



Neutral Citation Number: [2021] EWCA Civ 471

Case Nos: A3/2019/2949  
and A3/2020/1424

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**  
**IN THE BUSINESS AND PROPERTY COURTS IN BRISTOL**

**PROPERTY TRUSTS AND PROBATE LIST (ChD)**  
**Mr James Pickering (sitting as a Deputy Judge of the High Court)**  
**[2019] EWHC 2205 (Ch)**

**and**

**APPEALS (ChD)**  
**Mr Justice Marcus Smith**  
**[2020] EWHC 2002 (Ch)**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 31/03/2021

**Before:**

**LORD JUSTICE DAVID RICHARDS**  
**LORD JUSTICE MALES**  
and  
**LADY JUSTICE ELISABETH LAING**

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**Between:**

**FRANCES ELIZABETH WOOD**

**Claimant/  
Respondent**

- and -

**COMMERCIAL FIRST BUSINESS LIMITED**

**First  
Defendant**

(1) **BUSINESS MORTGAGE FINANCE 5 PLC**  
(2) **BUSINESS MORTGAGE FINANCE 7 PLC**

**Defendants/  
Appellants**

**And between:**

**BUSINESS MORTGAGE FINANCE 4 PLC**

**Claimant/**

Appellant

-and-

RICHARD MILES PENGELLY

Defendant/  
Respondent

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**David Lord QC and Stuart Cutting** (instructed by **Moore Barlow LLP**) for the **Appellants**  
**Stephen Meachem** (of **Law Tribe**) for the **Respondent Frances Elizabeth Wood**  
**William Hopkin** (instructed by **Coodes LLP**) for the **Respondent Richard Miles Pengelly**

Hearing dates: 11-12 November 2020

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**Approved Judgment**

*Covid-19 Protocol: This judgment has been handed down by Lord Justice David Richards remotely by circulation to the parties' representatives by way of e-mail, by publishing on [www.judiciary.uk](http://www.judiciary.uk) and by release to Bailii. The date and time for hand down will be deemed to be Wednesday, 31 March 2021 at 10:30.*

## **Lord Justice David Richards:**

### *Introduction*

1. These two separate appeals raise common issues, as to the circumstances in which a borrower is entitled to rescission of a loan contract and its accompanying mortgage or other security where the broker through whom the secured loan was arranged has received an undisclosed commission from the lender.
2. The lender and the broker were the same in both cases. The lender was Commercial First Business Limited (CFBL), which went into liquidation in November 2018 and was dissolved in December 2019. Soon after the various loans were made, they were assigned to third parties by way of securitisation. Those assignees are the appellants in both cases, but it is common ground that the assignments are immaterial to the issues raised. The broker was UK Mortgage and Financial Services Limited (the broker).
3. In both cases, the borrowers defaulted on the loans. In each case, the borrower sought rescission of the loan agreements and mortgages, on the grounds that CFBL had paid commissions to the broker without the knowledge or consent of the borrower.
4. In one case, Mrs Frances Wood issued proceedings to set aside the loan agreements and mortgages on a number of grounds in the Chancery Division of the High Court (the Wood case), after enforcement proceedings had been taken against her and possession orders had been made. The claim was heard by Mr James Pickering, sitting as a Deputy Judge of the High Court. He gave judgment in November 2019: see [2019] EWHC 2205 (Ch). He found in her favour on the issue of the undisclosed commissions, but rejected the other grounds advanced by Mrs Wood. He ordered CFBL to pay to Mrs Wood a total of £92,927, the aggregate of the undisclosed commissions paid by it to the broker, and rescinded the relevant mortgage agreements and deeds, on condition that she gave restitution to the relevant assignee in an amount to be determined by accounts which the judge ordered. The assignees appeal against the orders for rescission, with the permission of Flaux LJ.
5. In the other case, proceedings were brought against Richard Pengelly in the Bodmin County Court (the Pengelly case). The claim was issued by CFBL but its assignee was later substituted as claimant. The claim was heard by His Honour Judge Carr, sitting in the County Court at Truro, who dismissed Mr Pengelly's defence and counterclaim in its entirety and gave liberty to the claimant to enforce a possession order which had earlier been made. On appeal to the High Court, Marcus Smith J allowed Mr Pengelly's appeal as regards the claim for rescission based on the payment of an undisclosed commission paid by CFBL to the broker, subject to satisfactory arrangements for counter-restitution being agreed or determined by the court: see [2020] EWHC 2002 (Ch). The assignee appeals with the permission of Flaux LJ, who ordered that the appeal should be heard with the appeal in the Wood case.

### *The issues on appeal*

6. Although the borrowers succeeded on the issue of undisclosed commissions in both cases, there is an important difference in principle between the two judgments under appeal. In the Wood case, Mr Pickering held that in order for relief to be granted against the party who paid the undisclosed commission, it was not necessary for a

fiduciary relationship to exist between (in these cases) the client and the broker. By contrast, Marcus Smith J held that a fiduciary relationship was a necessary pre-condition to the grant of relief, including rescission, against the party who paid the commission. The first ground of appeal in the Wood case is that Mr Pickering was wrong on that issue. A respondent's notice was not filed in the Pengelly case, seeking to uphold Marcus Smith J's order on that additional ground, but the issue inevitably arises in that appeal as well.

7. In any event, it was held in both cases that a fiduciary relationship existed between the broker and Mrs Wood and Mr Pengelly respectively, and that finding is challenged on both appeals.
8. It was contended by the appellants in both cases that the commissions paid by CFBL to the broker were properly categorised as half-secret commissions of the type found by this court in *Hurstanger Ltd v Wilson* [2007] EWCA Civ 299, [2007] 1 WLR 2351. If that were the case, the court would have a broad discretion as to the relief it should grant. In both cases, it was held that the commissions in these cases were fully secret, not half-secret, commissions.
9. There are thus three issues raised by these appeals:
  - (1) Is a fiduciary relationship between the client and the broker a necessary pre-condition to the grant of relief against the payer of the undisclosed commission?
  - (2) Did a fiduciary relationship exist between the client and the broker in these cases?
  - (3) Are the commissions that were paid properly categorised as half-secret commissions?

*The facts*

10. Mrs Wood carried on a buffalo farming and organic mozzarella cheese-making business at two farms in Somerset. She started the business at Higher Alham Farm, Batcombe, Shepton Mallet, Somerset and in 2006 purchased a second farm, Dean Street Farm at Dean, Shepton Mallet, Somerset. In May 2006, she borrowed £1,020,000 from CFBL secured by a mortgage over Higher Alham Farm, which was largely applied in repaying two loans secured on that property. They included a loan of £314,000 from UK Country Capital Limited (UKCC), a company owned and controlled by Des Phillips, who also owned and controlled the broker.
11. In July 2007, Mrs Wood borrowed a further £1,427,320 from CFBL, secured by a mortgage over Dean Street Farm. These funds were largely applied in repayment of further loans that had been made by UKCC.
12. In November 2007, a further loan of £174,474 was made by CFBL to Mrs Wood, secured by the mortgage over Higher Alham Farm.
13. These loans were all arranged through the broker, engaged by Mrs Wood for the purpose of finding loan finance. She paid a fee of £14,500 in respect of the first loan and a fee of £3,726 in respect of the third loan. The broker waived its fee for arranging the second loan.

14. The broker also received commissions from CFBL: £30,600 (3%) for the first loan, £57,092.80 (4%) for the second loan, and £5,234.22 (3%) for the third loan. It was not disputed that Mrs Wood did not know that these commissions were paid.
15. Turning to the other case, Mr Pengelly farms at The Barn, Middle Amble, Wadebridge, Cornwall. In 2005, he borrowed £81,250 from CFBL, secured by a mortgage on his farm, partly to repay two loans at what he considered to be uncompetitive interest rates. The loan was arranged through the broker, to whom Mr Pengelly paid a fee of £2,954.48. The broker was also paid commission of £2,437.50 (3% of the loan) by CFBL. It was not disputed that Mr Pengelly was not informed of the payment of this, or any, commission by CFBL.
16. The broker's terms of business were the same in both cases. They provided as follows:

“The firm is registered with the Financial Services Authority under registration number 305196:

- a) Full advice and recommendation;
- b) Information on different types of mortgage products available to allow you to make a choice;
- c) Information on a single product only, where no advice given.

We offer information on different types of mortgage products available to allow you to make a choice.

We work from a panel of lenders to enable you to select the appropriate lender and mortgage product to meet your individual circumstances and needs and we will therefore be acting on your behalf.

During our initial meeting, we will be completing a detailed mortgage questionnaire to enable appropriate advice to be given to you on your mortgage requirements.

We will also provide you with information relevant to your mortgage needs, covering such items as an explanation of the main repayment methods and the implications of taking out a mortgage.

Once we have made our recommendations to you, we will confirm our advice in writing. You should keep this as it will be an important record of our discussions. Details of the loan will also be confirmed in your lender's formal offer.

We may receive fees from lenders with whom we place mortgages. Before we take out a mortgage, we will tell you the amount of the fee in writing. If the fee is less than £250, we will confirm that we will receive up to this amount. If the fee is £250 or more, we will tell you the exact amount.

We will treat all your personal information as private and confidential (even when you are no longer a customer) except when we are permitted by law or where disclosure is made at your request or with your consent in relation to arranging your mortgage. You have the right of access under the Data Protection Act 1998 to your personal records held on your files.

Our aim is to provide you with a first class professional and confidential service. We have internal procedures for handling complaints fairly and speedily and, should a complaint arise, in the first instant you should contact our Compliance Officer at the address or telephone number detailed below.

Thereafter, should the complaint not be resolved to your satisfaction we will assist you in resolving it by referring it to the Financial Ombudsman Service whose address can be found in our complaints procedure.”

17. Printed on the reverse side of the terms of business was a standard acceptance form in the following terms:

- “1. I/We instruct you to endeavour to re-structure/re-negotiate my/our existing finance arrangements and provide ongoing advice.
2. I/We undertake to be bound by the terms and conditions as detailed overleaf.
3. I/We confirm that the information given is true and complete.
4. I/We confirm you have full authority to negotiate on our behalf from the date of signing this acceptance until such time as alternative instructions are given by me/us.
5. I/We undertake to keep confidential and not to disclose to any person other than our officers and employees or any of our professional advisors any information concerning potential providers of the facilities supplied by yourselves in the course of our performing under these terms.
6. I/We undertake not to approach your lending source direct at any time without the specific authority of yourself, such authority not to be unreasonably withheld.

7. I/We understand that any valuation, survey or inspection undertaken or made pursuant to our request will be made only for the benefit of yourselves and/or a lender.
8. I/We give permission to you and/or a lender to contact my Bank, Accountant, Solicitors, past or present employer or any other person regarding information which may be required to fulfil your instructions from me/us.
9. I/We agree to be responsible for any legal or other costs or expenses of yourselves or a lender incurred in endeavouring to re-structure our finances.”

*Issue 1: is a fiduciary relationship between the client and the broker a necessary pre-condition to relief against the payer of undisclosed commission to the broker?*

i) *The claim and judgment in the Wood case*

18. Mrs Wood’s pleaded case includes the averment that CFBL’s payment of the undisclosed commissions to the broker without her informed consent “was, as a matter of law, a breach of fiduciary duty and amounted to a bribe”, and that further it ran contrary to applicable guidelines published by the Office of Fair Trading; paragraphs 2D and 2E of the amended particulars of claim. In paragraphs 62A and 62B, it is pleaded that, in making the payments and not disclosing them, CFBL committed or assisted the broker to commit a breach of fiduciary duty and that, by reason of such breach, Mrs Wood had suffered loss and damage, for which CFBL was jointly and severally liable with the broker. Paragraph 62C pleads, further or in the alternative, that as a matter of law the non-disclosed commissions were “bribes” and entitled Mrs Wood to recover from CFBL all the losses which she had suffered as a consequence of entering into the mortgages, such losses falling to be assessed as damages for fraud and on the assumption that the bribes induced her to enter into the mortgages. Paragraph 62D pleads, further or in the further alternative, that Mrs Wood was entitled to elect at the conclusion of the trial to recover the amount of the undisclosed commissions from CFBL. Paragraph 62E pleads that she was entitled to rescission of the mortgages.
19. As will be seen, this pleading reflects the various remedies which the authorities establish are available against the payer of undisclosed commissions or bribes. It can also be seen that the claims are not put exclusively on bases which required the existence of a fiduciary relationship between Mrs Wood and the broker.
20. After a careful review of many of the authorities dealing with undisclosed commissions, Mr Pickering concluded that a fiduciary relationship between the claimant and the payee was not a pre-condition to relief against the payer or the payee. The existence of a fiduciary duty, and a breach of that duty, provided an alternative route to relief. All that needed to be established was that the payee was the agent of the claimant and that the three matters identified by Slade J in *Industries & General Mortgage Co Ltd v Lewis* [1949] 2 All ER 573 (*Industries & General*) were satisfied:

“For the purposes of the civil law a bribe means the payment of a secret commission, which only means (i) that the person making the payment makes it to the agent of the other person with whom he is dealing; (ii) that he makes it to that person knowing that that person is acting as the agent of the other person with whom he is dealing; and (iii) that he fails to disclose to the other person with whom he is dealing that he has made that payment to the person whom he knows to be the other person’s agent. Those three are the only elements necessary to constitute the payment of a secret commission or bribe for civil purposes.”

21. By contrast, he held that, in the case of a so-called half-secret payment, the decision of this court in *Hurstanger Ltd v Wilson* [2007] EWCA Civ 299, [2007] 1 WLR 2351 required there to be a fiduciary relationship. The basis for this difference is that half-disclosure means that the payment is not, in law, a bribe, but equitable remedies are available if the disclosure is insufficient to satisfy the need for informed consent where there is a fiduciary relationship. He held, however, that the payments made by CFBL to the broker were wholly undisclosed and amounted in law to bribes. While he held that a fiduciary relationship was therefore unnecessary to the relief sought by Mrs Wood, he added that in his view “it is abundantly clear that not only was [the broker] Mrs Wood’s agent but moreover that their relationship was a fiduciary one...she trusted and relied on [the broker] to assist her in her attempts to raise finance. In such circumstances, I have no doubt that [the broker] owed Mrs Wood a fiduciary duty”.
- ii) *The claim and judgment in the Pengelly case*
22. Mr Pengelly pleads in his defence and counterclaim to CFBL’s possession claim that he was not skilled or experienced in financial matters, that the broker provided advice and a recommendation to enter into the mortgage in favour of CFBL and that he reposed trust and confidence in the broker and followed the broker’s advice. It is pleaded that, in the premises, the broker “was at all material times his agent and stood in the capacity of a fiduciary as it owed to him undivided loyalty”. The relief claimed does not, however, necessarily depend on the pleaded fiduciary duty. Paragraph 7 pleads that the payment of commission by CFBL to the broker was not disclosed and “therefore amounted to a secret commission or bribe”. Paragraph 8 states that the “payment of a secret commission or bribe by [CFBL] to the broker tainted the mortgage with fraud and the Defendant has an absolute right to avoid the same. The Defendant claims rescission in aid of his common law right to avoid the mortgage”. An alternative claim expressly based on a fiduciary duty is contained in paragraph 9: “Alternatively, if rescission is refused, the Defendant will seek equitable compensation in respect of [CFBL’s] procurement of the broker’s breach of fiduciary duty as aforesaid.”
23. Marcus Smith J held that a fiduciary relationship between Mr Pengelly and the broker was a necessary pre-condition to any relief against CFBL or its assignees. At [16(1)], he said that the starting point for Mr Pengelly’s counterclaim was that the broker was his fiduciary, owing him the fiduciary duties of trust and confidence “if I can describe them so generally and so generically at the moment”. However, the judge accepted that Mr Pengelly also put his case on a basis that this was not dependent on a



fiduciary relationship. At [23], he summarised the grounds of appeal before him as including (i) that HHJ Carr had erred in holding that, in secret commission cases, it was necessary for there to be a fiduciary relationship and (ii) (necessarily as an alternative) that he erred in failing to find that there was an agency relationship between the broker and Mr Pengelly that imposed fiduciary duties on the broker.

24. At [24] to [28], Marcus Smith J discussed the nature of a fiduciary relationship, with references to the well-known passage from the judgment of Millett LJ in *Bristol and West Building Society v Mothew* [1998] Ch 1 at 18, a passage from the judgment of Mason J in the High Court of Australia in *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 96-97, and *Finn: Fiduciary Obligations* (1<sup>st</sup> ed.) (1977) at [2]. He drew attention to the important statement by Millett LJ that a person “is not subject to fiduciary obligations because he is a fiduciary: it is because he is subject to them that he is a fiduciary”.
25. At [29] to [35], the judge addressed the fiduciary duties that arise out of the relationship of principal and agent. He said at [35] that the nature of fiduciary duties, in terms of both their content and the remedies in the case of breach, will differ according to the relationship out of which they arise and that the case before him was concerned with the fiduciary duties arising out of the principal and agent relationship. This led him to consider two questions: what, exactly, is meant by the relationship of principal and agent, and is every such relationship a fiduciary one. As to the first question, he adopted the definition in article 1 of *Bowstead and Reynolds on Agency* (21<sup>st</sup> ed.) (2019) that “[a]gency is the fiduciary relationship which exists between two persons, one of whom expressly or impliedly manifests assent that the other should act on his behalf so as to affect his legal relations with third parties”, rejecting the lender’s submission that it was confined to agents who could make contracts on behalf of their principal and holding that it included anyone who could act so as to affect the principal’s legal relations, for example by making pre-contract disclosures or representations.
26. While it was important not to be too prescriptive about what functions qualify a person as an agent with fiduciary duties and what functions do not, it was dangerous to equate the term agent with the status of a fiduciary, citing in support a passage from the judgment of Asplin LJ in *Prince Arthur Ikepechukwu Eze v Conway* [2019] EWCA Civ 88 at [39], to which I return below. The breadth and uncertainty of the duties of agents to their principals makes the label “fiduciary” “extremely fact dependent”.
27. Under the general heading “Fiduciary duties”, the judge considered between [36] and [45] various matters under four sub-headings. The first and second were “The centrality of loyalty” and “The duty of undivided loyalty”, both by reference to *Bristol and West Building Society v Mothew*. The third was “Gains or profits by the fiduciary”, with reference to *Keech v Sandford* (1726) SC 2 Wh & TLC 693 and the judgment of Deane J in the High Court of Australia in *Chan v Zacharia* (1984) 154 CLR 178. Neither of these cases was concerned with or discussed bribes or secret commissions but the judge said at [43] that, so far as the fiduciary is concerned, a secret commission is indistinguishable from other forms of gain that can, but should not, be derived from a fiduciary position. In all such cases there was a duty to account for the gain. The difference lay in the fact that the secret commission or bribe is paid by a third party. Under the fourth sub-heading, “Consent”, the judge adopted a

passage from *Snell's Equity* (34<sup>th</sup> ed.) (2020) at [7-015], which deals with the principal's consent as a defence to a claim for breach of fiduciary duty.

28. Under a further general heading, "Accessory liability: third parties", the judge addressed additional legal issues under three sub-headings: the definition of a secret commission or bribe ([46] to [49]), accessory liability ([50] to [55]) and "half-secret" commissions ([56] to [63]). At this stage, I need not refer to the section on half-secret commissions.

29. As regards the definition of a bribe, the judge accepted the statement of Slade J in *Industries & General* as a current statement of the law. He continued at [48]:

"It is clear that a bribe or secret commission constitutes one form of profit that a fiduciary should not make out of his or her position as a fiduciary. Its significance, as I have noted, in cases such as the present, is that a bribe or secret commission is paid by a third party to the fiduciary; and we are here concerned with the implications on that third party of such a payment."

30. Moving on to accessory liability, the judge cited a passage from the judgment of Christopher Clarke J in *Novoship (UK) Ltd v Mikhaylyuk* [2012] EWHC 3586 (Comm) and continued:

"50. It is clear from the foregoing that unless there is a breach of fiduciary duty by the fiduciary in receiving the secret commission or bribe, there cannot be any liability in the payer of the secret commission or bribe in making it. It would be absurd, and clearly not contemplated by the cases, were the payer to have any liability if (by way of example):

(1) The recipient of the secret commission or bribe was not a fiduciary at all.

(2) The recipient of the secret commission or bribe was a fiduciary, but had made full disclosure to his or her principal, and obtained the principal's consent to receiving it from the third party.

51. It follows that the liability of a third party is contingent upon there being a breach of fiduciary duty on the part of the fiduciary to whom the secret commission or bribe is made."

31. The judge then asked, assuming the payment of the secret commission or bribe constitutes a breach of fiduciary duty on the part of the payee, what more needed to be shown to render the third party payer liable for the payment of the bribe. After citation of lengthy passages from the judgment of Millett J in *Logicrose v Southend United Football Club Ltd* [1988] 1 WLR 1256, the judge answered his question by adopting the test propounded by Slade J in *Industries & General*, with some amendment, principally substituting "fiduciary" for "agent" wherever it appeared, for the reasons given earlier by him.

32. At [64] to [69], the judge considered whether a fiduciary relationship existed between Mr Pengelly and the broker, concluding that it did. Before doing so in detail, he said at [65]:

“65. There was some suggestion in the grounds of appeal that it was not necessary, in order for the appeal to succeed, for there to be a fiduciary relationship between Mr Pengelly and UKMFS. I reject this contention. As I have described, the liability of the third party is an accessory liability, based upon the third party being an accessory to the agent's breach of fiduciary duty to his principal. If there is no fiduciary relationship, there can be no breach of fiduciary duty and no accessory liability.”

33. This is the only point in the judgment at which the necessity for a fiduciary relationship is expressly addressed. The judge's decision that it is necessary is expressly linked to the availability of relief against CFBL's assignee. He says that the liability of a third party is as an accessory to the agent's breach of fiduciary duty. Without a fiduciary relationship between Mr Pengelly and the broker, there can be no accessory liability.
34. The earlier part of the judgment, summarised above, proceeded implicitly on the assumption that a fiduciary relationship was required. This is a little puzzling because Mr Pengelly's grounds of appeal clearly raised the issue of whether a fiduciary relationship was required, which was developed in counsel's skeleton argument, in part by reference to the judgment in the Wood case. As that was a judgment of a Deputy High Court Judge, the judge should, on conventional principles, have followed it unless satisfied that it was wrong. However, the judge knew that an appeal to this court was pending in Wood and I understand why, in those circumstances, he approached the issue *de novo*. Nonetheless, it would have been helpful if he had addressed the reasoning in Mr Pickering's judgment.
35. It is not clear whether the judge was saying that a fiduciary relationship between Mr Pengelly and the broker was necessary only for the purposes of securing relief against the payer of the commission as an accessory, or whether it would also be necessary if relief were sought against the broker.
36. Nor do I find it clear which characteristics of a fiduciary relationship the judge considered needed to exist before relief in respect of a bribe or secret commission could be granted. “Fiduciary relationship” is a protean term, capable of covering a wide range of different rights and obligations. It is worth quoting from the passage in *Finn: Fiduciary Obligations* (1977) at p.2 cited by the judge at [27]:

“On the modern usage of "fiduciary", Sealy concluded that it is not definitive of a single class of relationships to which fixed rules and principles apply. Rather, its use has generally been descriptive, providing a veil behind which individual rules and principles have been developed. This conclusion – an incontestable one – is the starting point of this work. In the following pages it will be suggested that it is meaningless to talk of fiduciary relationships as such. Once one looks to the

rules and principles which actually have been evolved, it quickly becomes apparent that it is pointless to describe a person – or for that matter a power – as being fiduciary unless at the same time it is said for the purposes of which particular rules and principles that description is being used. These rules are everything. The description "fiduciary", nothing. It has gone much the same way as did the general descriptive term "trust" one hundred and fifty years ago."

37. The term "fiduciary relationship" is most commonly used with respect to well-established categories, such as trustee and beneficiary, director or manager and company, employer and employee, and principal and agent where the agent is authorised to act for and exercise powers of the principal. Subject to agreement to the contrary, those are relationships to which what might be called the full panoply of fiduciary obligations apply. There is some indication that the judge considered that this was required to be the case where a payment is said to have been a bribe and relief is sought in respect of it. So, at [26], the judge quoted the passage from Millett LJ's judgment in *Bristol and West Building Society v Mothew* at p.18 where the nature of, and core obligations arising from, a fiduciary relationship are summarised. At [36] to [43] he addressed in more detail some of those obligations, by reference to cases such as *Keech v Sandford* which concerned the fullest form of fiduciary relationship. There is no indication in the judgment that the judge was identifying a relationship with a limited range of obligations.

iii) *The appellants' submissions*

38. In support of the appeal against Mr Pickering's decision on this point in the Wood case, Mr Lord QC, appearing for the appellants in both appeals, submitted in his skeleton argument that, in the absence of a fiduciary relationship, there is no legal basis for a cause of action against the third party who has paid the secret commission. He also submitted that not all agents owe fiduciary duties and that Slade J's test in *Industries & General*, although referring to agents in an unqualified way, assumes that the agent is in a fiduciary relationship with the principal. It is, he submitted, the very nature of the fiduciary relationship that gives rise to the liability that Slade J recognised. This did not only affect claims against the third party payer of the commission, but, Mr Lord submitted, if the agent does not owe fiduciary duties, the agent is not in a position of conflict and there is nothing wrong with him receiving a commission from a third party. He relied on the decision of HH Judge Raynor QC, sitting as a Judge of the High Court, in *Commercial First Business Ltd v Pickup and Vernon* [2017] CTLC 1<sup>1</sup>, which Mr Pickering had considered but not followed, as well of course as the judgment of Marcus Smith J in the Pengelly case.
39. While the requirement for a fiduciary relationship remained his primary submission, Mr Lord developed in his oral submissions at the hearing of the appeal an alternative submission that there must exist a duty of loyalty, such that the agent must not allow personal interests, such as the receipt of a commission from a third party, to conflict with his or her duty to give disinterested advice.

iv) *Discussion*

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<sup>1</sup> There does not appear to be a neutral citation number.

40. In what follows, I will for convenience refer interchangeably to “agent” and “payee”, without intending to suggest that there must be an agency relationship before an undisclosed payment can in law constitute a bribe or secret commission.
41. In approaching the issue whether a fiduciary relationship must exist, it is important to go back to the policy of the law which underpins its approach to bribery or the making of secret payments as inducements.
42. The law, reflecting the views of society, has for a very long time set its face against bribery as a corrosive practice, which undermines the country’s social, economic and commercial values and well-being. As Lord Templeman put it, giving the judgment of the Privy Council in *Attorney-General for Hong Kong v Reid* [1994] 1 AC 324 at 330, “Bribery is an evil practice which threatens the foundations of any civilised society”. Over 90 years earlier, Romer LJ said in *Hovenden & Sons v Millhof* (1900) 83 LT 41, [1900-03] All ER Rep 846:

“The courts of law of this country have always strongly condemned and, when they could, punished the bribing of agents, and have taken a strong view as to what constitutes a bribe. I believe that the mercantile community as a whole appreciate and approve of the court’s views on the subject. But some persons undoubtedly hold laxer views. Not that those persons like the ugly word “bribe”, or would excuse the giving of a bribe if that word be used, but they differ from the courts in their view as to what constitutes a bribe. It may, therefore, be well to point out what is a bribe in the eyes of the law. Without attempting an exhaustive definition, I may say that the following is one statement of what constitutes a bribe. If a gift be made to a confidential agent with the view of inducing the agent to act in favour of the donor in relation to transactions between the donor and the agent’s principal and that gift is secret as between the donor and the agent – that is to say, without the knowledge and consent of the principal – then the gift is a bribe in the view of the law.”
43. This passage makes clear that the meaning of bribe, for the purposes of civil remedies, extends well beyond its popular connotation of a corrupt payment, to include any payment or gift made as an inducement to an “agent” and not disclosed to the “principal”. Romer LJ goes on to set out special rules that apply to such payments, two of which are of general application. First, the court does not inquire into the payer’s motives in making the payment or allow evidence to be given as to motive. Second, the court will presume in favour of the principal and against the payer and the agent that the agent was influenced by the payment, and this presumption is irrebuttable. These rules are applied by the law, Romer LJ said, “in the interests of morality with a view of discouraging the practice of bribery”.
44. The vice involved in the payment of a bribe, for the purpose of civil remedies, is that it may induce the payee to depart, consciously or otherwise, from the duty he owes to another person.

45. The circumstances in which such a duty may be owed will vary greatly. Some may involve persons who clearly owe fiduciary duties in any event, such as trustees, directors or employees. At perhaps the other extreme, a person may be retained for the purpose of giving a single piece of advice. In any of these cases, and in the many other cases that will arise somewhere between them, the person owing the duty is at risk of being suborned by a payment or offer from a third party as an inducement to favour the payer or others.
46. The risk inherent in requiring “a fiduciary relationship” as a pre-condition for remedies in respect of bribes or secret commissions is either that civil remedies which should be available will be denied because there is not a fiduciary relationship, or that the term “fiduciary relationship” will be applied so widely as virtually to deprive it of content beyond the simple proposition that a person under a duty to another must not accept or be offered an inducement to influence them in the performance of that duty.
47. The present cases do not involve relationships, such as trustee and beneficiary or director and company, which without more clearly qualify as fiduciary. They fall within a broad and common set of relationships which involve a contractual or other legal duty to provide information or advice or recommendations. The precise scope of the duties of the brokers in the present cases, as in all cases, will require examination by reference to the terms of their engagement.
48. To ask in cases of this kind whether there is a fiduciary relationship as a pre-condition for civil liability in respect of bribery or secret commissions is, in my judgment, an unnecessarily elaborate, and perhaps inaccurate, question. The question, I consider, is the altogether simpler one of whether the payee was under a duty to provide information, advice or recommendation on an impartial or disinterested basis. If the payee was under such a duty, the payment of bribes or secret commissions exposes the payer and the payee to the applicable civil remedies. No further enquiry as to the legal nature of their relationship is required.
49. This is not to say that, in the many cases in which a fiduciary relationship clearly exists, the remedies available cannot be analysed in terms of the consequences of a breach of fiduciary duty. If a fiduciary relationship exists, it is a breach of that duty for the fiduciary to accept a secret commission or the offer of a secret commission, and in such a case the payer or offeror will be procuring or assisting a breach of fiduciary duty. Both will be liable to a range of remedies: accounts of profits, compensation for loss and rescission of transactions.
50. While that applies in those cases where there is a fiduciary relationship, that is not the essential pre-condition, which in my judgment is the much simpler question posed above. Essentially, I consider that Mr Lord’s second, alternative submission is correct. While it may sometimes be appropriate to describe a duty to give disinterested advice or information as “fiduciary”, it is not necessary to do so. It is the content of the duty, not the label attached to it, that matters. This, as it appears to me, is in accordance with the authorities as well as with principle.
51. I should add that in most of the cases the law on bribery and secret commissions is referred to as applying to payments to “agents”, whether or not they are said to owe fiduciary duties. As will appear, I doubt whether the law on bribery is restricted to an “agent” properly so called, by which I mean a person authorised or ostensibly

authorised to act on behalf of another. It is enough, in my view, that the person who is offered or paid a secret commission is, as Christopher Clarke J put it in *Novoship (UK) Ltd v Mikhaylyuk* [2012] EWHC 3586 (Comm) at [108], “someone with a role in the decision-making process in relation to the transaction in question e.g. as agent, or otherwise someone who is in a position to influence or affect the decision taken by the principal”

52. In what follows, I will look at the authorities as they relate to the possible requirement for a fiduciary relationship and to the closely connected question of the remedies available, bearing in mind the view of Marcus Smith J that a fiduciary relationship between Mr Pengelly and the broker was a pre-condition to rescission of his mortgage taken out with CFBL.

v) *The authorities*

53. A significant number of the leading cases were decided in the late 19<sup>th</sup> century and the early 20<sup>th</sup> century, many of them by this court. For the most part, they do not refer to the need for a fiduciary relationship, or even mention the term. Instead, they refer to a duty to provide disinterested advice, or use similar language.
54. Among the most important of these authorities is *Panama and South Pacific Telegraph Co v India Rubber, Gutta Percha, and Telegraph Works Co* (1875) LR 10 Ch App 515 (*Panama Telegraph*). The plaintiff company (the Panama Company) was formed and promoted by the defendant company (the Telegraph Works Company) to make and lay a submarine telegraph cable from Peru to Panama. The Telegraph Works Company contracted with the Panama Company to manufacture and lay the cables at a total cost of what was then the very considerable sum of £300,000. The terms of the contract made payment of instalments of the price conditional on certificates from the Panama Company’s engineer as to progress with the manufacture of the cables. An engineer was engaged by the Panama Company for these purposes, on terms that it would pay him a commission of 1.5% of payments under the contract as they were made. Unknown to the Panama Company, the engineer was also engaged by the Telegraph Works Company to lay the submarine cable for a total sum of £80,000 payable as payments were made by the Panama Company to the Telegraph Works Company.
55. The position was therefore that the engineer was responsible for issuing certificates as to the progress being made by the Telegraph Works Company as the condition for payments to it by the Panama Company, while at the same time receiving payments from the Telegraph Works Company which were conditional on receipt by it of payments from the Panama Company.
56. On discovery of these facts by the independent directors of the Panama Company, it commenced proceedings seeking, against the Telegraph Works Company, rescission of the contract between them and repayment of sums paid under the contract and, against the engineer, repayment of the commission paid to him by the Panama Company. The claims succeeded at first instance and the orders were upheld on appeal.
57. James LJ said at p. 526:

“According to my view of the law of this Court, I take it to be clear that any surreptitious dealing between one principal and the agent of the other principal is a fraud on such other principal, cognizable in this Court. That I take to be a clear proposition, and I take it, according to my view, to be equally clear that the defrauded principal, if he comes in time, is entitled, at his option, to have the contract rescinded, or, if he elects not to have it rescinded, to have such other adequate relief as the Court may think right to give him.”

58. Mellish LJ said at pp. 528-529:

“It is quite sufficient that the laying of the cable was a material part of the contract, with reference to which the Defendants must have known that the Plaintiffs required honest and disinterested advice. Indeed it is difficult to see any position more confidential than the position of the telegraph engineer with a telegraph company, particularly a marine telegraph company. The ordinary directors of such a company are entirely at the mercy of their engineer as to whether it is desirable to buy a particular concession, what contracts shall be taken for making the cable, and what contracts shall be taken for laying the cable. On all these matters they must entirely depend on the skill and disinterested advice of their engineer.”

59. This was sufficient to justify rescission of the contract, Mellish LJ saying at p. 532:

“But whether it is so or not, I am clearly of opinion that if by any fraudulent misconduct of the Defendants in entering into an agreement with Sir Charles Bright, which had the effect of making it impossible to keep him as a disinterested engineer - if by that it is rendered impossible that the Plaintiffs can have the full benefit of the contract, then it appears to me that there is sufficient to entitle them to rescind the contract.”

60. So far as appears from the report, the engineer was an independent contractor engaged in the case of the Panama Company to provide it with his expert and disinterested advice and certificates. He was not a director or employee of that (or any other) company. The contract whereby the Telegraph Works Company would make payments to him, which objectively conflicted with his legal duty to provide disinterested advice to the Panama Company, was sufficient to entitle the latter to rescission of its contract with the Telegraph Works Company and to repayment of sums paid under the contract.

61. I consider Mr Pickering was correct in his judgment at [63] to say that the secret payments were “treated as a special category of fraud with the principal being entitled to have the relevant contract rescinded at his or her election”.

62. The emphasis on the duty to provide disinterested advice as the pre-condition to the application of the rules and remedies available in the case of bribes and secret commissions has been repeated in many cases since *Panama Telegraph*.



63. A striking authority is *Shipway v Broadwood* [1899] 1 QB 369. The defendant agreed to buy two horses from the plaintiff, provided a veterinary surgeon called Pinkett passed them as sound. Pinkett gave his certificate for which he received a fee from the defendant. The defendant sent the plaintiff a cheque for the price. On delivery of the horses, the defendant formed the view that they were not sound, which was confirmed following an examination by another vet, and he stopped the cheque. The plaintiff sued on the cheque. During his evidence at trial, Pinkett admitted that he had accepted an offer from the plaintiff to be paid a commission if the horses were sold, which was not disclosed to the defendant. This court held that the plaintiff could not rely on Pinkett's certificate in view of the secret commission paid for its production and that therefore he was not entitled to judgment on the cheque.
64. The decision turned on Pinkett's engagement to provide the certificate, which he did in the course of his professional practice as a vet. In so doing, he owed a duty to examine the horses with proper skill and care and to express his disinterested opinion by giving, or refusing to give, the certificate. As Chitty LJ said at p. 373: "The plaintiff placed Pinkett in a position in which his duty conflicted with his interest". It was immaterial whether or to what extent the secret commission influenced Pinkett in giving his certificate.
65. Collins LJ said at pp. 373-374:

"Pinkett was designated by the buyer as the person on whose opinion the sale of the horses depended, and the objection to the validity of his certificate is that he was promised by the seller a sum of money if the horses were sold. I take it to be clear law that a principal who has placed the agent of the other party to the contract in such a position as that in which Pinkett was placed is debarred from relying on a certificate given, by the agent. There is a personal incapacity on his part to maintain any action based on the decision of the agent."
66. Although Chitty LJ and Collins LJ, but not A.L.Smith LJ, referred to Pinkett as the defendant's agent, he was a professional person engaged by the defendant to give his opinion on a matter within his expertise. It is that duty to give a disinterested opinion that made the secret commission unlawful. It was a necessary incident of his contractual engagement. I am not sure in what legal sense Pinkett could be described as the defendant's agent.
67. A parallel case might be that of a barrister instructed to advise a client on the legality of a contract it was proposing to make. The other intended contracting party knows that the advice is being taken and offers to pay the barrister a sum if the contract is made. I should have thought there could be no doubt that this would engage the rules and remedies as regards bribes and secret commissions. The barrister clearly owes a duty to give his disinterested advice, but a barrister would not normally be considered his or her client's agent or as being in a fiduciary relationship with the client.
68. In *Logicrose Ltd v Southend United Football Club Ltd* [1988] 1 WLR 1256 a director of the defendant company negotiated with the plaintiff for the grant of a licence over land owned by the defendant. As a director, he was clearly in a fiduciary relationship with the defendant company. He also held shares in the defendant company as a

nominee for another person (X). The director had agreed, without disclosure to the defendant, that the plaintiff company would pay £70,000 to an offshore company controlled by X. The defendant succeeded in its claim to rescind the licence. This was not therefore a case of a bribe paid by a third party but of a third party assisting the director to divert to X money that should have been paid to the defendant company. The defendant company sought rescission of the licence.

69. Millett J drew a parallel with the payment of bribes and secret commissions. He said at p.1260, under the heading “Rescission”:

“It is well established that a principal who discovers that his agent in a transaction has obtained or arranged to obtain a bribe or secret commission from the other party to the transaction is entitled, in addition to other remedies which may be open to him, to elect to rescind the transaction ab initio or, if it is too late to rescind, to bring it to an end for the future...

The remedy is not confined to cases where the agent has taken a bribe or secret commission in the strictest sense. It is available whenever, without his principal’s knowledge and consent, the agent has put himself in a position where his interest and duty may conflict. A principal is entitled to the disinterested advice of his agent free from the potentially corrupting influence of an interest of his own....The principal, having been deprived by the other party to the transaction of the disinterested advice of his agent, is entitled to a further opportunity to consider whether it is in his interest to affirm it.”

70. In *Anangel Atlas Compania Naviera SA v Ishikawajjima-Harima Heavy Industries Co Ltd* [1990] 1 Lloyd’s Rep 167, Leggatt J reviewed the law on bribes and secret commissions. He said at p.169 that *Panama Telegraph* established “the basic principle that any surreptitious dealing between one principal to a contract and the agent of the other principal is a fraud in equity of which the Court may take cognisance”. At p. 171, he said that the correct test for determining whether a payment to an agent constituted a bribe was “whether or not the making of it gives rise to a conflict of interest, that is to say, puts the agent into a position where his duty and his interest conflict”.
71. The judgment of Briggs J in *Ross River Ltd v Cambridge City Football Club* [2007] EWHC 2115 (Ch) concerned the defendant’s claim to rescind three related transactions with the claimants for the sale and lease-back of its football ground. It alleged that its chief executive, who had taken the lead on its behalf in the negotiations, had received secret payments from an agent for the claimants. This again was a case where it was clear that a fiduciary relationship existed between the chief executive and the defendant. At [204], Briggs J, citing *Logicrose*, said that: “The essential vice inherent in bribery is that it deprives the principal, without his knowledge or informed consent, of the disinterested advice which he is entitled to expect from his agent”.
72. *Nelmes v NRAM Ltd* [2016] EWCA Civ 491 involved a claim that the relationship between a borrower and the broker who introduced the lender was unfair within the

meaning of the Consumer Credit Act 1974. The broker received a “procuration fee” from the lender, which was not disclosed to the borrower. This court held that, by reason of the undisclosed fee, the relationship was unfair and the borrower was entitled to recover the amount of the fee from the lender. Christopher Clarke LJ, with whom Elias and Kitchin LJ agreed, said at [34] that on classic principles the borrower would be entitled to recover the amount of the commission from either the lender or the broker and at [35] that: “A relationship between lender and borrower which involves such a payment deprives the borrower of the disinterested advice of his broker and is, for that reason, unfair”.

73. All the above cases have emphasised the duty to give impartial or disinterested advice as the critical factor in bringing the law on bribery and secret commissions into play. It is, however, also the case that there are a significant number of authorities, particularly in recent years, which have analysed the liability of the payer and recipient of a bribe or secret commission in terms of a fiduciary duty, albeit in what is described in some of the cases as a very loose sense.
74. In *Grant v The Gold Exploration and Development Syndicate Ltd* [1900] 1 QB 233, Govan, a director and promoter of the company purchasing a mine, was paid an undisclosed commission by the plaintiff seller, Grant. The purchaser recovered the amount of the commission from the seller. Collins LJ referred at p.246 to the director as someone who stood “in a fiduciary relation to the intended buyer, and who as such was debarred from receiving a commission from the vendor without disclosing the fact to such buyer”. At p. 255, Vaughan Williams LJ said that the buyers were “persons to whom Govan as their agent owed a fiduciary duty, and who had done them a wrong by taking a commission, and I think that Grant was a party to that wrong and guilty of a breach of a constructive fiduciary duty to the syndicate at the time when he was paid the £2,000...”. As a director and promoter, Govan was in a clear fiduciary relationship with the purchasing company.
75. In the well-known case of *Reading v Attorney-General* [1951] AC 507, Sergeant Reading had, while serving in Egypt, been paid large sums to ride in uniform on lorries carrying illicit spirits so as to avoid inspection by the police. The cash still in his possession when he was arrested was seized and he ambitiously brought proceedings to recover it.
76. In the Court of Appeal (reported as *Reading v The King* [1949] 2 KB 232), Asquith LJ, sitting with Tucker and Singleton LJ, gave the judgment of the court. He said at p. 236:

“The principles of law applicable to such a case as the present would seem to be the following. When a servant, or agent, by a breach of duty damnifies his master or principal, the latter can, of course, recover in an ordinary action for breach of contract for any loss he has actually suffered. But there is a well established class of cases in which he can so recover, whether or not he has suffered any detriment in fact. These are cases in which the servant or agent has realized a secret profit, commission or bribe in the course of his employment; and the amount recoverable is a sum equal to such profit. In most of these cases it has been assumed that the plaintiff, in order to

succeed, must prove that a “fiduciary relation” existed between himself and the defendant and that the defendant acted in breach of this relation. But the term “fiduciary relation” in this connexion is used in a very loose, or at all events a very comprehensive, sense.”

77. At p. 238, Asquith LJ said:

“Assuming a fiduciary relation is necessary to enable the Crown to recover, we are of opinion, differing in this respect from the learned trial judge, that in the wide sense in which the term is used in the relevant cases such a relation subsisted in this case as to the user of the uniform and the opportunities and facilities attached to it; and that the suppliant obtained the sums claimed by acting in breach of the duties imposed by that relation. The inference of a fiduciary relation is certainly not weakened by the circumstance that the suppliant was a non-commissioned officer on active service in a foreign country allied with His Majesty. But we do not wish to be taken as holding that if a fiduciary relation were absent the appeal would necessarily succeed.”

78. The House of Lords affirmed the decision and, in large part, the reasoning of the Court of Appeal. Lord Porter said at p. 516, as regards the right of a principal to recover a bribe or secret commission:

“As to the assertion that there must be a fiduciary relationship, the existence of such a connexion is, in my opinion not an additional necessity in order to substantiate the claim; but another ground for succeeding where a claim for money had and received would fail. In any case, I agree with Asquith, L.J. (18), in thinking that the words “fiduciary relationship” in this setting are used in a wide and loose sense and include, *inter alia*, a case where the servant gains from his employment a position of authority which enables him to obtain the sum which he receives.”

79. This authority suggests that, to the extent that it is appropriate to categorise the necessary relationship as “fiduciary”, it is used in a “wide and loose sense”.

80. Of the recent authorities, the first is *Hurstanger Ltd v Wilson*. As I earlier indicated this is important to the third issue of a half-secret commission. It is also illuminating on the issue of the necessity for a fiduciary relationship. The claimant brought possession proceedings to enforce its security for a loan of £8,000 made to the defendants. The loan had been arranged through a broker and included a fully disclosed broker’s fee of £1,000. The lender paid the broker an additional commission of £240, which was not fully disclosed. On that basis, the borrower claimed rescission of the loan agreement and security.

81. As appears from the judgment of Tuckey LJ, with whom Waller and Jacob LJJ agreed, the broker was required, as the borrowers' agent, to get them the best possible deal, which as Tuckey LJ said meant that "the relationship created was obviously a fiduciary one": [33].

82. What is interesting for the purposes of the first issue is what Tuckey LJ said at [38]:

"Obviously if there has been *no* disclosure the agent will have received a secret commission. This is a blatant breach of his fiduciary duty but additionally the payment or receipt of a secret commission is considered to be a form of bribe and is treated in the authorities as a special category of fraud in which it is unnecessary to prove motive, inducement or loss up to the amount of the bribe. The principal has alternative remedies against both the briber and the agent for money had and received where he can recover the amount of the bribe or for damages for fraud where he can recover the amount of any actual loss sustained by entering into the transaction in respect of which the bribe was given: *Mahesan s/o Thambiah v Malaysia Government Officers' Housing Co-operative Society Ltd* [1979] AC 374, 383. Furthermore the transaction is voidable at the election of the principal who can rescind it provided counter-restitution can be made: *Panama and South Pacific Telegraph Co v India Rubber, Gutta Percha and Telegraph Works Co* (1875) LR 10 Ch App 515, 527, 532-533."

83. As I read that paragraph, Tuckey LJ is distinguishing between the receipt of a bribe or secret commission as a breach of fiduciary duty and the payment and receipt of a bribe or secret commission as an actionable wrong in its own right, as he makes clear in [39]:

"Is there a half-way house between the situation where there has been sufficient disclosure to negate secrecy, but nevertheless the principal's informed consent has not been obtained? Logically I can see no objection to this. Where there has only been partial or inadequate disclosure but it is sufficient to negate secrecy, it would be unfair to visit the agent and any third party involved with a finding of fraud and the other consequences to which I have referred, or, conversely, to acquit them altogether for their involvement in what would still be breach of fiduciary duty unless informed consent had been obtained."

84. *McWilliam v Norton Finance (UK) Ltd* [2015] EWCA Civ 186, [2015] PNLR 22 is another case concerning a finance broker who received a half-secret commission from the lender. The borrowers' appeal against the dismissal of their claim against the broker for payment to them of the commission was allowed, with the respondent broker (by then in liquidation) not represented. The court was satisfied that the broker was trusted to get the best possible deal, which involved a relationship of trust and confidence giving rise to a fiduciary duty of loyalty. Applying *Hurstanger*, a fiduciary

relationship was necessary for the borrowers to succeed, given that the commission was half-secret.

85. A case in a very different context, and one involving criminal corruption, was *UBS AG (London Branch) v Kommunale Wasserwerke Leipzig GmbH* [2017] EWCA Civ 1567, [2017] 2 CLC 584. The facts were complex but, for present purposes, the salient facts were as follows. The claimant banks sought payment of substantial sums due under financial derivative contracts. The defendant resisted payment on a number of grounds, including that it was entitled to rescission of the contracts on the grounds that its managing director had been paid large bribes to commit it to the contracts by its financial adviser, Value Capital. This court held that Value Capital had not been the agent of the claimant banks and that the banks had not known of the payment of the bribes. The straightforward basis for rescinding the contracts by reason of the payment of bribes was therefore not available. Nonetheless, the banks had knowingly assisted Value Capital in other breaches of its fiduciary duty to the defendant such that it was appropriate to rescind the contracts. The existence of a fiduciary relationship was essential to the way that the defendant put its case: see [106].
86. In considering this part of the case, Briggs and Hamblen LJ in their joint majority judgment referred to *Panama Telegraph, Grant v Gold Exploration and Development Syndicate Ltd* and *Shipway v Broadwood* as establishing the principle that provides for remedies when there are surreptitious dealings between one contracting party and the other party's agent. They said at [112]:
- “The mischief which the principle is aimed at preventing is the secret deprivation of the principal of the disinterested advice which he is entitled to expect from his fiduciary. The principal thinks he is getting the loyal and disinterested advice of his fiduciary when in truth he is not. This abuse may be achieved by a secret payment to the fiduciary by the other party to the contemplated transaction, but this is not the only way in which it can be achieved. The fiduciary may be disabled from giving disinterested advice by a multitude of surreptitious means.”
87. In this passage, the relevant duty owed by the agent is said to be a fiduciary duty, but the substance of the duty is to give “loyal and disinterested advice”.
88. *Medsted Associates Ltd v Canaccord Genuity Wealth (International) Ltd* [2019] EWCA Civ 83, [2019] 1 WLR 4481 concerned a broker who introduced sophisticated and wealthy clients to an investment firm. The clients knew that the broker was paid commission by the firm, but the amounts were not disclosed to them. It was therefore another case of a half-secret commission and, in line with *Hurstanger*, it was necessary to decide whether the broker owed fiduciary duties to the clients. Although the broker did not give any advice or make any recommendations, it did impliedly represent to its clients that the terms offered by the firm were competitive. Longmore LJ, with whom Peter Jackson and Asplin LJ agreed, said at [32]: “To that extent at least the clients/investors reposed trust and confidence in Medsted; to my mind that gives rise to a duty which can be legitimately categorised as “fiduciary””. He continued at [33] that it was still necessary to ask, “what the scope of that “fiduciary” duty is” and concluded that, on the facts of the case, the broker was not obliged to

disclose the amount of the commissions paid to it. The double use of inverted commas round “fiduciary” was deliberate and illuminating.

89. So also is the judgment of Asplin LJ in *Prince Eze v Conway* [2019] EWCA Civ 88, a decision of the same constitution delivered on the same day as *Medsted*. The claimant sought rescission of a contract to purchase a property on grounds that a secret commission had been paid to the person who introduced him to the property.
90. It was submitted for the respondent vendors that, in order to engage the law relating to bribes and secret commissions, the claimant must show a fiduciary relationship with the recipient of the commission. Having reviewed a number of the authorities to which I have earlier referred, Asplin LJ said at [39]:

“It is clear from the authorities that in order for the law of bribery and secret commissions to be engaged there must be a relationship of trust and confidence between the recipient of the benefit or the promise of a benefit and his principal (used in the loosest of senses) which puts the recipient in a real position of potential conflict between his interest and his duty. Not all agents will be in such a position and the relationship may well arise where there is no agency at all”

91. At [42], Asplin LJ said: “In the context of bribes and secret commissions, where necessary, a broad view is taken of the necessary fiduciary relationship” and she cited the passages from *Reading v Attorney-General* in this court and the House of Lords which I have earlier quoted. At [43], she said:

“The real question, therefore, is whether the person receiving the benefit or the promise of a benefit was acting in a capacity which involved the repose of trust and confidence in relation to the specific duties performed rather than on some general basis and whether the payment to him in that capacity was such that a real position of potential conflict between his interest and his duty arose: see *McWilliam & Anr v Norton Finance (UK) Ltd* [2015] 1 All ER (Comm) 1026 per Tomlinson LJ at 1041d and *Novoship* per Christopher Clarke J at [106] and [107]. The requirement that the recipient of the payment or promise of payment must be someone with a role in the decision-making process in relation to the transaction or someone who is in a position to influence or affect the decision taken by the principal, as referred to in *Novoship* at [108], seems to me to be no more than a means of satisfying the central criterion that the recipient owes fiduciary duties to the principal in relation to the transaction in question and a means of determining the extent of his obligations and fiduciary duties.”

92. I conclude from these authorities that the suggested requirement for a fiduciary relationship is no more than saying that, in the type of case with which we are concerned, the payee of the bribe or secret commission must owe a duty to provide disinterested advice or recommendations or information. As I said earlier, it is the duty to be honest and impartial that matters.

93. In his judgment in the Pengelly case, Marcus Smith J regarded the existence of a fiduciary relationship as essential to relief against the payer of the bribe or secret commission: see [50]-[51], which I have earlier quoted. Mr Lord made the same submission in support of the appeal in the Wood case: “In the absence of a fiduciary relationship, there is no legal basis for a cause of action as against the third party who has paid the secret commission” and, later in his skeleton argument: “...the liability of the third party depends on the third party being an accessory to the agent’s conflict and breach of fiduciary duty”.
94. With respect to Marcus Smith J and the submissions of Mr Lord, I do not believe this to be borne out by the authorities. They make clear that bribery is an actionable wrong at common law, as well as in equity, for which common law remedies, as well as equitable remedies, are available. The remedies include rescission of the transaction in connection with which the bribe or secret commission was paid. The payer of the bribe is rightly viewed not as an accessory but as a primary wrongdoer.
95. The remedies available were analysed by Lord Diplock, giving the judgment of the Privy Council, in *T. Mahesan S/O Thambiah v Malaysia Government Officers’ Co-operative Housing Society Ltd* [1979] AC 374 (*Mahesan*). The appellant was a director and employee of the respondent housing society. He was paid a substantial bribe by the vendor of property sold to the society at a considerable overvalue. The society brought proceedings against the appellant for payment to it of the amount of the bribe and for damages equal to the amount of the overvalue. The Privy Council held that the society was not entitled to both remedies but had to elect between them before judgment was entered.
96. Lord Diplock traced the origins of the claim for recovery of a bribe from the payee to equity (although this has been questioned: see *Beatson: The Use and Abuse of Unjust Enrichment* (1991) at pp.222-23), but showed that by the late 19<sup>th</sup> century it was established that the bribe was recoverable at common law as money had and received, without the need to show any loss. The payee was also liable in tort for damages for the loss suffered by the claimant. The same remedies were available against the payer. The position, illustrated by decisions such as *Grant v Gold Exploration and Development Syndicate Ltd* and *Hovenden and Sons v Millhoff*, was summarised by Lord Diplock at p.383:

“Upon analysis, what these rules really describe is the right of a plaintiff who has alternative remedies against the briber (1) to recover from him the amount of the bribe as money had and received, or (2) to recover, as damages for tort, the actual loss which he has sustained as a result of entering into the transaction in respect of which the bribe was given; but in accordance with the decision of the House of Lords in *United Australia Ltd. v Barclays Bank Ltd.* [1041] A.C. 1 he need not elect between these alternatives before the time has come for judgment to be entered in his favour in one or other of them.

This extension to the briber of liability to account to the principal for the amount of the bribe as money had and received, whatever conceptual difficulties it may raise, is now and was by 1956 too well established in English law to be



questioned. So both as against the briber and the agent bribed the principal has these alternative remedies: (1) for money had and received under which he can recover the amount of the bribe as money had and received or, (2) for damages for fraud, under which he can recover the amount of the actual loss sustained in consequence of his entering into the transaction in respect of which the bribe was given, but he cannot recover both.”

97. The earlier authorities also established that where a party to a contract had paid a bribe or secret commission to the agent or advisor to the other party, the latter was entitled to rescission of the contract.
98. Rescission was then, and remains, a remedy available both at law and in equity. As Snell’s Equity (34th ed. 2020) states at [15-001]: “The basis for the remedy is the election of a party whose consent to the formation of the contract was vitiated in one way or another, for example by a misrepresentation. Similar but distinct remedies developed at law and in equity. Owing to its greater flexibility, the equitable remedy is now predominant except in relation to executory contracts, insurance and the sale of goods.” The greater flexibility in large part lay in equity’s ability to provide satisfactory substitutes for the precise *restitutio in integrum* required by the common law.
99. Rescission is also available in a wider range of cases in equity than at law, but it clearly is available at law in the case of fraud, and bribery was treated as a species of fraud; see, for example, *Smith v Sorby* (1875), reported with *Harrington v The Victoria Graving Dock Co* (1878) 3 QBD 549.
100. In *Mahesan*, Lord Diplock treated rescission as being given as an equitable remedy: “...the giving of the bribe was treated in equity as constructive fraud on the part of the giver and where it was given in connection with a contract between the principal and the briber the principal was entitled to rescission of the contract. This equitable right was additional to his right to recover the bribe from the agent.” Equitable remedies are not, however, confined to cases of fiduciary relationships and, just as both payer and payee were liable to pay the bribe or commission as money had and received and were liable as joint tortfeasors in deceit to pay damages for loss suffered by the innocent party, so there is no suggestion in Lord Diplock’s judgment or in the earlier authorities to which I have referred that the payer was liable only as an accessory for another’s breach of fiduciary duty or that a breach of fiduciary duty was a necessary condition for the availability of rescission. Citing *Panama Telegraph* in *Hurstanger* at [38], Tuckey LJ said that “the transaction is voidable at the election of the principal who can rescind it provided counter-restitution can be made”. This entitlement to rescission is contrasted with the court’s discretion to set aside a transaction in the case of a half-secret commission, which was held in *Hurstanger* to be available only in the case of a breach of fiduciary duty.
101. These authorities demonstrate that the common law remedies of money had and received and damages are available against the third party payer of a bribe or secret commission, and that rescission of a transaction with the third party is available as of right, subject to making counter-restitution. None of this depends on establishing that the third party is an accessory to a breach of fiduciary duty by the payee.

102. My conclusion from this over-lengthy citation of authority is that, in cases such as the present where an “agent” providing advice, information or recommendations has received or been offered a bribe or secret commission, the question that the court should ask and focus on is: did the “agent” owe a duty to be impartial and to give disinterested advice, information or recommendations? If the answer is “yes”, the remedies discussed above are available. Courts have, principally in recent cases, characterised this as a fiduciary duty of loyalty. While this may be accurate, it does not mean that in such cases courts need involve themselves in complex analyses of the nature of a fiduciary relationship or the duties which may be associated with a fiduciary relationship. It would be better to avoid doing so. It is enough just to ask the straightforward question stated above.

*Issue 2: Did the broker owe a fiduciary duty to Mrs Wood and Mr Pengelly?*

103. In the Pengelly case, Marcus Smith J, reversing the trial judge, held that by virtue of its terms of engagement the broker owed a fiduciary duty to Mr Pengelly. First, he held that the broker was an agent for Mr Pengelly, relying on (i) the statement in the terms that “we will therefore be acting on your behalf”, (ii) the full authority given by the terms to the broker to negotiate with potential lenders on Mr Pengelly’s behalf, although it did not have authority to bind him, and (iii) the undertaking by the broker to research the market and to recommend an appropriate lending package to meet his individual circumstances and needs.
104. Although the judge asked separately whether this agency created a fiduciary relationship, he essentially relied on the same factors for his conclusion that it did so. The broker “was tasked with bringing to Mr Pengelly the best deal (for him) on the market” and Mr Pengelly “was entitled to the best possible deal that [the broker] could provide”.
105. In the Wood case, the judge had, of course, held that it was not necessary for Mrs Wood to show a fiduciary relationship with the broker. He applied the three-stage test of Slade J in *Industries and General Mortgage Co Ltd v Lewis*, holding that each stage was satisfied. He held that the broker was Mrs Wood’s agent for much the same reasons as Marcus Smith J in the Pengelly case. The broker “did not just randomly source lenders but selected lenders based on what Mrs Wood said she was looking for” and, in doing so, acted on her behalf. The broker charged her substantial fees in respect of two of the three loans made by CFBL. The terms and conditions stated that the broker was acting on her behalf and would complete a detailed questionnaire “to enable appropriate advice to be given to you on your mortgage requirements”.
106. Further, the judge considered that it was “abundantly clear” that the relationship was fiduciary. In addition to the factors mentioned above he accepted Mrs Wood’s “clear evidence...that she trusted and relied on [the broker] to assist her in her attempts to raise finance”. He had earlier said that, even where an agent gives no advice or recommendation but instead simply proposes or arranges a particular contract, there is “at the very least an implied representation that the proposed contract was “competitive” (*McWilliam* [38]; *Medsted* [30, 32]) thereby resulting in the principal reposing trust and confidence in the agent and, accordingly, giving rise to a fiduciary relationship (*Medsted* [33])”.

107. Before us, in the Pengelly case, the appellant supported the two-stage approach adopted by Marcus Smith J of asking, first, whether the broker was Mr Pengelly's agent and, second, if so, whether a fiduciary relationship existed, but it challenged the judge's conclusions on both points. On the question of agency, the appellant argued that the key question was whether the broker was able to affect the legal relations of Mr Pengelly. The broker did not make any contract for Mr Pengelly or dispose of any property but was engaged, as an independent contractor, to introduce him to a potential lender. The judge was wrong to rely on the terms of engagement, because they were drafted to cover all eventualities depending on which of the three levels of service set out in the first paragraph was being provided by the broker in any particular case. In the cases of levels (b) and (c), both involving no more than the provision of information, the broker would not be providing any advice. On the evidence at trial, which established that the broker proposed only the mortgage with CFBL, on the basis that it was significantly better than Mr Pengelly's existing loan arrangements, the broker was providing the third type of service, information on a single product only, with no advice. The broker was therefore not permitted to negotiate or make representations on behalf of Mr Pengelly nor was it obliged to research the market to find the most suitable lending package to meet Mr Pengelly's needs. Marcus Smith J was wrong to hold otherwise.
108. The appellants submitted that, for the same reasons, Marcus Smith J was wrong to find that a fiduciary relationship existed between the broker and Mr Pengelly. It was not open to him to say that the broker was tasked with bringing to Mr Pengelly "the best deal (for him) on the market" or was under a duty to "get the best deal they could". The trial judge had not made these findings and it was not open to Marcus Smith J, sitting as an appellate court, to do so. Nor was there any evidence on which such findings could be made. The broker was providing "packaging services", which were entirely administrative in nature, to ensure that the mortgage application proceeded to offer and completion seamlessly. The trial judge had found that, once the broker had identified the mortgage with CFBL, it packaged the mortgage application together and submitted it to CFBL. Although the trial judge found that the broker had given advice, that was insufficient to turn the relationship into a fiduciary one.
109. Much the same arguments were advanced by the appellants on their appeal in the Wood case.
110. In my judgment, both Marcus Smith J and Mr Pickering were unquestionably correct to hold that, on the basis of the broker's terms and conditions and on the basis of the findings of fact at first instance, the broker owed duties which engaged the law applicable to bribes and secret commissions. It was under a duty to make a disinterested selection of mortgage product to put to its client in each case. To the extent that it is necessary, they were also correct to hold that the broker owed a fiduciary duty of loyalty to Mrs Wood and Mr Pengelly in the performance of its duties. As I have indicated in relation to the first issue, it matters not whether that duty is characterised as "fiduciary", either in a loose sense or at all.
111. Taking first the terms and conditions and the acceptance form, they contained a number of provisions that are consistent only with such duties. They included:

- i) “We work from a panel of lenders to enable you to select the appropriate lender and mortgage product to meet your individual circumstances and needs and we will therefore be acting on your behalf”.
  - ii) “During our initial meeting, we will be completing a detailed mortgage questionnaire to enable appropriate advice to be given on your mortgage requirements.”
  - iii) “Once we have made our recommendation to you, we will confirm our advice in writing.”
  - iv) “I/We instruct you to endeavour to re-structure/re-negotiate my/our existing finance arrangements and provide ongoing advice.”
  - v) “I/We confirm you have full authority to negotiate on our behalf...”.
112. Mr Lord submitted that it was not all the terms of these documents that applied in these cases. The relevance of particular terms depended on the level of service being provided. In the present cases, the broker put forward only one mortgage product and therefore the service fell within level (c), which involved no advice. This qualification of the express terms is not stated in the documents, but I accept that, if as in these cases no express advice is provided, some modification to the terms may be necessary.
113. Nonetheless, the terms are inconsistent with Mr Lord’s submission that the broker’s only duty was to pick one mortgage provider and product without regard to the availability of better products. It is the broker, not the client, that had access to a panel of lenders (and the clients undertook themselves not to approach the broker’s lending sources at any time without the broker’s authority) and the broker undertook to work from that panel to provide the appropriate product to meet the client’s individual circumstances and needs. This necessarily involved judgment and choice on the part of the broker. As Mr Pickering said in his judgment, the broker “did not just randomly source lenders but selected lenders based on what Mrs Wood said she was looking for”. Moreover, the broker had express authority to negotiate with lenders, and could thereby seek to improve the terms available to the client. It is difficult to see that the grant of this authority had any other purpose.
114. Mr Lord was driven to submit that if the broker sourced two mortgage proposals, each of which met the stated needs of the client, but one offered better terms than the other, the broker was under no duty to put the more favourable proposal to the client. He further submitted that the broker was entitled to put forward the less favourable proposal, even though the reason for doing so was the offer to the broker of an undisclosed commission. These submissions lack all commercial sense, indeed all sense, and cannot, in my judgment, be reconciled with the terms on which the broker was engaged.
115. The case advanced for the appellants is also irreconcilable with the findings of fact made by the trial judges.
116. In the Pengelly case, Judge Carr found that the broker’s principals were

“gifted salesmen who showed an interest in their client’s business and gave the impression that they were people who could be trusted. In essence, their sales pitch was to reassure Mr Pengelly that he could take a step back and they would organise everything; all he had to do was to sign on the dotted line.”

117. Judge Carr also found:

“There is no doubt in my mind that [the broker was] providing what can properly be described as advice to Mr Pengelly. Mr Pengelly contacted them because he knew them and wanted assistance with the sourcing of a mortgage. He did not want to do that himself. Indeed, he felt that he did not have the expertise, so he went to [the broker]. In simple terms, they told him they could deal with the problem and that they had access to the products that would meet his need.”

118. Mr Pickering found that Mrs Wood trusted and relied on the broker to assist her in her attempts to raise finance. I have earlier quoted what Mr Pickering said about the broker not just randomly sourcing lenders, but it is worth setting out the full passage from his judgment:

“The service provided by [the broker] was not merely an administrative service: it was much more than that. Its representatives visited and met Mrs Wood on various occasions and discussed her financial needs and requirements with her. [The broker] did not just randomly source lenders but selected lenders on what Mrs Wood said she was looking for. Again, it seems to me that when doing so [the broker] must have been acting on her behalf.”

119. Mr Lord also relied on the term that stated that the broker might receive fees from lenders as being inconsistent with any duty of loyalty. This submission cannot stand with *Hurstanger*, in which the broker was held to owe a fiduciary duty, notwithstanding a term disclosing in general terms the possibility of the payment of a commission by the lender to the broker. Further, for the reasons given in respect of the third issue, the broker’s failure to make any disclosure in accordance with the term in these cases meant that Mr Pengelly and Mrs Wood were entitled to proceed on the basis that no fees or commissions, other than those that were in fact disclosed, were being paid.

120. I would also add that, in my view, the broker could place reliance on this term only if it expressly drew the client’s attention to it. Although Marcus Smith J proceeded on the basis that Mr Pengelly had actual knowledge of the term, Judge Carr found that Mr Pengelly so completely trusted the broker that he did not read the documents that he was asked to sign. He held that, by signing the acceptance form, Mr Pengelly knew or was deemed to know of the term. There is no finding that Mrs Wood knew of the term.

121. In my judgment, Marcus Smith J and Mr Pickering were clearly right in their conclusions as to the duties owed by the broker to Mr Pengelly and Mrs Wood.
122. In their written submissions before this court, and in their submissions at first instance, the appellants laid considerable stress on the decision of HH Judge Raynor (sitting as a Deputy Judge of the High Court) in *CFBL v Pickup and Vernon*, to which I earlier referred. A principal reason put forward for permission to appeal was that there was a conflict at High Court level between the decision in that case and the decision in the Wood case.
123. In *CFBL v Pickup and Vernon*, the judge held the payment to the broker to be a half-secret commission (on this point there is no dispute), so on the authority of *Hurstanger* a fiduciary relationship between the broker and the borrowers was required as a pre-condition to any relief. The judge held that no fiduciary relationship existed.
124. There were two main grounds for this conclusion. First, the term stating that the broker might receive commissions from lenders was inconsistent with any duty of loyalty to the borrower. I have already explained why that is not, in my judgment, correct.
125. Second, the judge held that, after the borrowers' response to the broker's advertisement and the explanation of their requirements, all that occurred was that the borrowers received a quotation for a loan from the lender, leading to the completion and submission of an application form for the loan. As explained above, this is far from a complete description of the broker's role in the cases before us. Equally, however, it fails adequately to take into account the broker's role in *CFBL v Pickup and Vernon*. At [40], the judge had said that the broker in that case was "not a whole of market broker but had a restricted panel of lenders to whom they would refer customers *based on what they considered best fitted their stated requirements*" (emphasis added). There was clearly intended to be an exercise of judgement on the part of the broker as to what best fitted the borrower's requirements, an exercise requiring an impartial and disinterested view. In my view, this was sufficient to impose a fiduciary duty on the broker, in the limited sense in which that term is used in this context.
126. In my judgment, *CFBL v Pickup and Vernon* was wrongly decided and should not be followed.

*Issue 3: Were the payments made in these cases "half-secret" commissions?*

127. As earlier mentioned, the appellants in both cases contended that the commissions paid by CFBL to the broker were properly categorised as half-secret commissions. What is meant by this is that the borrowers in each case knew, or they would have known if they had read the terms of business, that the broker might be paid fees by lenders. They accept that the borrowers were not told the amounts of those fees or commissions, and so accept that they were half-secret.
128. This category of half-secret commissions, and its consequences for the available remedies, derive from the decision of this court in *Hurstanger Ltd v Wilson*. I have earlier summarised the facts, reasoning and conclusions in that case. Tuckey LJ did

not use the term “half-secret”, but explained the half-way house between a wholly secret commission and a commission which is sufficiently disclosed to negate secrecy but insufficiently disclosed to obtain the borrowers’ informed consent. One of the consequences, it was held, was that the resulting contract was not voidable at the election of the borrowers but, because there was nonetheless a breach of the broker’s fiduciary duty, the court had a discretion to award the most appropriate remedy in the particular circumstances of the case, which could but would not necessarily include rescission.

129. It was argued in the present cases that the commissions paid to the broker fell to be seen as half-secret and the court therefore had a wide discretion as to remedy, which it was argued should not extend to rescission. This was based on one of the paragraphs in the terms of business:

“We may receive fees from lenders with whom we place mortgages. Before you take out a mortgage, we will tell you the amount of the fee in writing. If the fee is less than £250, we will confirm that we will receive up to this amount. If the fee is £250 or more, we will tell you the exact amount.”

130. Both judges rejected this submission.

131. In the Wood case, Mr Pickering said at [135]:

“In short, in addition to informing the borrower of the *possibility* of commission being paid, the terms contain an express promise that, in the event of such commission being in fact paid, the borrowers *will* be notified in writing of the amount. To me, therefore, the terms also contain an implied representation that if the borrower is not notified of the amount of any commission paid, the borrower is entitled to assume that in fact no such commission has been paid at all.”

132. In the Pengelly case, Marcus Smith J came to essentially the same conclusion. He observed that the effect of the terms of business was that the borrower’s consent was not required to the payment of commission, provided that disclosure was made in accordance with the terms, but in the case of Mr Pengelly no disclosure at all was made. He said at [79(3)]:

“Given the obligation in the Terms to disclose any commission received, [the broker’s] failure to disclose that commission would have resulted in Mr Pengelly making the (perfectly reasonable) assumption that no commission was earned by [the broker] at all in his case. That is because the Terms stated that if a commission was received, it would be disclosed before the Mortgage was taken out.”

133. The appellants challenge these conclusions. They argue that the terms of business put the borrowers on notice that a commission might be paid to the broker, and that was all that was needed to prevent the commission from being a secret, as opposed to a half-secret, commission. They submitted that the first sentence of the provision in the

terms of business was very similar to the equivalent provision in *Hurstanger*: “In certain circumstances this company does pay commission to brokers/agents”. They relied on Tuckey LJ’s observation in that case at [43]:

“If you tell someone that something may happen, and it does, I do not think that the person you told can claim that what happened was a secret. The secret was out when he was told that it might happen.”

134. The difficulty for the appellants lies in the remaining sentences of the provision in the broker’s terms of business. They imposed an unqualified obligation on the broker to inform the borrower, before a mortgage was taken out, of the amount of the fee. As each of the commissions in both cases exceeded £250, the exact amount had to be disclosed. Without such disclosure, the borrowers were not on notice that any commission might be paid. On the contrary, the only conclusion from the absence of any notification as required was that no commission was to be paid. The undisclosed commissions were therefore secret, not half-secret, commissions.

*Conclusion*

135. For the reasons given in this judgment, I would dismiss the appeals in both cases.

**Lord Justice Males:**

136. I agree.

**Lady Justice Elisabeth Laing:**

137. I also agree.