

## Conflict of interest.

by **Thom Vaughan** of E.A.D. Solicitors LLP.

An Agent must not allow a conflict of interest to arise between his agency and competing interests or there may be expensive consequences.

The recent Scottish Court of Session decision in *Samsung Semiconductor Europe Ltd v Docherty (FE) & Anor* [2011] ScotCS CSOH\_32 (17 February 2011) served as a timely reminder that agents or employees owing fiduciary duties to their employer / principal should never forget the requirement not to make a secret profit from their elevated position.

In this case, Docherty was employed by Samsung and advised and influenced it to continue procuring services from DKV, a technology testing company, to deal with quality assurance issues raised by Dell, one of Samsung's most important customers. Over the period of time that Samsung contracted with DKV, one of its managers queried with Docherty whether this company was truly giving the best value and whether alternative contractors should be considered.

Docherty consistently reassured Samsung, sometimes via email, that DKV represented the best alternative; sometimes this was done by rubbishing the performance or charging rates of other potential providers, such as Axiom and Flextronics.

In reality, part of the reason Docherty favoured DKV was that he had a business interest in it as a shareholder. He had not disclosed this fact to his employer Samsung in clear breach of an express provision of his contract of employment.

The Court held that Docherty owed a fiduciary duty to Samsung. He occupied a position of great responsibility and had "authority to represent SSEL in front of Dell in regard to all QA related issues". Among other things, he obtained prices from suppliers and potential suppliers and carried out negotiations with DKV on behalf of Samsung in relation to a number of matters. In short, he undertook the great bulk of the contact between SSEL and DKV.

The judge found that there was potentially a conflict between, on the one hand, Docherty's duties as a QA Manager and Senior QA Manager for Samsung to act in the best interests of his employer and, on the other, his interest as, in effect, a 50% shareholder in DKV.

As QA Manager, he was in a position to influence decisions about the work to be given to DKV and the payment for that work; and as a 50% shareholder in DKV he stood to gain if decisions made by Samsung resulted in DKV's services being retained, or in DKV being given more work, or in DKV being paid more generously for its work than it might otherwise have been.

Docherty actually accepted in cross examination that his undisclosed financial interest in DKV put him in a position where he had a potentially conflicting interest.

As the judge found that Docherty was in breach of his fiduciary duty to Samsung by his involvement in DKV he was obliged to account for the profits derived from that interest. He was therefore ordered to pay Samsung a total of €340,808.92, plus interest at a rate of 8% p.a. until payment.

This is a cautionary tale for any employee or agent owing fiduciary duties and underlines the requirement to avoid any conflict of interest situations arising and the strong line taken by the courts in relation to breach of this duty. It will be prudent for agents carrying a range of product lines or having an involvement in other commercial interests to take stock by analysing whether any conflict has already arisen or is likely to arise.

Article written by Thom Vaughan of EAD Solicitors LLP, specialists in agency and distribution law.

**e a d** solicitors

**Head Office: Prospect House,  
Columbus Quay, Liverpool L3 4DB  
Tel: 0151 735 1000  
www.eadsolicitors.co.uk**



Disclaimer: This column does not contain legal advice and is for general guidance only. Agentbase, E.A.D. Solicitors, RSM Tenon and the writer accept no liability in connection with the general guidance given in this column.