

Additional Notes to *Shock v. Nash*

Insert at page 229 as a continuation of Note 2:

Comment a to Section 390 makes it clear that the facts the agent must disclose to the principal vary with the circumstances:

a. Facts to be disclosed. One employed as agent violates no duty to the principal by acting for his own benefit if he makes a full disclosure of the facts to an acquiescent principal and takes no unfair advantage of him. Before dealing with the principal on his own account, however, an agent has a duty, not only to make no misstatements of fact, but also to disclose to the principal all relevant facts fully and completely. A fact is relevant if it is one which the agent should realize would be likely to affect the judgment of the principal in giving his consent to the agent to enter into the particular transaction on the specified terms. Hence, the disclosure must include not only the fact that the agent is acting on his own account (see § 389), *but also all other facts which he should realize have or are likely to have a bearing upon the desirability of the transaction from the viewpoint of the principal.* This includes, in the case of sales to him by the principal, not only the price which can be obtained, but also all facts affecting the desirability of sale, such as the likelihood of a higher price being obtained later, the possibilities of dealing with the property in another way, *and all other matters which a disinterested and skillful agent advising the principal would think reasonably relevant.*

If the principal has limited business experience, an agent cannot properly fail to give such information merely because the principal says he does not care for it; the agent's duty of fair dealing is satisfied only if he reasonably believes that the principal understands the implications of the transaction.

Restatement (Second) § 390 cmt. a (*emphasis added*). Similarly, Comment c provides that the standard of fairness varies according to the factual context:

c. Fairness. The agent must not take advantage of his position to persuade the principal into making a hard or improvident bargain. *If the agent is one upon whom the principal naturally would rely for advice,* the fact that the agent discloses that he is acting as an adverse party does not relieve him from the duty of giving the principal impartial advice based upon a carefully formed judgment as to the principal's interests. If he cannot or does not wish to do so, he has a duty to see that the principal secures the advice of a competent and disinterested third person. *An agent who is in a close confidential relation to the principal, such as a family attorney,* has the burden of proving that a substantial gift to him was not the

result of undue influence. Even though an agent employed to sell is not in such a position, payment of less than the reasonable market value for property he buys from the principal is evidence that the bargain was unfair. *If the principal is not in a dependent position*, however, and the agent fully performs his duties of disclosure, a transaction of purchase and sale between them is not voidable merely because the principal receives an inadequate price or pays too great a price.

Restatement (Second) § 390 cmt. c (*emphasis added*).