elements are travel and accommodation. The customer is invoiced by CITS Ltd. on a printed form which sets out the total cost to the customer. At the bottom left hand corner of the form is a breakdown of the total headed "Hotelier information" in which the component parts of the package are broken down into the travel and accommodation and other charges. That section, however, is not included

in the customer's copy. On receipt of the invoice the customer pays CITS Ltd. the total charge and, in turn, the accommodation content is sent to DSL to enable it to pay the hotel according to its contract with it. It will be convenient hereafter to call the first and second defendants "DSL".

In or about August, 1993, Mr. Lora on behalf of the plaintiffs and Miss Devoy on behalf of the first defendant concluded an agreement, eventually reduced to writing, which was drafted by Miss Devoy. About a month later a typed copy was signed by Miss Devoy but apparently not by Mr. Lora. However there is no dispute but that the written document contains what the parties had agreed. Nothing, therefore, attaches to the lack of Mr. Lora's signature. No oral additions were made to the written document which is as follows:

*"DESTINATION SPECIALISTS LIMITED*

*HOTEL SAVOY LIMITED*
*SWANSONS HOTEL (1993) LIMITED*

*AGREEMENT FOR THE PROVISION OF MARKETING AND RELATED SERVICES*

*This document is intended to act as an interim agreement between Destination Specialists Limited 'DSL', Hotel Savoy Limited, 'Savoy' and Swansons Hotel (1993) Limited 'Swansons'.*

*Under this agreement, DSL undertakes to:*

1. *Establish a Central Reservations Office 'CRO' for Savoy and Swansons. This will involve establishing manual booking charts and administrative procedures compatible with the Welcome computerised system which is operated by Savoy and Swansons.*

2. *DSL will manage the operation of the CRO in order to maximise the revenue earned from accommodation by Savoy and Swansons.*

3. *DSL will market and promote Savoy and Swansons in the following manner:*

- *Setting up features in the brochures of UK tour operators,*
- *Offering adequate allocations and arranging contracts with UK tour operators,*

- *Managing the administration matters with the UK tour operators. However, all matters relating to receipt of payment will be the responsibility of Savoy and Swansons.*

- *Establishing relationships with coach companies organising special tours to Jersey, with emphasis on coinciding with special events.*

- *Establishing a link with Viewdata and the Central Reservation System being established by Jersey Tourism.*

- *Ensuring that Savoy and Swansons are in the 'Where to Stay' magazine produced by the Jersey Hotel and Guest House Association. Savoy and Swansons will pay for the cost of the advertisements.*

- *Developing the European market for the hotels by introducing European tour operators.*

- *Where necessary, generate additional advertising in order to maximise accommodation revenue. Savoy and Swansons will pay for the cost of the advertisements.*

4. *DSL undertakes to meet prospective tour operators on their arrival in Jersey on a familiarisation visit and to give them a sightseeing tour of Jersey. The ancillary costs, mainly the use of a car and petrol costs will be borne by DSL.*

*Under this agreement Savoy and Swansons undertake jointly to:*

5. *Pay a fee of 5% of the net income relating to accommodation and related food received from guests booked into the hotel through the efforts of DSL. For the avoidance of doubt the following applies:*

   *Net income means the net amount charged to the guests for accommodation and food which is included in the arrangement booked by the guest. It does not include incidental income or food which is not part of the package booked by the guest.*

   *Guests booked through the efforts of DSL means all guests booked through tour operators who have been made aware of the hotels by DSL. It also includes guests booking as a result of the advertisement in 'Where to Stay' and any other advertisements. Income from guests who are chance bookings are not included in the calculation of net income.*

   *In order to assist DSL, each hotel will pay £1,250 per month on account, commencing on 1 September 1993, to be received by DSL before the 31st of each month. On a six monthly basis the amount due to DSL will be calculated and paid to DSL within 14 days. If the payments on account exceed the amount due, DSL will refund any excess to Savoy and Swansons. For the purposes of establishing this agreement, the first date when the amount due will be calculated will be 30 June 1994.*

6. *Provide DSL with furnished office space at Swansons adequate for two people for the duration of the contract. DSL have the option of using alternative space at its own expense.*

7. *Supply DSL with sufficient literature and brochures on the hotels to enable DSL to market and promote the hotels.*

8. *DSL will offer complimentary accommodation, for a reasonable period, to visiting tour operators on familiarisation visits.*

9. *Savoy and Swansons will meet the costs of food and drink for entertaining prospective clients on familiarisation visits at either hotel.*

10. *Savoy and Swansons will refer enquiries for agent or group bookings to DSL.*

11. *Savoy and Swansons will employ a full time reservations clerk if the work load requires it.*

*This agreement is initially for one year after which the terms shall be reviewed. At any time after the first anniversary of this agreement, either party may give notice of their intention to terminate the agreement by giving the other party three months written notice.*

*Signed on behalf of Destination Specialists Limited by:*

*M.A.Devoy* *Date*
*Director*

*In the presence of:*

*Signed on behalf of Hotel Savoy Limited by:*

*J. Lora* *Date*
*Director*

*In the presence of:*

*Signed on behalf of Swansons Hotel (1993) Limited by:*

*J. Lora* *Date*
*Director*

*In the presence of:* "

Purporting to act in accordance with the terms of the agreement, DSL began to advertise the plaintiffs' hotels and to effect bookings in the manner we have described earlier through CITS Ltd.

It negotiated a "bed price" with Mr. Lora, sometimes at a rack rate, sometimes at a reduced rate, depending on the season, and sometimes at a "distressed" rate if times were hard in the tourist industry as they were in 1994.

In or about August, 1994, a guest at the Hotel Savoy complained to the manager, Mr. Jose de Freitas, about some matter to do with the hotel and in so doing produced an invoice, presumably from CITS Ltd., although we were not shown it. Mr. de Freitas noticed that the figure charged to the guest on the invoice was higher than that DSL had paid, or were due to pay, to the first plaintiff.

We must pause a little here to look at the mechanics of the arrangements. All bookings were entered in a Wellcome computer in DSL's central reservation office, which had been set up under the contract between the parties. After receiving the invoice from CITS Ltd., DSL entered the division between the travel and accommodation (and any supplements) into the computer. Some six weeks before the expected arrival of the guest DSL sent an accommodation invoice to the guest on the hotel's letter heading. That invoice set out the amount that was due to the hotel for the accommodation. It seems that that amount was to be paid directly to the hotel together with any extras incurred by the guest during his or her stay. An example of such a letter is the one sent to a Mr. Maddison and it is as follows:-

"

*Hotel Savoy*
*&*
*Swansons Hotel*
*Central Reservations*

*DESTINATIONS*
*PO BOX 791*
*ST HELIER*
*JERSEY*

*Booking Reference 3281/50*
*03/08/1994*

*Re MR B MADDISON*

*We have pleasure enclosing our official confirmation invoice for your accommodation at The Hotel Savoy.*

*ACCOMMODATION RESERVED 2 Twin Rooms*

*Dated 21/8/94 to 27/8/94 HALF BOARD*

| *Pax* | *Nts* | *Rate* | |
|---|---|---|---|
| *4 x* | *6 x* | *25.00 Adults* | *600* |
| *1 x* | *6 x* | *12.50 Child 2-11* | *75.00* |
| | | *TOTAL BOOKING* | *£675.00* |

*Please make your cheque payable to 'Hotel Savoy'"*

On receipt of a copy of that letter, the managers of the respective hotels entered the amounts in what was called a debtors' ledger. It was that figure which did not tally with that of the accommodation charges actually paid by the guest who had complained. DSL say that not only letters of that sort were inserted in the computer but also the complete CITS Ltd.'s customer's invoice so that, given the accepted open nature of its operations in the central registration office, first in Swanson's Hotel and then in accommodation at La Collette, provided by Mr. Lora, the latter as well as his managers, could have seen the amount charged to each guest for accommodation and that therefore, they knew about the difference between the amount charged to the guest and what the hotels were to receive. We recalled Mr. Lora on this point. He disagreed and said that he only saw confirmation of the booking in the form of the invoice/letter we have described earlier. Following the complaint by the guest Mr. Lora consulted Advocate Sinel and an Order of Justice containing an Anton Piller Order was obtained from the Deputy Bailiff on 16th November 1994. There were also a number of injunctions which were varied by consent on 21st November 1994. Amongst the terms of the Court's Order of that latter date were the following:-

*(1) To provide an account of all monies obtained as set out in paragraph 5 and 6 hereof;*

*(2) To pay damages in the sums of £16,355.75, £36,006.56 and £1,759.50;*

*(3) To pay damages in respect of the matters listed at Schedules D & E hereof;*

*(4) To pay general damages to the Plaintiffs;*

*(5) To pay damages to the Plaintiffs consequent upon taking of the account;*

*(6) To pay the costs of and incidental to this action on a full indemnity basis;*

*(7) To comply with such further or other Orders as the Court may make;*

*(8) All necessary accounts and inquiries;[sic]*

*(9) To pay interest on such amounts as may be due."*

The plaintiffs rely on express or implied terms of the contract of September, 1993. They also say that, as an agent, DSL owed a number of fiduciary duties to them, and in particular, not to make a secret profit or commission on the transactions with them. The plaintiffs now claim damages under two heads:-

(A) £16,356.27 [sic] for contractual breach by accommodating guests in hotels other than their own and

(B) £36,006.56 being the difference in total of the amount charged to guests by DSL for the accommodation and that actually received by the two hotels.

The plaintiffs also ask for a taking of account together with damages and interest. DSL deny any breach of the agreement and cross claim for damages for the wrongful obtaining of the injunctions and the imposition of the Anton Piller Order. DSL also claims £22,450 being the balance due to it under the agreement.

By consent the parties prepared a number of questions for the Court which has facilitated our task quite considerably and for which we are grateful to counsel.

A great deal of evidence concerned detailed figures in the 561 examples produced by the plaintiffs, which had been compiled from the documents obtained as a result of the Anton Piller Order. Happily we have not been required to go into them because DSL accepted them as calculations, but no further.

The questions for the Court are as follows:

1. What were the terms of the Agreement between the parties?

2. Were there any implied terms in the Agreement, if so what were they?

3. Were the Defendants or either of them ever an agent or agents of the Plaintiffs or either of them? If so, what were the terms of the agency and were any of the terms of the agency breached. If any of the terms of the agency were breached what consequences if any flow from such breach?

4. Were any of the terms of the Agreement breached? If so which terms and how were they breached?

5. What consequences if any flow from any breach of the terms of the Agreement?

Miss Devoy is clearly an articulate, competent and experienced business woman. That on several occasion during her evidence she was unable or reluctant to answer straightforward questions cannot be ascribed to business inexperience or lack of self confidence. On one occasion, at least, she was forced to admit that an answer she had given in relation to the cost of children's accommodation was a lie. As regards charging for some children which DSL admitted and not passing on those charges to the hotel she said it was a mistake. If so, it happened on at least thirty-two occasions. On other occasions her evidence was inconsistent. Two examples will suffice:-

1. On 7th November, Miss Devoy said Mr. Lora did not know of DSL's profit. She did not tell him as she did not think it necessary as she thought that DSL was entitled to it as a tour operator.

On 10th November, Miss Devoy said that Mr. Lora knew that DSL as a tour operator was making a profit on the package put together by it.

2. On 7th November, Miss Devoy said that DSL made a profit of £12 on flight tickets or other travel arrangements, whereas Miss F. Horman, Sales Marketing Manager of CITS Ltd. said that DSL could not sell on air tickets. The inference we draw from that evidence is that DSL could not make a profit from the sale of air tickets. Later Miss Devoy changed her story and suggested that DSL had made the £12 or so profit from the accommodation element in the package. It follows that if DSL took that amount, or something similar, out of the accommodation content that would reduce the sums due to the plaintiffs if DSL was obliged to account for the whole of the accommodation charged to and paid by the guest. Miss Devoy said that the £12 had nothing to do with Mr. Lora.

The Court had no hesitation where there was a conflict of evidence between Mr. Lora and his managers with that given by Miss Devoy in preferring that of the plaintiffs and their witnesses. Moreover if Mr. Lora knew of the profit being made by DSL it may be asked why he reacted as he did when confronted with the discrepancy in the figures. No other reason has been advanced for his subsequent actions that led to the present case.

The total gross profit worked out, either by Miss Devoy or an employee, in manuscript on what came to be called "the upside down paper" (because in most, if not all of the 561 examples that was how it was done by writing at the bottom of part of the invoice from CITS Ltd.) came to some £36,000. Miss Devoy justified this by saying that DSL was entitled to the profit as it was part of a package that included travel, accommodation, transport and insurance and in particular, and stressed by Miss Devoy on many occasions, that the gross profit was needed and indeed had been used, to pay for promoting the plaintiffs' hotels by maximising the use of the bedstock through advertising and brochures.

The evidence of Mr. Albutt, a chartered accountant called by DSL, was that of the gross profit such costs as claimed by Miss Devoy reduced the net profit to almost nothing. When Schedule A (the claim in respect of hotels other than those of the plaintiffs being booked when there were vacancies at Swansons and the Savoy) is examined it shows that the amount claimed was 7.3% of the total business of the plaintiffs. Nevertheless, there were fourteen such hotels to which bookings had been diverted.

When recalled about the advertising costs Mr. Lora said that he believed that they were shared fifty-fifty at the end of the season. He paid for such costs when asked. He thought that he had paid between £7,500 and £9,000 in 1994. Miss Devoy said that Mr. Lora had not paid such an amount but accepted that he had paid some £5,000 in January and February 1994. She had told him what she was spending in April, 1994. Mr. Lora produced a schedule of what he had paid in 1994 which came to something over £13,000. Again there is considerable conflict between him and Miss Devoy on this point.

Miss Horman, whom we have mentioned earlier said that her company was a retailer (Miss Devoy thought it was a wholesaler). When she looked at Mr. Maddison's invoice from her company she considered that the amount entered in the bottom left hand side of the page by DSL for the accommodation element (assuming there were no deductions) namely £994.15, should have been paid to the hotel. In fact, it received £675.

The nub of this head of claim is whether the two hotels should have received the amount listed on the CITS Ltd. invoice by DSL as the accommodation element.

Mr. Hoy submitted that on the proper interpretation of the contract DSL was entitled to keep the profit. When asked whether he relied on an express term, which clearly he could not, or an implied term, he said that the arrangements by DSL acting as a tour operator were such that they were outside the contract altogether. That line of defence might only succeed if the Court decided that there were no implied terms in the contract and that the position of the parties was not that of principal and agent. Mr. Hoy did concede, quite properly in our view, that if we were to find that that relationship existed, then DSL were bound by the fiduciary duties claimed by the plaintiffs.

**Sibley v. Berry** (7th July 1987) Jersey Unreported CofA; (1992) JLR.N.4. is the authoritative case on implied terms in the law of Jersey. There, on page seven, the Court examined the leading English case on implied terms, **Liverpool City Council v. Irwin and another (1977) A.C. 239.** The extract from that judgment starting at page 253 is that of the opinion of Lord Wilberforce. It is as follows:-

> ***"There are varieties of implications which the courts think fit to make and they do not necessarily involve the same process. Where there is, on the face of it a complete bilateral contract, the courts are sometimes willing to add terms to it as implied terms: this is very common in mercantile contracts where there is an established usage: in that case the courts are spelling out what both parties know and will, if asked, unhesitatingly agree to be part of the bargain. In other cases where there is an apparently complete bargain the courts are willing to add a term on the ground that without it the contract will not work - this is the case, if not of "The Moorcock" (1889) 14 P.D. 64, itself on its facts, at least of the doctrine of "The Moorcock" as above, as usually applied. This is, as was pointed out by the majority in the Court of Appeal, a strict test - though the degree of strictness seems to vary with the current legal trend - and I think they were right not to accept it as applicable here. There is a third variety of implication, that which I think Lord Denning M.R. favours, or at least did favour in this case, and that is the implication of reasonable terms. But though I agree with many of his instances, which in fact fall under one or other of the preceding heads, I cannot go so far as to endorse his***

> *principle. Indeed, it seems to me, with respect, to extend a long and undesirable way beyond sound authority. The present case, in my opinion, represents a fourth category, or I would rather say, a fourth shade on a continuous spectrum. The Court here is simply concerned to establish what the contract is, the parties not having themselves fully stated the terms. In this sense the Court is searching for what must be implied."*

The [Jersey] Court of Appeal also cited paragraph 212 from Chapter III of part II of Pothier's Traité des Obligations where he said:-

> *" C'est une règle commune à toutes les conditions des obligations, qu'elles doivent passer pour accomplies, lorsque le débiteur qui s'est obligé sous cette condition en a empêché l'accomplissement.".*

The Court continued:-

> *"This doctrine which is stated there by Pothier in his own terms, could also be stated in the categories of implied terms more familiar to an English lawyer".*

It seems to us that the instant case does not fall into the fourth category which is a variation of the Moorcock, (1889) 14 P.D.64. Nor is it one of established usage. The second test of Lord Wilberforce is to be preferred. It is a stiff test, as Sir Godfray Le Quesne said in the Sibley case. Nevertheless, since the object of the contract was to maximise the plaintiffs' turnover, on which DSL were entitled to 5% it seems to us that any arrangement which, unknown to the plaintiffs, reduced that turnover to a significant degree, would render the agreement at least inefficacious, if not wholly futile. Furthermore, we do not accept that the arrangements of DSL acting as a tour operator vis-à-vis the plaintiffs can be severed from the clear terms of the agreement.

As regards the law of agency the principles have been accepted in Jersey for a long time. See **Wood v. Wholesale Electrics (Jersey) Limited** (1976) Jersey Judgments 415 and **JK Fruit & Vegetable Catering v. Harbour Lights Hotel Ltd.** (1987-88) JLR 72. The essence of an agency is explained in 4 Halsbury 1: paragraph.1:

> *"The relation of agency arises whenever one person, called 'the agent' has authority to act on behalf of another, called 'the principal', and consents so to act. Whether that relation exists in any situation depends not on the precise terminology employed by the parties to describe their relationship, but on the true nature of the agreement or the exact circumstances of the relationship between the alleged principal and agent."*

We consider that there was an agency relationship between the parties. The circumstances permit no other interpretation.

It follows that there existed a fiduciary relationship that required DSL to prefer the plaintiffs' interests to its own, not to make an undisclosed profit and to account to

its principal for any profit made in breach of its fiduciary duty. These principles are so well known that it is not necessary to cite the authorities for them.

Accordingly we may now answer the questions as follows:

1. The terms of the agreement are those set out therein, the principal clause of which reads:-

> *"DSL will manage the operation for CRO in order to maximise the revenue earned by Savoy and Swansons".*

2. There were some implied terms, the main one being (as claimed in the Order of Justice):-

> *"not to make a secret profit or commission in respect of the said agency whether paid by third party or otherwise without accounting to the Plaintiffs for the same;"*

3. DSL was the agent of the plaintiffs. Any failure to observe the fiduciary duties arising from that relationship gives rise to damages in the normal way.

4. DSL made a secret profit, preferred its interests to that of the plaintiffs, and did not keep the plaintiffs fully informed of what it was doing.

5. The plaintiffs are entitled to damages.

As regards the counter-claim we dismiss it as the breaches of its fiduciary duties as an agent negate any right to a commission. See **Boston Deep Sea Fishing and Ice Company v. Ansell** (1888) 39 Ch. 339. The judgment of Cotton LJ at page 357 is very much in point:-

> *"...but what I say is this, that where an agent entering into a contract on behalf of his principal, and without the knowledge or assent of that principal, receives money from the person with whom he is dealing, he is doing a wrongful act, he is misconducting himself as regards his agency ..."*

We therefore order:-

1. that an account shall be provided by DSL of all monies obtained on behalf of the plaintiffs;
2. damages will be paid by the first and second defendants jointly and severally to the plaintiffs in the sums of £16,356.27 or £16,355.75 and £36,006.56 and
3. the defendants jointly and severally will pay to the plaintiffs general damages of £5,000.

I wish to be heard on the question of costs.

## Authorities

Wallis v Taylor (1965) JJ 455

Wood v Wholesale Electrics (Jersey) Limited (1976) JJ 415

J.K. Fruit & Vegetable Catering Limited v Harbour Lights Hotel Limited (1987 -88 ) JLR 72

ED Sibley (née Pavey) v PL Berry (née du Feu) (07 July 1987 ) Jersey Unreported CofA: (1992) JLR.N.4.

Basden Hotels Limited v Dormy Hotels Limited (1968) JJ 911

4 Halsbury 1: Page 1

Chitty on Contract. The Common Law Library No 2, (27th Ed'n); Volume II [Specific Contracts]: Chapter 1 "Agency" Chapter 31 p.67 - 99

Halsburys Statutes Volume 1 p 1-2, 94 - 108

Brown v IRC (1965) AC 244

Shallcross v Oldham (1862) 2 Johns & H 609

Parker v McKenna (1874) LR 10 Ch, App.96.

Imperial Mercantile Credit v Coleman & Knight (1873) LR 6 HL 189

Boston Deep Sea Fishing & Ice Company v Ansell (1888) 39 Ch 339

Re: Haslam & Hier-Evans (1902) 1 Ch 765 C.A.

Queensland Mines Ltd v Hudson & Ors (1978) 52 ALJR 399 PC, AL JR p.399 PC

Cook v Deeks (1916) 1AC 554

Boardman v Phipps (1967) 2 AC 46

Toppin v Healey (1863) Weekly Reporter 466

Johnson v Kearley (1908) CA KB 514

World Transport Agency Ltd v Royte (England) Ltd (1957) QB LLLR 381

Chan v Zacharia (1983-84) HC of A CLR 198

Gray v Haig & Haig v Gray (1854) Ch 219

Liverpool City Council v Irwin & Anor (1977) A.C. 239

"The Moorcock" (1889) 14 P.D. 64

Cheltenham v Gloucester Building Society & Ricketts (1993) 1 WLR 1645

Fletcher Sutcliffe Wild Ltd v Burch (1982) FSR 64

Financiera Avenida SA v Shiblaq (14th January 1991) "The Times"
Smith v Day (1882) 21 Ch D 421

Barratt Manchester Ltd v Bolton MBC (3rd November 1997) "The Times"

Pothier: Traité des Obligations (Nouvelle Edition) Paris 1821: pp 86-94 (English Translation attached)