HOUSE OF LORDS

OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT IN THE CAUSE

Hilton (Appellant) *v.* Barker Booth and Eastwood (a firm) (Respondents)

[2005] UKHL 8

LORD HOFFMANN

My Lords,

1. For the reasons given in the speeches of my noble and learned friends Lord Scott of Foscote and Lord Walker of Gestingthorpe I too would allow this appeal and make the order proposed.

LORD HOPE OF CRAIGHEAD

My Lords,

2. For the reasons given in the speeches of my noble and learned friends Lords Scott of Foscote and Lord Walker of Gestingthorpe, which I have had the advantage of reading in draft, I too would allow this appeal and make the order which has been proposed by Lord Walker.

LORD SCOTT OF FOSCOTE

My Lords,

3. I have had the advantage of reading in draft the opinion prepared by my noble and learned friend Lord Walker of Gestingthorpe and am in full agreement with the reasons he has given for allowing this appeal. I wish particularly to associate myself with my noble and learned friend's remarks in paragraphs 10 and 47 of his opinion. Since, however, your

Lordships are disagreeing both with the trial judge and a unanimous Court of Appeal, I want to add a few words of my own.

4. The issue in this case is determined, in my opinion, by the principles expressed in *Moody v Cox* [1917] 2 Ch. 71. Lord Walker has cited the relevant passage from the judgment of Lord Cozens-Hardy MR. I would add to that citation a passage from the judgment of Scrutton LJ, at p 91. Scrutton LJ referred to evidence given by the defendant Cox to the effect that he, Cox, knew that the price the client, Moody, was paying for the cottages was a good deal more than the value that had been placed on the cottages for probate purposes and that he, Cox, had not told the client the amount of the probate valuation. Scrutton LJ then continued:

> "A man who says that admits in the plainest terms that he is not fulfilling the duty which lies upon him as a solicitor acting for a client. But it is said that he could not disclose that information consistently with his duty to his other clients, the cestuis que trust. It may be that a solicitor who tries to act for both parties puts himself in such a position that he must be liable to one or the other, whatever he does. The case has been put of a solicitor acting for vendor and a purchaser who knows of a flaw in the title by reason of his acting for the vendor, and who, if he discloses that flaw in the title which he knows as acting for the vendor, may be liable to an action by his vendor, and who, if he does not disclose the flaw in the title, may be liable to an action by the purchaser for not doing his duty as solicitor for him. It will be his fault for mixing himself up with a transaction in which he has two entirely inconsistent interests, and solicitors who try to act for both vendors and purchasers must appreciate that they run a very serious risk of liability to one or the other owing to the duties and obligations which such curious relation puts upon them."

5. The reasoning in *Moody v Cox* did not depend on the circumstance that actual misrepresentations might have been made by the solicitors to their client. It depended on the failure by the solicitors to disclose to their client information that it was their contractual duty to him to disclose. The fact that the disclosure of the information would, or might, have placed the solicitors in breach of duties they owed to

others did not relieve them of the contractual duties they had undertaken or of the legal consequences of their breach of those contractual duties.

6. The Court of Appeal in the present case recognised, I think, that in general it could be no answer to a claim for damages for breach of a contractual obligation that performance of the obligation would have constituted a breach of a contractual obligation owed to someone else. Hence the attempt by Sir Andrew Morritt V-C to identify an implied term in the contract between the appellant and his solicitors under which the solicitors would be excused from disclosing to the appellant information that they were legally obliged to someone else to treat as confidential (see paras 32 and 33 of Sir Andrew Morritt V-C's judgment). I agree with Lord Walker that the proposed implied term cannot be justified by any of the various tests for the implication of terms into a contract. If, when instructing the respondent firm to act for him, the proposed implied term had been put to the appellant, it is inconceivable that he would have responded "Yes, of course", or with words to that effect. He would have asked what sort of information his solicitors were talking about and to whom the duty of confidentiality was owed. He would surely have asked for guidance as to whether his assent to the proposed term would be prejudicial to his interests. The implied term route as a way of relieving the respondent solicitors of contractual obligations that they would otherwise have owed the appellant seems to me to be an impossible one.

7. In any event, the description of the information about Mr Bromage that ought to have been disclosed to the appellant as "confidential" seems to me a red herring. I doubt whether a fact that is a matter of public record, such as a bankruptcy or a criminal conviction, can justify such a description. The reason why it would have been a breach of the solicitors' duty to Mr Bromage to inform the appellant of Mr Bromage's bankruptcy and criminal conviction was not because the information was "confidential" but because it was their duty as Mr Bromage's solicitors to do their best to further Mr Bromage's interests in the transaction in respect of which Mr Bromage had instructed them. To have disclosed those facts to the appellant would surely have peremptorily frustrated the proposed transaction. It would, therefore, have been a breach of their duty to Mr Bromage to have done so.

8. So the conclusion seems to me inescapable that the solicitors had put themselves in a position in which they owed to their two clients, Mr Bromage on the one hand and the appellant on the other hand,

contractual duties that were inconsistent with one another. If, at an early stage, they had told the appellant that they could not act for him and that he should go to other solicitors, they would have extricated themselves from their dilemma. In the event, however, they continued to act for both clients and it was inevitable that they would be in breach of the contractual duties they owed to one or the other. The unfortunate victim turned out to be the appellant and they have no answer, in my opinion, to his claim against them for damages for breach of contract.

9. So I would allow this appeal and make the order that Lord Walker has proposed.

LORD WALKER OF GESTINGTHORPE

My Lords,

10. The facts of this case need to be set out in some detail. The courts below do not seem to have found them particularly shocking. I have to say that I do. It adds to my dismay that if (as I would) your Lordships allow this appeal, it will still not achieve finality in the appellant's efforts to obtain redress for the wrong which was done to him nearly fifteen years ago.

The facts

11. The appellant Mr Ian Hilton started work in 1972, at the age of 17, as an apprentice bricklayer. He became an experienced subcontractor in the house-building industry. In 1978 he became a client of the respondent, Barker Booth and Eastwood ("BBE"), a firm of solicitors practising in Blackpool. In the mid 1980s Mr Hilton began to trade as a developer in a small way of business, buying small sites in or around Blackpool. He traded in partnership with his wife, but he was the only one who was in any way active in the business. In 1988 the partnership made a profit of over £100,000 from developing and selling two sites. In the course of that transaction he called on his solicitor, Ms Helen Lawson of BBE, and was introduced to her partner Mr Kevin Gorman. At that time Mr Gorman ranked fourth, and Ms Lawson fifth, out of the six partners in the firm.

12. In 1989 Mr Hilton separated from his wife. At that time they owned two undeveloped sites, one at Falmouth Road, Blackpool (acquired in 1985) and another larger site at Watson Road, Blackpool (acquired in 1988). The Falmouth Road site was developed by the erection of one house and was transferred into the sole name of Mrs Hilton. The Watson Road site was a larger area suitable for the erection of several flats. In 1990 it was still undeveloped. Mr Hilton put up a large sign carrying the words "Hilton Homes" and his telephone number.

13. In June or July 1990 Mr Hilton received a phone call (perhaps as a result of the "Hilton Homes" notice) from Mr Neil Bromage. Mr Bromage introduced himself as a cousin of Mr Hilton's estranged wife (and it is accepted that he was a cousin of hers) but Mr Hilton had never met him before and had no idea who he was. In the next few weeks Mr Hilton had a number of phone calls and visits from Mr Bromage, all concerned with possible development plans. Mr Bromage expressed an interest in buying the flats at Watson Road, once they had been built. In his witness statement Mr Hilton described Mr Bromage as pestering him.

14. What Mr Hilton did not know, and did not discover until much later, was that Mr Bromage had only a few months before been released from prison on licence. On 30 October 1989 he was sentenced at Preston Crown Court to nine months' imprisonment after pleading guilty to three offences of participating in the management of a company while an undischarged bankrupt, one offence of fraudulent trading, and nine offences of obtaining credit while an undischarged bankrupt. He was released from prison on 16 March 1990.

15. These facts were however known to BBE since that firm had acted for Mr Bromage in the criminal proceedings. Mr Gorman had not himself acted in the criminal proceedings but he knew of Mr Bromage's bankruptcy and his prison sentence. In his witness statement he described Mr Bromage as an established client of the firm.

16. At the end of July and during August 1990 there were several meetings at BBE's offices between Mr Gorman, Mr Bromage and Mr Hilton. At trial there were conflicts of evidence about these meetings. BBE's pleaded case was that Mr Bromage and Mr Hilton instructed BBE jointly, and Mr Gorman in his witness statement stated that an agreement between them was already in place, and that he

(Mr Gorman) was "merely instructed to act for Bromage with regard to conveyancing formalities." That was the case which BBE ran at trial, asserting that no conflict of interest arose until much later in the retainer. But the judge did not accept that case. He preferred Mr Hilton's evidence, which was significantly different. The judge found Mr Hilton to be an honest witness. He specifically rejected the statement in Mr Gorman's witness statement that a deal had already been concluded before BBE were instructed. It is accepted on this appeal that at these meetings Mr Gorman lent credence to Mr Bromage.

17. Mr Hilton expected that at the first meeting at BBE's offices Mr Bromage would make an offer in respect of the Watson Road site. He did not do so on that occasion, although he did about two months later. The first transaction between Mr Hilton and Mr Bromage (and the only one which formed part of Mr Hilton's pleaded case) related to a site at 74 Waterloo Road, Ashton on Ribble, which had been found by Mr Bromage. It had planning permission for the erection of six flats.

18. The outcome was that Mr Hilton agreed to buy the Waterloo Road site from its owners for £85,000. He agreed to develop it by the erection of six flats and to sell the developed property to Mr Bromage for £351,000. The procedure envisaged in the contract (which was far from a routine conveyancing document) was that as each flat was completed the purchaser would pay £58,500 (credit for the original £25,000 deposit being given on the sixth flat) and would be granted a 999 year lease of the flat, with the freehold eventually being vested in a management company. Mr Bromage (unknown to Mr Hilton) agreed to sell on the flats to a subpurchaser, Mr John Riley, for £390,000. This third contract was in delphic terms and provided for no deposit. Mr Riley is a very shadowy figure in the story. His address was given as Mottram in Cheshire, but the judge recorded that he seemed to have spent much of his time in Mozambique, and that he proved of no more substance than Mr Bromage.

19. All three contracts were exchanged on the same day, 10 September 1990. BBE acted for both Mr Bromage and Mr Hilton. Mr Bromage had the professional services of Mr Gorman. Mr Hilton had the professional services of Mr Barry Scott, whom Mr Gorman described as a colleague but was in fact a solicitor employed by BBE. According to Mr Hilton's witness statement, he was told by Mr Gorman that Ms Lawson, a partner and his usual solicitor, was "busy with probate." Mr Gorman said that Mr Hilton himself suggested Mr Scott. The judge made no finding about that, but on any view it was

professionally improper for BBE to act on both sides in a transaction of this sort. Rule 6 of the Solicitor's Practice Rules 1990 (replacing an earlier rule to the same effect) contained an unqualified prohibition on the same firm of solicitors acting for both sides "if a conflict of interest exists or arises" or if the seller is selling or leasing as a builder or developer. Each of these is a free-standing prohibition which cannot be waived even by informed consent (and in any case any consent which Mr Hilton gave to these arrangements was plainly not his informed consent).

20. Not only was Mr Hilton selling as a builder and developer, but BBE had a direct and personal conflict of interest arising out of the deposit which Mr Bromage paid under his contract to purchase the Waterloo Road flats. Mr Hilton was well aware that he was embarking on a larger development than he had ever previously undertaken, and that he would need a large bank loan. He originally estimated this at £180,000 and Mr Gorman arranged that facility for him at Barclays Bank (it was later increased to £220,000). Mr Hilton also estimated that he needed a cash deposit of 10% of the full development value (that is £35,100). But at the last moment, Mr Scott told him that only £25,000 was available. As the judge laconically recorded:

> "The deposit on the first contract was negotiated down to £25,000 and advanced by the firm."

Mr Hilton was not told that his own solicitors were advancing the entire deposit to a convicted fraudster so as to clothe him with the appearance of being a man of substance. They did the same (to the extent of £30,000) when (in or around December 1990) Mr Hilton agreed with Mr Bromage to develop the Watson Road site and sell it after development for £585,000. Mr Hilton did not discover these facts until much later, when BBE's files were disclosed. Neither Mr Gorman nor Mr Scott could bring himself to mention these highly relevant facts in his witness statement.

21. As Sir Andrew Morritt V-C said in his judgment in the Court of Appeal ([2002] EWCA Civ 723, [2002] Lloyds Rep PN 500, para 5), from Mr Hilton's point of view, the Waterloo Road transaction was a disaster. In brief summary, he built the six flats (with a secured bank facility which had increased to £220,000) and in August 1991 Mr Scott gave notice to Mr Gorman that flats 1 to 4 were ready for completion of the leases. Mr Gorman responded on Mr Bromage's behalf that the flats

were not ready, and it is accepted that the first notice of readiness, and some subsequent notices, were premature. But the flats were ready by 20 November 1991. On 5 December 1991 Mr Hilton gave a notice to complete. Mr Bromage failed to complete, and also refused to vacate a caution which had been placed on the title. On 10 January 1992 Mr Hilton decided to rescind the contract. In his witness statement he gives an account of his last interview as a client of BBE:

> "I was very disillusioned with Bromage because I was under pressure from both my ex-wife and from the bank. When I asked Barry Scott to rescind the contract, he told me to sit where I was and he called on the internal telephone to Kevin Gorman, who came into his room and told me that the firm should not have acted because there was a conflict of interest. He told me that I would have to go to a different firm of solicitors to take advice. He told me to get out of the office. I left."

22. The next few years saw the collapse of Mr Hilton's business and a series of frustrations in his attempts to retain redress. The following summary is taken from Mr Hilton's witness statement and was not the subject of findings by the judge, but it appears only too credible. In January 1992 a bankruptcy petition was presented against him, but in the autumn of that year he put forward proposals for an IVA which were accepted. In April 1992 Mr Bromage offered to remove his caution if Mr Hilton returned his deposit with interest. Mr Hilton refused, partly because he did not have the money and partly because Mr Bromage had already persuaded Mr Hilton to advance him a total of £18,000 for commission which Mr Bromage claimed under an oral agreement. In October 1992 Mr Hilton issued a writ against Mr Bromage, with some modest financial backing from Barclays Bank. Mr Bromage seems to have been a very persuasive man; he later obtained waiver of a debt of £6,000 and a further £17,000 from the Bank as the price of vacating his caution.

23. Early in 1993 the Bank proceeded to enforce its securities. Waterloo Road was sold for £180,000 and Watson Road for £32,000. There was still a large deficit. In April 1993 Mr Hilton was advised for the first time that he had a better prospect of obtaining redress by suing BBE. But he had difficulty both in obtaining legal aid and in finding solicitors to act for him. Eventually, in December 1993 a writ was issued against BBE. During 1993 his estranged wife obtained a decree

nisi of divorce but it was not made absolute because of Mr Hilton's uncertain financial position.

24. Mr Hilton's legal aid for his action against Mr Bromage was withdrawn and in August 1994 those proceedings were struck out. In November 1994 his IVA was determined by the supervisor. Mr Hilton had great difficulty in achieving progress in the proceedings against BBE. Nothing happened between March 1996 and June 1997, when the Law Society intervened in the practice of the solicitors then acting for Mr Hilton. In 1997 Mr Hilton was adjudicated bankrupt, but the bankruptcy was annulled. Somehow Mr Hilton and his present solicitors managed to get the action to trial.

The proceedings below

25. The case was tried at Manchester before His Honour Judge Maddocks on three days during September 2001. The judge gave a reserved judgment on 28 September 2001. He made some findings of fact which I have already noted. He also made a clear finding that if Mr Hilton had been informed of Mr Bromage's antecedents, he would not have had anything to do with the Waterloo Road transaction. He found that BBE had been in breach of their professional duty but that the breach had caused no loss to Mr Hilton.

26. There were three important steps on the way to that conclusion. The first (and uncontroversial) step was that BBE were in breach of their professional duty in acting for both Mr Bromage and Mr Hilton. The second was that the facts of Mr Bromage's bankruptcy and convictions although "in the public domain and in that sense . . . not confidential information" were information which BBE could not pass on to Mr Hilton without a breach of their professional duty to Mr Bromage. The third step was expressed as follows by the judge:

> ". . . the breach of duty here lay in continuing to act, not in failing to pass on the information. Upon that footing, Mr Hilton was entitled to be placed, and is entitled to be placed, in the position he would have been if he had instructed an independent solicitor. The claim was not advanced that any such solicitor would have been aware or would have become aware of Mr Bromage's conviction,

> nor was it suggested that he should have advised Mr Hilton to have a credit report."

So the judge dismissed the action with costs. Had he found liability, he would have awarded damages of £175,335. Mr Hilton appealed against the judge's conclusion on liability and quantum. BBE cross-appealed as to quantum.

27. On 22 May 2002 the Court of Appeal (Sir Andrew Morritt V-C, Judge and Jonathan Parker LJJ) unanimously dismissed Mr Hilton's appeal. The Vice-Chancellor recorded the parties' agreement that if the appeal were to be allowed, the assessment of damages should be remitted to be assessed by a judge. Before I examine the reasoning in the Court of Appeal's judgments, it may be useful to state some basic principles.

The solicitor's duty to his client

28. A solicitor's duty to his client is primarily contractual and its scope depends on the express and implied terms of his retainer. When a mortgage lender such as a building society or bank instructs a solicitor who is also acting for the borrower, the solicitor is invariably given detailed, standard-form written instructions and these define with some precision the solicitor's duties to the mortgagee. Mr Hilton, by contrast, gave no written instructions to BBE, and there seems to have been no other documentary evidence of the terms of the retainer.

29. The relationship between a solicitor and his client is one in which the client reposes trust and confidence in the solicitor. It is a fiduciary relationship. But not every breach of duty by a fiduciary is a breach of fiduciary duty: see the observations of Millett LJ in *Bristol and West Building Society v Mothew* [1998] Ch 1, 16-17. If a solicitor is careless in investigating a title or drafting a lease, he may be liable to pay damages for breach of his professional duty, but that is not a breach of a fiduciary duty of loyalty; it is simply the breach of a duty of care. This may have practical consequences, for instance in relation to causation, as in the *Mothew* case.

30. A solicitor's duty of single-minded loyalty to his client's interest, and his duty to respect his client's confidences, do have their roots in the

fiduciary nature of the solicitor-client relationship. But they may have to be moulded and informed by the terms of the contractual relationship: see the well known observations of Mason J in *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 97, cited by Lord Browne-Wilkinson in giving the judgment of the Privy Council in *Kelly v Cooper* [1993] AC 205, 215. In this case no such moulding is necessary, since there were no express terms agreed as to Mr Hilton's retainer of BBE. Mr Hilton did not expressly plead that BBE was in breach of any fiduciary duty. He did not need to, since at trial he was not seeking to take the sort of causation point that was raised in the *Mothew* case [1998] Ch 1 (in this House the appellant's printed case did seek to take points based on a fiduciary relationship but the House did not find it necessary to decide whether to consider those points). On this issue of liability both sides have been content for the case to be dealt with as a claim for breach of contract. However, the content of BBE's contractual duty, so far as relevant to this case, has roots in the parties' relationship of trust and confidence.

31. The solicitor's duty of single-minded loyalty to his client very frequently makes it professionally improper and a breach of his duty to act for two clients with conflicting interests in the transaction in hand. Lord Jauncey of Tullichettle, giving the judgment of the Privy Council in *Clark Boyce v Mouat* [1994] 1 AC 428, 435 said:

> "There is no general rule of law to the effect that a solicitor should never act for both parties in a transaction where their interests may conflict. Rather is the position that he may act provided that he has obtained the informed consent of both to his acting. Informed consent means consent given in the knowledge that there is a conflict between the parties and that as a result the solicitor may be disabled from disclosing to each party the full knowledge which he possesses as to the transaction or may be disabled from giving advice to one party which conflicts with the interests of the other."

Here "disabled" plainly does not carry with it the meaning of "exonerated". Lord Jauncey then cited Richardson J in *Farrington v Rowe McBride & Partners* [1985] 1 NZLR 83, 90:

> "A solicitor's loyalty to his client must be undivided. He cannot properly discharge his duties to one whose interests

> are in opposition to those of another client. If there is a conflict in his responsibilities to one or both he must ensure that he fully discloses the material facts to both clients and obtains their informed consent to his so acting …. And there will be some circumstances in which it is impossible, notwithstanding such disclosure, for any solicitor to act fairly and adequately for both."

32. I need not go further into this point because it is (since the judge's rejection of BBE's case that Mr Bromage and Mr Hilton came to Mr Gorman with their deal already done) common ground that BBE could not properly act for both vendor and purchaser on the Waterloo Road transaction. Their duty was to inform Mr Hilton (first) that they could not act for him and (second) that he should seek legal advice from other solicitors, starting afresh (and not relying on any advice that he might already have received from BBE). A bare refusal to act, without clear advice about going to new solicitors, would not have been sufficient to discharge their duty. It is unnecessary to consider whether they should also have given the same advice to Mr Bromage.

Confidentiality

33. Two of the most important facts known to BBE, but unknown to Mr Hilton, were that Mr Bromage had been made bankrupt and that while an undischarged bankrupt he had committed numerous offences of dishonesty for which he was sentenced to a term of imprisonment. These facts were known to any journalist or member of the public who had been present in the Preston Crown Court when Mr Bromage pleaded guilty and was sentenced. They were also probably reported in local newspapers. They were, as Sir Andrew Morritt V-C observed, in para 11:

> "matters of public record and so not confidential in any strict legal sense."

Judge LJ's reference, in para 36, to legal professional privilege was, with respect, quite inapposite as regards the bare facts of the bankruptcy and the convictions.

34. In my opinion the notion of confidentiality, as generally understood by lawyers, is not really relevant to the issues in this case. It is a solicitor's duty to act in his client's best interests and not to do anything likely to damage his client's interests, so far as this is consistent with the solicitor's professional duty. To disclose discreditable facts about a client, and to do so without the client's informed consent, is likely to be a breach of duty, even if the facts are in the public domain. Some of the references in the Court of Appeal judgments to confidential information must, I think, be understood in this looser sense. The appellant's counsel was right to concede in the Court of Appeal, that disclosure of Mr Bromage's past by BBE would have been a breach of their duty to him, and the appellant did not seek to withdraw the concession before your Lordships.

Irreconcilable duties

35. If a house owner contracts to sell his house to one purchaser for £240,000 and then a week later contracts to sell it to another purchaser for £250,000, he assumes two contractual duties which are on the face of it irreconcilable, unless the seller has grounds for rescinding either contract, or can persuade one or other purchaser to release him from his obligation. That is so whether he enters into the second contract with his eyes open, in the hopes of making a larger profit, or whether (rather improbably) he does so inadvertently. It is no answer for him to say to either purchaser: I am sorry, I am obligated to another. His dilemma is his own fault (the phrase used by Lord Cozens-Hardy MR in *Moody v Cox* [1917] 2 Ch 71, 81, a case to which I shall return).

36. Mr Gibson QC (who appeared for BBE in this House and argued a difficult case with brevity and tact) did not accept that the man who sells his house twice was a fair analogy. He supported the reasoning in Sir Andrew Morritt V-C's judgment that the decision of the Court of Appeal in *Moody v Cox* was distinguishable, and that the only breach of duty on the part of BBE was their failure to refuse to act for Mr Hilton and to advise him to consult another solicitor. He did not accept that BBE's failure to disclose the facts about Mr Bromage's past was a second and more serious breach of duty, which did cause Mr Hilton actionable loss.

37. Sir Andrew Morritt V-C reasoned as follows, in paras 32 and 33:

> "I do not accept that BBE were also in breach of a duty to disclose to Mr Hilton what they knew of Mr Bromage. Just as the retainer of BBE by Mr Bromage in connection with his prosecution was not subject to some implied limitation by reference to disclosure to later clients so the retainer of BBE by Mr Hilton must be subject to an implied exclusion from any general duty of disclosure of that which they are legally obliged to treat as confidential. In my view such an exclusion satisfies all the well-known tests for the implication of contractual terms. Such an exclusion does not impinge on the solicitor's duty to do the best for his client; rather it demonstrates the importance of performing that duty promptly by informing the client that he cannot act for him.
>
> Thus it is not a question of two irreconcilable duties, to which the principles of *Moody v Cox* would apply, but of one being modified to take account of another."

Sir Andrew Morritt V-C did not explain how this implied term (which was never pleaded) satisfied the well-known tests for implied terms. In my respectful opinion the suggested term plainly did not meet those tests, whether formulated by reference to the officious bystander or by reference to business efficacy. The suggested term would no doubt have been very convenient for BBE. But from Mr Hilton's point of view it would have amounted to his agreeing that because his solicitors had failed in their duty to tell him to take separate advice, and had instead proceeded to act for him as well as for Mr Bromage, and (unknown to Mr Hilton) in a matter in which they had a personal financial interest, their duty to Mr Hilton must in some way be curtailed in order to accommodate their first breach of duty.

38. The notion that one breach of duty by BBE (failure to tell Mr Hilton that they could not act for him and that he should seek independent advice) should exonerate BBE in respect of a subsequent and more serious breach of duty (failure to disclose to Mr Hilton facts which would have saved him from ruin) seems contrary to common sense and justice. It is also in my opinion contrary to the principles stated by the Court of Appeal in *Moody v Cox*, a decision which has often been cited and followed both in England and in Commonwealth jurisdictions.

Moody v Cox

39. *Moody v Cox* [1917] 2 Ch 71 was an action for rescission of a contract of sale of a public house and four cottages, with a counterclaim for specific performance. The sellers, Hatt and Cox, were respectively a solicitor and his managing clerk. They were the trustees of a will trust, and were selling as such. In addition Hatt acted as solicitor for the purchaser Moody. The contract price was £8,400. Moody complained that Cox had failed to disclose to him a valuation showing the property to be worth less than the contract price, and that Cox had expressly asserted that the cottages were worth £225 each when he knew that they were worth less. There was also a "clean hands" issue arising from the fact that Moody had paid two sums of £100 to Cox as a sweetener; that point is of no relevance to this appeal.

40. Since Hatt and Cox were selling as trustees, they had a duty to their beneficiaries to obtain the best price reasonably obtainable. It was argued that this modified the extent of Hatt's duty, as a solicitor, to Moody as his client. That argument was decisively rejected. The key passages in the judgments of Lord Cozens-Hardy MR, Warrington LJ and Scrutton LJ [1917] 2 Ch 71, 81, 85, 91 are set out in Sir Andrew Morritt V-C's judgment (paras 12, 13 and 14 respectively). It is sufficient to repeat what Lord Cozens-Hardy MR said, at p 81:

> "A man may have a duty on one side and an interest on another. A solicitor who puts himself in that position takes upon himself a grievous responsibility. A solicitor may have a duty on one side and a duty on the other, namely, a duty to his client as solicitor on the one side and a duty to his beneficiaries on the other; but if he chooses to put himself in that position it does not lie in his mouth to say to the client 'I have not discharged that which the law says is my duty towards you, my client, because I owe a duty to the beneficiaries on the other side'. The answer is that if a solicitor involves himself in that dilemma it is his own fault. He ought before putting himself in that position to inform the client of his conflicting duties, and either obtain from that client an agreement that he should not perform his full duties of disclosure or say – which would be much better – 'I cannot accept this business.' I think it would be the worst thing to say that a solicitor can escape from the obligations, imposed upon him as solicitor, of disclosure if he can prove that it is not a case of duty on

> one side and of interest on the other, but a case of duty on both sides and therefore impossible to perform."

41. The thrust of this passage, and of all three judgments in *Moody v Cox*, is that if a solicitor puts himself in a position of having two irreconcilable duties (in that case, to his beneficiaries and to his client, Moody) it is his own fault. If he has a personal financial interest which conflicts with his duty, he is even more obviously at fault. In this case BBE were in the position (through their own fault) of having two irreconcilable duties, to Mr Bromage and to Mr Hilton, and of also having a personal interest (because of the undisclosed £25,000 loan, which was likely to be recoverable only if Mr Bromage did well in his transaction with Mr Hilton). On the face of it their position was significantly worse than that of the solicitor in *Moody v Cox*.

42. However, Mr Gibson submitted that Sir Andrew Morritt V-C had been right in distinguishing *Moody v Cox*, in para 15:

> "In that case the duty arose from the fiduciary relationship between the purchaser, Moody, and his solicitor and vendor Hatt and the presumption of undue influence in consequence of the fact that Hatt was not only Moody's solicitor but a vendor to him. No such relationship is relied on in this case."

Similarly, he said in para 33:

> "But that case concerned the breach of a fiduciary duty and presumption of undue influence arising on the sale of property by a solicitor to his client to which different considerations apply."

With great respect to Sir Andrew Morritt V-C I cannot agree with that analysis. In *Moody v Cox* Hatt owed a (purely) fiduciary duty to his beneficiaries and a duty to his client which was (in the way that I have already explained) both contractual and fiduciary, the content of the contractual duty of full disclosure being rooted in the fiduciary relationship between solicitor and client. In the present case BBE owed that type of duty to both Mr Bromage and Mr Hilton, and they also had a

personal financial interest. In *Moody v Cox* [1917] 2 Ch 71, 80 Lord Cozens-Hardy MR expressly stated that the solicitor's duty of disclosure does not depend on undue influence.

43. Mr Gibson also relied on the reference at the end of the judgment of Scrutton LJ, at p 92, to "actual misrepresentations". But in my opinion my noble and learned friend Lord Hoffmann was right in describing this (in the course of argument) as a throwaway remark. The overwhelming focus of all three judgments in *Moody v Cox* is on non-disclosure, and the principle as to the solicitor's duty is stated in wide terms.

44. Mr Gibson submitted that a solicitor who has conflicting duties to two clients may not prefer one to another. That is, I think, correct as a general rule, and it distinguishes the case of two irreconcilable duties from a conflict of duty and personal interest (where the solicitor is bound to prefer his duty to his own interest). Since he may not prefer one duty to another, he must perform both as best he can. This may involve performing one duty to the letter of the obligation, and paying compensation for his failure to perform the other. But in any case the fact that he has chosen to put himself in an impossible position does not exonerate him from liability.

Mortgage cases

45. During the 1990s there were many reported cases concerned with claims (resulting from the crash in the property market) against solicitors who had acted for both sides in mortgage transactions. These cases are discussed at some length in the parties' written submissions. But counsel rightly spent little time on them in oral argument because many of them turned (as I have already noted) on special features of the mortgage lender's instructions to the solicitors. I do not think it is necessary or helpful to embark on a survey of the recent mortgage cases, but I note that in *Mortgage Express Ltd v Bowerman & Partners* [1996] 2 All ER 836, 844-845, Millett LJ stated the solicitor's duty in wide and general terms:

> "A solicitor who acts for both a purchaser and a mortgage lender faces a potential conflict of duty. A solicitor who acts for more than one party to a transaction owes a duty of confidentiality to each client, but the existence of this

> duty does not affect his duty to act in the best interests of the other client."

Millett LJ then went on to explain why no conflict arose on the particular facts of that case.

46. Sir Andrew Morritt V-C referred to the *Mortgage Express* case but treated it as inapplicable because of the implied term which he discerned as modifying the solicitor's duty. Parker LJ, in para 47, also referred to the *Mortgage Express* case and derived from the judgment of Sir Thomas Bingham MR, at p 842, the proposition that any term in a solicitor's contract of retainer relaxing a solicitor's duty of confidentiality to his client (save with informed consent) would be contrary to public policy. I respectfully doubt whether Sir Thomas Bingham MR intended to lay down any such rule, and I do not think there is any such rule. In any case the issue is not as to the extent of BBE's duty to Mr Bromage, but as to their duty to Mr Hilton. It comes back to the same simple point that if a solicitor is unwise enough to undertake irreconcilable duties it is his own fault, and he cannot use his discomfiture as a reason why his duty to either client should be taken to have been modified.

Disposal

47. For these reasons I would allow the appeal and direct that the quantum of damages (if not agreed) should be assessed by a judge. But it is now 15 years since Mr Hilton suffered a grievous wrong for which he has not been compensated. For the good name of the solicitors' profession his compensation should be agreed, on a generous scale, without further delay.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

48. For the reasons given in the speeches of my noble and learned friends Lord Scott of Foscote and Lord Walker of Gestingthorpe I too would allow this appeal and make the order proposed.