Neutral Citation [2020] EWHC 2002 (Ch)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BRISTOL
APPEALS (ChD)

On appeal from the order of His Honour Judge Carr dated 13 December 2019, sitting at the County Court at Truro

Sitting remotely at:
The Bristol Civil Justice Centre
2 Redcliff Street
Bristol BS1 6GR

Date: 28 July 2020

Claim No: 8PC42959
Appeal No: 9BS0135C

Before:

THE HONOURABLE MR JUSTICE MARCUS SMITH

BETWEEN:

RICHARD MILES PENGELLY

Appellant
(Defendant in the proceedings below)

-and-

BUSINESS MORTGAGE FINANCE 4 PLC

Respondent
(Claimant in the proceedings below)

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Mr William Hopkin (instructed by **Coodes Solicitors**) for the Appellant
Mr Stuart Cutting (instructed by **Moore Barlow LLP**) for the Respondent

Hearing date: 24 June 2020 with subsequent written submissions

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Mr Justice Marcus Smith:

A. INTRODUCTION

1. By a claim brought by Business Mortgage Finance 4 plc (**Finance 4**[1]), Finance 4 sought possession of a property known as and situate at The Barn at Middle Amble, Wadebridge, Cornwall, PL27 6EW (Title No CL 147251), which I shall refer to as the **Property**. The claim for possession was made pursuant to a mortgage dated 11 January 2006 (the **Mortgage**). The original lender and mortgagee was Commercial First Business Limited (**CFBL**) and Finance 4 claims as CFBL's assignee.

2. The mortgagor and owner of the Property is Mr Richard Pengelly. By his defence and counterclaim to Finance 4's claim, Mr Pengelly sought to have the Mortgage rescinded, either because CFBL had paid and his (Mr Pengelly's) fiduciary had received a secret commission or because the contract was unfair under the consumer protection legislation.

3. The claim came before His Honour Judge Carr, sitting in the County Court at Truro. At that time, there was already in place a possession order, which was stayed pending the outcome of the hearing before Judge Carr.[2] In a judgment dated 6 December 2019 (the **Judgment**), Judge Carr determined the claim in favour of Finance 4 and dismissed Mr Pengelly's defence and counterclaim. He ordered the removal of the stay that was in place, given his decision and the length of time the proceedings had been on-going.[3] Judge Carr's decisions were set out in an order dated 13 December 2019.

4. Mr Pengelly sought permission to appeal this order on various grounds. By my order dated 29 January 2020, I gave Mr Pengelly permission to appeal on all grounds. These are described more particularly in Section C(3) below. I also re-imposed the stay on the possession order and on the associated order as to costs.

5. The appeal was listed for hearing on 24 April 2020. For various reasons, immaterial to this judgment, the appeal was in fact heard on 24 June 2020. Judgment was reserved and this is that reserved judgment.

6. This judgment is structured as follows:

   (1) In Section B, I set out the facts as found by Judge Carr.

   (2) In Section C, I describe the contentions advanced by Mr Pengelly before Judge Carr, the Judge's findings and Mr Pengelly's grounds of appeal. As will be seen, the issues before the Judge were – in extremely broad terms – twofold:

[1] A list of the **bolded** terms used in this judgment, identifying the paragraph in which the term is first used, is at Annex 1 hereto.

[2] There is a complex procedural history, which is not material for the purposes of this appeal.

[3] See paragraph 28 of the Judgment.

(a) First, there were issues relating to the question as to whether the Mortgage could be rescinded by reason of a secret commission paid by CFBL to Mr Pengelly's (alleged) agent and fiduciary.

(b) Secondly, there was a question of whether Mr Pengelly's relationship with CFLB was unfair within the meaning of section 140A of the Consumer Credit Act 1974.

(3) In Section D, I set out the law as it relates to secret commissions; and in Section E I apply that law to the determinations of the Judge, dealing with the grounds of appeal that relate to those aspects.

(4) In Section F, I deal with the point arising under the Consumer Credit Act 1974.

B. THE FACTS

7. This section draws on the facts as set out in the Judgment.

8. Mr Pengelly is a farmer who operates the working farm at the Property. In 2005, Mr Pengelly had two outstanding loans at what he regarded as uncompetitive interest rates. He wanted to re-finance these loans and also raise some additional capital, this borrowing to be secured by a mortgage over the Property.

9. In order to do so, Mr Pengelly approached UK Mortgages and Finance Services Limited (**UKMFS**). His principal contacts there were a Mr Holder[4] and a Mr Phillips. In due course, a mortgage was arranged – this was the Mortgage – and an advance of some £81,000 was agreed. This had the effect of paying off the two loans, and providing Mr Pengelly with some £30,000 in capital. At [5] of the Judgment, the Judge records:

> "…It is right to record that Mr Pengelly in subsequent years took out a much larger loan through the same brokers and with the same lender. Those loans, as is the case with the one with which I am concerned, fell substantially into arrears, and proceedings involving the latter loan have long ago been concluded in separate possession proceedings."

10. Mr Pengelly's relationship with UKMFS was informal and trusting. Mr Pengelly gave evidence before the Judge. At [6] of the Judgment, the Judge states:

> "Mr Pengelly describes himself, I am sure quite accurately, as a hardworking farmer who has had to deal with financial matters as part of his day-to-day business, but he was in no way a financial expert. That is why he approached brokers that he knew in order to address the finances he wishes to raise. In his witness statement, Mr Pengelly describes at length the business model operated by UKMFS. Everything was very informal. It is clear that Mr Horton and Mr Philips 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 sign on the dotted line. As a result of that, Mr Pengelly accepts that he would often not read the documentation provided, even when it came to signing it. He cannot even say whether the documents he signed had been completed or were blank, or what had been

[4] The Judgment refers to this gentleman variously as "Mr Holder" (at [5]) and "Mr Horton" (at [6]). I shall use the first designation – but nothing turns on this.

completed on those in which entries had been made. He accepts entirely that he had every opportunity to read the documentation and every opportunity to consider what it provided him with. He agrees that he signed documentation, waiving any requirement for independent legal advice, and documentation accepting the various terms and conditions of the mortgage by which he is bound."

11. The Judge found that Mr Pengelly received UKMFS's standard terms and conditions (the **Terms**) and that he signed an **Acceptance** of these Terms.[5] The Terms provided as follows:[6]

"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 need, 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.

[5] See [7] and [8] of the Judgment. The problem for the Judge was that UKMFS had long since gone into liquidation, and the documentation was in something of an uncertain state. I accept and adopt the Judge's findings of fact.

[6] Emphasis added.

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."

12. The Acceptance, which was intended to be signed, and which the Judge found was signed by Mr Pengelly, was in the following form:

"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. Solicitor, 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."

13. Mr John Barbour, a director of CFBL, was the other witness who gave evidence before the Judge. The Judgment states:

"9. I move now very briefly to the evidence of Mr Barber. He worked for CFBL and had done for many years. I do not propose to go through his witness statement in detail, but it confirms the structure of this particular organisation. In simple terms, they had no direct access to potential borrowers and relied entirely on brokers to provide new business. As Mr Barber confirmed, at any given time there would be hundreds of brokers on their books and there was no restriction on those brokers working for other lenders. Put shortly, CFBL was prepared to underwrite mortgages that the more conventional high street lenders may have avoided. In this case, Mr Pengelly was relying on the value of agricultural land and buildings to provide security, which, as these courts are aware, can be more difficult to value than conventional residential housing. At the time, Mr Pengelly had two County Court judgments outstanding against him.

> 10. It was the policy of CBFL, as confirmed in their written documentation, to require all brokers to inform borrowers of the commission structure. They, of course, had no direct dealings with the borrowers prior to the mortgage being entered into. They would have satisfied themselves that the standard terms and conditions in this case complied with their requirements, as they did. They would have received the necessary documentation from the broker and made a decision as to the mortgage. They would then be responsible for managing and, if necessary, enforcing the terms of that mortgage. They operated a commission-based system common in business. Again, as their documentation makes clear, they would pay the broker between 2 and 4 per cent of the sum lent in the form of commission. We know that the broker took a similar commission directly from Mr Pengelly. All the evidence before me shows that this was standard business practice and there was nothing unusual or excessive about the rates provided by CFBL. Neither was there any attempt to hide the payment of the commission as it appears in clear terms on the underwriter's documentation, being documentation Mr Pengelly could have requested at any time. It is perfectly clear, as regards the operation of the business, CFBL operated in an open and conventional fashion. CFBL have subsequently assigned the rights of this mortgage, along with many others, to the claimant in this case. The claimant therefore had no involvement in any of the dealings that led to the original mortgage."

14. It is important to be clear as to the Judge's findings in relation to commission:

(1) UKMFS received a commission of between 2% and 4% from both Mr Pengelly and CFBL. On a loan of £81,000, UKMFS would have received between £1,620 and £3,240 from <u>each of</u> Mr Pengelly and CFBL.

(2) Obviously, Mr Pengelly would have known about the payment he made to UKMFS: and this payment is, in large part, irrelevant for the purposes of these proceedings. Certainly, it cannot amount to a secret commission. It was the remuneration that Mr Pengelly paid to UKMFS for the services they were providing.

(3) Equally obviously, Mr Pengelly would have that UKMFS <u>might</u> receive fees "from lenders with whom we place mortgages". However, it was Mr Pengelly's case – which the Judge appears to have accepted – that he was not told anything more than what was said in the Terms. Nor did Mr Pengelly ask any questions about other commission UKMFS might have received in placing the Mortgage.[7] According to the Judge, additional commission received by Mr Pengelly "was a matter of indifference to him as it was not something he was going to be responsible for".[8]

C. MR PENGELLY'S CONTENTIONS; THE JUDGE'S FINDINGS AND THE GROUNDS OF APPEAL

(1) The contentions

15. Before His Honour Judge Carr, Mr Pengelly contended:

[7] This seems clear from [12] of the Judgment, the first sentence of [13] and [17].

[8] Judgment at [17].

(1) That UKMFS had been paid a secret commission by CFBL such that Mr Pengelly was entitled to rescind the Mortgage as of right; alternatively

(2) That there was, by reason of the commission paid, a discretion in the court (which the court should exercise in his favour) to rescind the Mortgage; alternatively

(3) That Mr Pengelly's relationship with CFBL, and now Finance 4, was unfair within the meaning of section 140A of the Consumer Credit Act 1974.

16. In order to understand the nature of Mr Pengelly's contentions, it is necessary to consider the law as it relates to secret commissions, "half-secret" commissions and bribes, as well as the relevant provisions of the Consumer Credit Act 1974. More specifically:

(1) The starting point for Mr Pengelly's counterclaim was that UKMFS 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).

(2) Of course, in this case, Mr Pengelly's counterclaim was not against UKMFS, the party who might be said to be his fiduciary. (UKMFS's status as fiduciary, I should stress, was a point in dispute before the Judge.) Rather, it was against Finance 4, as the assignee of CFBL.[9] Mr Pengelly sought rescission not of a contract between himself and UKMFS, but rather rescission of the Mortgage, which subsisted between himself and (now) Finance 4. It was no part of Mr Pengelly's case that CFBL or Finance 4 was his fiduciary: the only fiduciary relationship pleaded by Mr Pengelly was that alleged to have subsisted between himself and UKMFS. It was Mr Pengelly's case that:

(a) UKMFS was his fiduciary.[10]

(b) A secret commission or bribe was paid to UKMFS and that this was not disclosed to him "by either the broker or [CFBL] and therefore it amounted to a secret commission or bribe".[11]

(c) As a result, according to Mr Pengelly's Defence and Counterclaim:

> "8. The payment of a secret commission or bribe by [CFBL/Finance 4] to [UKMFS] tainted the [Mortgage] with fraud and [Mr Pengelly] has an absolute right to avoid the same. [Mr Pengelly] claims rescission in aid of his common law right to avoid the [Mortgage].
>
> 9. Alternatively, if rescission is refused, [Mr Pengelly] will seek equitable compensation in respect of [CFBL's/Finance 4's] procurement of the broker's breach of fiduciary duty as aforesaid."

[9] Mr Pengelly's Defence and Counterclaim did not differentiate between CFBL and Finance 4: see paragraph 1 of the Defence and Counterclaim. So far as I can tell, no point was taken as regards Finance 4's status as assignee and whether this might afford Finance 4 additional defences. It is certainly too late to entertain any such point now, and (although it will be necessary for the purposes of exposition to differentiate between CFBL and Finance 4) I shall, for the purposes of this judgment, treat Finance 4 as if it were CFBL.

[10] See paragraph 6 of the Defence and Counterclaim.

[11] See paragraph 7 of the Defence and Counterclaim.

(3) Finally, paragraph 10 of the Defence and Counterclaim pleads:

> "Further or alternatively, [Mr Pengelly] contends that the matters set out above give rise to a relationship which is unfair to him within the meaning of section 140A of the Consumer Credit Act 1974…and [Mr Pengelly] seeks such relief as is meet pursuant to section 140B of the Act to right such unfairness as the court may find."

(2) The Judge's findings

17. The Judge found that there was no fiduciary relationship as between Mr Pengelly and UKMFS. His reasoning was as follows:

> "19. The next question is whether [UKMFS] were acting as agents. There is no doubt in my mind that [UKMFS] were 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 he did not have the expertise, so he went to [UKMFS]. In simple terms, they told him they could deal with the problem and they had access to the products that would meet his need. I accept entirely they did not provide him with a range of options nor did they discuss with him the possibility of other lenders. That was because Mr Pengelly was not particularly interested in undertaking a comparative exercise. He simply wanted two loans rolled into one alone with the provision of additional working capital. I have no doubt that Mr Pengelly was interested, of course, in the interest rates achieved and the repayment schedule provided. But having concluded it was a loan he could service that was significantly better that his present position, that was where his interest began and ended. Thereafter, [UFMS] carried out necessary administrative functions and provided the bundle of information to the lenders.
>
> 20. However, the provision of advice in such a way is not the same as establishment of an agency. As is made clear in *Bowstead & Reynolds on Agency* (21st ed), agency is a 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 relationships with third parties, and the other of whom simply manifests assent so as to or so acts pursuant to the manifestation. There are plentiful Court of Appeal authorities to support such a proposition. For two quite distinct reasons, [UKMFS] never achieved the heights of such a fiduciary relationship. The first arises as a result of my conclusions about what Mr Pengelly knew or was deemed to know about the terms and conditions in which the broker operated. At that point, he had those terms and conditions and he could have no expectation that the brokers were acting with undivided loyalty. That in itself was seen [*sic*] to be fatal to a finding of an agency arrangement of the type argued for.
>
> 21. Secondly, what [UKMFS] actually did for Mr Pengelly was in no way akin to a fiduciary relationship. There has never been any suggestion that they could commit Mr Pengelly to any contractual arrangements, much less signed or entered into the mortgage on his behalf. After they had identified the product that Mr Pengelly had accepted, they simply put together the information necessary to allow the lender to progress. The only person who could have entered into the mortgage agreement was Mr Pengelly. He could have stopped and withdrawn at any point. In simple terms, without his agreement and signature, there would have been no mortgage. It follows that there is no fiduciary relationship in this case."

18. He held that Mr Pengelly's counterclaim had to fail for that reason: the existence of a fiduciary duty was a prerequisite to Mr Pengelly's contentions succeeding.[12] However, the Judge went on to consider what the position would be if he was wrong on this point. The Judge considered that the law regarding secret and half-secret commissions to be articulated in a three-stage test laid down in *Industries & General Mortgage Co Ltd v. Lewis* by Slade J:[13]

> "A large number of authorities have been cited. Sometimes the words "secret commission" are used, sometimes "surreptitious payment", and sometimes "bribe". For the purpose 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 had 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."

19. Considering this test, the Judge held:[14]

> "There is the three stage-test laid out in *Industries & General Mortgage Co Ltd v. Lewis*, [1949] 2 All ER 573. There is no doubt that the lender did not disclose the payment of the commission directly to Mr Pengelly. That was because they relied on their standard terms requiring the broker to do this. A second requirement is that they knew the broker was acting as fiduciary agent. There is no evidence they did. They employed brokers to simply package the information necessary for them to decide whether a mortgage should be granted or not. They knew perfectly well that the brokers could not enter into the mortgage on their own as they would require the direct agreement of the borrower. It was they as lenders who had the contractual relationship with the borrower. The brokers simply provided the introduction. Therefore, I do not find the second limb made out. The third limb is obviously made out."

20. The second limb of Slade J's test depends, as it seems to me, as requiring an agency of a fiduciary nature. I am not clear whether the Judge was going further than this, and was suggesting that as well as knowing of the agency, the person making the payment needed to know that the agent was (as a matter of legal characterisation) a fiduciary. That seems to be the implication of the Judge's words, and that is a matter to which I will revert. For this (related) reason, the Judge found that Mr Pengelly's counterclaim must fail.

21. Finally, the Judge found that because this was a case of a "half-secret" commission, "there would be a discretion available to the court when it came to disposal".[15] As to this:

(1) It will be necessary to consider exactly what is meant by a "half-secret" commission – and, to be clear, the term is not that of the Judge's making, but arises out of the Court of Appeal's decision in *Hurstanger Ltd v. Wilson,*[16] which I consider further below. In essence, however, a "half-secret" commission is a

[12] Judgment at [22].

[13] [1949] 2 All ER 573 at 575.

[14] Judgment at [22].

[15] Judgment at [23].

[16] [2007] EWCA Civ 299.

secret commission or bribe paid to an agent where there has been partial, but not full, disclosure to the agent's principal. Of course, where there has been full disclosure to the agent's principal, and that principal has provided his or her informed consent, there is no bribe or secret commission at all. A "half-secret" commission appears to seek to describe that variety of cases falling short of informed consent, but where some level of disclosure has occurred.

(2) The Judge considered that the legal position in this case is in an unsatisfactory state:[17]

> "Where does that leave the legal position? The principal challenge in this case is there are two conflicting rulings by two Deputy High Court Judges. There is the judgment of His Honour Judge Raynor, QC in *Commercial First Business Ltd v. Pickup*, [2017] CTLC 1 and the judgment of Mr Pickering sitting as a Deputy High Court Judge in *Wood v. Commercial First Business Ltd (in liquidation)*, [2019] EWHC 2205. As these two judgments have effectively reached diametrically opposite decisions, I am required to decide between them when reaching my conclusions in this case. I make it clear I have read both judgments with care in what I accept is a complex and developing area of law. I will deal, where I need to, with the specific conclusions in each of these judgments, but, having considered them and the other authorities that have been placed in front of me, I am, with respect, quite clear that the decision in *Commercial First Bank v. Pickup* properly and fairly reflects the law in this area."

I should note that the second of these cases, *Wood*, is on appeal to the Court of Appeal and that appeal is due to be heard later on this year.

(3) The Judge considered that to be the case (i.e., a "half-secret" commission) because Mr Pengelly had "undoubtedly received the standard terms and conditions which confirm the possibility that the broker would receive a commission from the lender. The wording of this warning was considered in identical terms in the authorities referred to. This properly can classify the payments as a half-secret commission, as dealt with in authorities such as *Hurstanger*. As was described in that case, the secret was out of the bag, although I accept there was no evidence that Mr Pengelly was ever told the exact amount. He never asked about the amount for the reasons I have already indicated.[18] It was a matter of indifference to him as it was not something he was going to be

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[17] Judgment at [16].

[18] Those reasons are set out in Judgment at [14]: "Mr Pengelly was clear that he made no enquiries at the time to see whether the interest rates were compatible or not and what other mortgages he could have obtained elsewhere. He was also clear that he was extremely glad to have redeemed the two expensive loans and to have capital available. When asked a number of times what he would have done had he been aware of the commission and its amount, he was unable to put together any cogent argument as to why he would have done anything other than accept the mortgage as was. In truth the only sensible reaction Mr Pengelly would have exhibited would have been relief that the part of the commission that was going to fund this mortgage was the responsibility of someone else. As was said a number of times, his brokers were extremely good at what they did and he trusted their judgment. The knowledge of a perfectly normal business standard commission would in no way have shaken that belief. I am quite clear that if Mr Pengelly had known of the commission's legal [*sic*] amount, he would have acted in exactly the same way, taken out the same mortgage and sadly got into precisely the same difficulties when it came to managing the repayments."

responsible for."[19] The Judge spelled out what he considered the consequence of this to be:[20]

"One consequence of Mr Pengelly being aware or deemed to be aware of this term is that he could no longer believe that the brokers were acting for him could be said to be acting with undivided loyalty. When the possibility of a commission was raised, Mr Pengelly was aware that there was a potential conflicting financial incentive operating upon the broker."

(4) Having found that this was a case of a "half-secret" commission, the Judge stated:

"23. In any event, given this is a half-secret commission, there would be a discretion available to the court when it came to disposal. The court would have to decide in all the circumstances whether it is fair, just and appropriate to order rescission. It clearly would be neither fair, just or appropriate to do so in this case. As I have already found, had Mr Pengelly been aware of the amount of the commission, I am perfectly clear he would have continued with the mortgage in identical terms. Finding half the commission required was to be paid by the lender rather than being set at his door would have caused him nothing but relief. There is no evidence that it was anything other than a competitive mortgage appropriate to his circumstances which he was glad to receive. Granting rescission in such circumstances, with all the consequences that flow from such a decision, would be grossly disproportionate and unjust.

24. The question then arises as to whether some lesser sanction should be adopted, in particular the repayment of the commission with interest. For the reasons I have already indicated, I can see no justification for enriching Mr Pengelly in this way. In any event, while rescission could be ordered against an assignee such as the claimant, that is not the case with the lesser sanction that I have indicated. Such a debt would be owed by CFBL, who are no longer party to these proceedings. Therefore, even if I am wrong when it came to the exercise of this discretion, it cannot be awarded against the present claimant."

22. On the separate question of the Consumer Credit Act 1974, the Judge rejected the point in the following terms:

"25. That leaves the claim based on an unfair relationship. Section 140A of the Consumer Credit Act 1974 makes it clear that the relationship with which I am concerned would fall within its auspices [*sic*]. The definition of what amounts to an unfair relationship is extremely wide. The sole basis alleged in the pleadings for this being an unfair relationship is the payment of the commission. As already indicated, Mr Pengelly was aware or deemed to be aware of the possibility of the commission and made no enquiries about it. He received the mortgage he wanted at a fair and competitive rate. There is no evidence he would have acted in any other way had he been aware of the commission. In those circumstances, there is nothing unfair about the relationship. Further, rescission being a discretionary remedy, for all the reasons already given, it cannot be appropriate in this case."

[19] Judgment at [17].

[20] Judgment at [18].

(3) The grounds of appeal

23. Mr Pengelly appealed all of the Judge's conclusions in three grounds of appeal. I will not set out verbatim the grounds of appeal, but in substance Mr Pengelly contended that:

(1) The Judge had erred in failing to find that there was an agency relationship between UKMFS and Mr Pengelly that imported fiduciary duties between them.

(2) The Judge had erred in concluding that CFBL had no knowledge of this fiduciary relationship and that, therefore, the second element of the test in *Industries & General Mortgage Co Ltd v. Lewis* was not met.[21]

(3) The Judge erred in holding that, in secret commission cases, it was necessary for there to be a fiduciary relationship.

(4) The Judge erred in concluding that this was a case of a "half-secret" commission and that, in truth, this was a case where the commission was fully "secret". The jurisdiction in *Hurstanger* was therefore not engaged.[22]

(5) Even if this was a case of a "half-secret" commission, the Judge erred in holding that Mr Pengelly's remedy was as restricted as he found: he should have ordered "discretionary" rescission.

(6) The Judge erred in his conclusions in relation to section 140A of the Consumer Credit Act 1974.

D. THE LAW

(1) Fiduciaries and fiduciary relationships

24. The term "fiduciary relationship" describes a relationship that entails particular obligations and responsibilities because of the nature of trust and confidence that exists between the **fiduciary** (the person who owes the duties) and the person to whom those duties are owed (who, for want of a better term, I shall refer to as the **principal**).

25. In *Hospital Products Ltd v. United States Surgical Corporation*,[23] Mason J said:

> "The accepted fiduciary relationships are sometimes referred to as relationships of trust and confidence or confidential relations viz trustee and beneficiary, agent and principal, solicitor and client, employee and employer, director and company, and partners. The critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position. The expressions "for", "on behalf of", and "in the interests of" signify that the fiduciary acts in a "representative" character in the exercise of his responsibility…"

[21] See paragraph 20 above.

[22] See paragraph 21(1) above, where this jurisdiction is referenced.

[23] (1984) 156 CLR 41 at 96-97.

26. In *Bristol and West Building Society v. Mothew*,[24] Millett LJ provided the following description of a fiduciary:

> "A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary."

27. Whilst helpful as a label, the terms "fiduciary", "fiduciary relationship" and "fiduciary duty" need to be treated carefully. In *Fiduciary Obligations*, Finn says:[25]

> "The term itself is a relative latecomer to the vocabulary of English law. As LS Sealy has indicated in his short analysis of fiduciary relationships, it only achieved sustained currency in the law reports towards the middle of the last century and then only as a term descriptive of those relationships which were formerly designated as relationships of "trust" but which could no longer be so described with accuracy given the technical meaning which came to be attached to the term "trust" itself. 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 – and 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."

28. Millett LJ, in *Mothew*, also quoted Finn's *Fiduciary Obligations*, making the point 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". In short, the label "fiduciary" attaches as a consequence of a person's relationship with his or her principal.[26]

(2) Agents as fiduciaries

29. Whilst it is, perhaps, equally dangerous to abandon altogether the search of unifying principle, it is obviously the case that the nature of fiduciary duties (both in terms of their content and the legal response or remedy where there is a breach) will differ according to the relationship in which or out of which they arise. In this case, we are concerned with the fiduciary duties that arise out of the relationship of principal and agent.

30. Two questions immediately arise:

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[24] [1998] Ch 1 at 18.

[25] Finn, *Fiduciary Obligations*, 1st ed (1977) at [2].

[26] *Bristol and West Building Society v. Mothew*, [1998] Ch 1 at 18.

(1) What, exactly, is meant by the relationship of principal and agent?; and

(2) Is every such relationship a fiduciary one?

Unsurprisingly, these two questions are connected.

31. *Bowstead and Reynolds* defines "agency" in the following terms:[27]

"**Article 1**

Agency and Authority

(1) Agency 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, and the other of whom similarly manifests assent so to act or so acts pursuant to the manifestation. The one on whose behalf the act or acts are to be done is called the principal. The one who is to act is called the agent. Any person other than the principal and the agent may be referred to as a third party.

(2) In respect of the acts to which the principal so assents, the agent is said to have authority to act; and this authority constitutes a power to affect the principal's legal relations with third parties.

…"

32. It was suggested by Finance 4 that (at least in the case of a mortgage broker) the reference to "a power to affect the principal's legal relations with third parties"[28] meant that "true" agency was limited to those relationships where the agent was empowered to affect the principal's legal relations by causing a contractual relationship to arise between the principal and the third party. Whilst, clearly, this is an instance of agency, I do not accept that the relationship of agency is limited to this case. An agent can affect his legal relations with third parties in many cases where the agent has no power to conclude a contract on behalf of his principal. Thus, and purely by way of example, a solicitor acting for a vendor in a house purchase, has authority to receive and give good discharge for the purchase monies received, but does not have authority to conclude the sale itself; equally, an insurance broker may have no power to conclude the contract of insurance, but may well be the "agent to know" for the purposes of disclosure and – if guilty of a non-disclosure or misrepresentation – may very well render the contract of insurance voidable even though the contract itself was concluded by the principal. This is because it is perfectly possible for an agent to affect the principal's legal relations with third parties in ways other than the conclusion of a contract.

33. Clearly the label cannot drive the legal consequence, and the term "agent" is used frequently and in a variety of contexts. The fact that a person adopts or is given the label "agent" – or, conversely, seeks to avoid it – cannot be determinative. That is why is it necessary to focus on the functions that the agent is performing. But it is important not to be too prescriptive about what functions qualify a person as being an agent with fiduciary duties and what functions do not (even though the term "agent" may be used).

[27] Watts, *Bowstead and Reynolds on Agency*, 21st ed (2019) (***Bowstead and Reynolds***).

[28] Which is a phrase repeatedly used in *Bowstead*.

34. For that reason, it is dangerous to seek to equate the term agent with the status of a fiduciary. If the concept of agency is a wide-ranging and indeterminate one, then to say that all agents are fiduciaries is likely to be wrong. This point was made by the Court of Appeal in *Prince Arthur Ikpechukwu Eze v. Conway*:[29]

(1) In that case, an extremely broad concept of agency was contended for.[30] Asplin LJ made clear that the enquiry was inevitably extremely fact sensitive. The facts and circumstances needed to be carefully examined to see whether in fact a purported agent – and even a confidential agent – was in a fiduciary relationship to his or her principal.[31]

(2) There is no absolute correlation between "agency" and fiduciary duties. A person not an agent might be a fiduciary; and an agent would not necessarily be a fiduciary. Asplin LJ stated:[32]

> "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 arise where there is no agency at all. It is not helpful, therefore, to consider what might be considered to be the paradigm of any particular type of agent, whether an "introducing agent" or otherwise. It all depends on the nature of the individual's duties and which of those duties is engaged in the precise circumstances under consideration. Although the relationship of principal and agent is a fiduciary one, not every person described as an "agent" is the subject of fiduciary duties and a person described as an agent may owe fiduciary duties in relation to some of his activities and not others…"

35. *Bowstead and Reynolds* makes the entirely fair point that the duties of agents towards their principals are difficult to state with any degree of abstraction or generality because the concept of agency is so wide and because there are so many rules of application to specific types of agent or agency.[33] This "means that the common law duties of an agent can only be referred to in very general terms, which indicate the sorts of way in which an agent may be held in breach of duty".[34] This breadth and uncertainty obviously makes extremely fact dependent the label "fiduciary".

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[29] [2019] EWCA Civ 88. The statement of the law in this case is consistent with a number of other recent cases, notably: *Plevin v. Paragon Personal Finance* Ltd, [2014] UKSC 61 at [33]; *McWilliam v. Norton Finance (UK) Ltd (in liquidation)*, [2015] EWCA Civ 186 at [39] to [40]; *UBS AG (London Branch) v. Kommunale Wasserwerke Leipzig GmbH*, [2017] EWCA Civ 1567 at [83] to [84] and [92].

[30] At [38].

[31] At [38].

[32] At [39].

[33] *Bowstead and Reynolds* at [6-001].

[34] *Bowstead and Reynolds* at [6-001].

(3) Fiduciary duties

(a) The centrality of loyalty

36. In *Bristol and West Building Society v. Mothew*,[35] Millett LJ said this about a fiduciary's obligations:

> "The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal."

37. There are two aspects of a fiduciary's duties that require further consideration in the judgment: first, the duty to act solely for the principal – the duty of undivided loyalty; and, secondly, the obligation on a fiduciary not to make a profit out of his trust.

(b) The duty of undivided loyalty

38. A principal is entitled to the undivided loyalty of his fiduciary. In *Bristol and West Building Society v. Mothew*,[36] Millett LJ stated:

> "…A fiduciary who acts for two principals with potentially conflicting interests without the informed consent of both is in breach of the obligation of undivided loyalty; he puts himself in a position where his duty to one principal *may* conflict with his duty to the other…This is sometimes described as "the double-employment rule". Breach of the rule automatically constitutes a breach of fiduciary duty…"

39. Similarly, Asplin LJ in *Prince Arthur Ikpechukwu Eze v. Conway*:[37]

> "…an agent of one principal cannot become the agent of the other without the permission of the first with whom he originally established his agency and therefore he cannot receive a commission from the second principal without the full knowledge of the first…"

(c) Gains or profits by the fiduciary

40. A fiduciary's loyalty will be undermined if he or she is subject to other incentives or calls on his or her loyalty. A fiduciary must avoid such conflicts, and the law provides remedial incentives to ensure that a fiduciary's loyalty is unimpaired, by making sure that if a fiduciary makes a profit out of his or her position he or she must account for it to his or her principal, unless the fiduciary has the principal's informed consent to make that profit.

41. *Keech v. Sandford*[38] involved a lease held on trust. On the expiration of the lease, the trustee sought a renewal of it for the benefit of his beneficiary – this was refused. The trustee then sought and obtained a renewal of the lease for his own benefit. One can easily see the potential for conflict of interest. If the trustee could, in these circumstances, himself obtain the renewal, how could the principal be assured that the

[35] [1998] Ch 1 at 18.

[36] [1998] Ch 1 at 18-19.

[37] [2019] EWCA Civ 88 at [37].

[38] (1726) Sel Cas t King 61; 25 ER 223

fiduciary had acted with "single-minded loyalty" when seeking renewal of the lease on the principal's behalf? More to the point, how could a court test that the fiduciary had acted with "single-minded loyalty"? The answer is to ensure that the fiduciary is obliged to disgorge his benefit to the principal. In *Keech v. Sandford* that outcome was achieved by obliging the fiduciary to hold the renewed lease on the same trusts as the old lease had been held. Lord King LC held:

> "…Though I do not say there is a fraud in this case, yet he should rather have let it run out than to have the lease to himself. This may seem hard, that the trustee is the only person of all mankind who might not have the lease; but it is very proper that the rule should be strictly pursued, and not in the least relaxed; for it is very obvious what would be the consequences of letting trustees have the lease on refusal to renew to *cestui que use*."

42. The principle operates so that a fiduciary is obliged to account to his principal for two types of gain, which were clearly expressed by Deane J in *Chan v. Zacharia*:[39]

> "The variations between more precise formulations of the principles governing the liability to account are largely the result of the fact that what is conveniently regarded as the one "fundamental rule" embodies two themes. The first is that which appropriates for the benefit of the person to whom the fiduciary duty is owed any benefit or gain obtained or received by the fiduciary in circumstances where there existed a conflict of personal interest and fiduciary duty or a significant possibility of such conflict; the objective is to preclude the fiduciary from being swayed by considerations of personal interest. The second is that which requires the fiduciary to account for any benefit or gain obtained or received by reason of or by use of his fiduciary position or of opportunity of knowledge resulting from it: the objective is to preclude the fiduciary from actually misusing his position for his personal advantage. Notwithstanding authoritative statements to the effect that the "use of fiduciary position" doctrine is but an illustration or part of a wider "conflict of interest and duty" doctrine …the two themes, while overlapping, are distinct. Neither theme fully comprehends the other and a formulation of the principle by reference to one only of them will be incomplete. Stated comprehensively in terms of the liability to account, the principle of equity is that a person who is under a fiduciary obligation must account to the person to whom the obligation is owed for any benefit or gain (i) which has been obtained or received in circumstances where a conflict or significant possibility of conflict existed between his fiduciary duty and his personal interest in the pursuit or possible receipt of such a benefit or gain or (ii) which was obtained or received by use or by reason of his fiduciary position or of opportunity or knowledge resulting from it."

43. Where the fiduciary receives a gain from a third party, that gain is often referred to as a **secret commission** or **bribe**. 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. For instance, *Keech v. Sandford* did not involve a secret commission or bribe, but nevertheless was a profit or gain for which the fiduciary was obliged to account. The reason a secret commission or bribe is important in this case, and the reason I am differentiating such a gain from other sorts of (wrongful) profit that a fiduciary can derive from his or her position, is because the secret commission or bribe is paid by a **third party** – and it is this case that this judgment is concerned with.

(d) Consent

44. *Snell* says this:[40]

[39] (1984) 154 CLR 178 at 198-199.

> "The fiduciary's principal is competent to relax, or to forgo altogether, the protection which fiduciary doctrine provides him or her. The principal may authorise the fiduciary to act in a way which would otherwise be a breach of fiduciary duty, but the "relation must be in some way dissolved; or, if not, the parties must be put so much at arm's length, that they agree to take the character of purchaser and vendor". The principal may bring an end to the fiduciary relationship completely, which avoids the application of fiduciary duties, or alter the fiduciary's non-fiduciary duties in respect of a particular transaction so that, for that transaction, there is no conflict between those non-fiduciary duties and the fiduciary's personal interest.
>
> To provide the fiduciary with an effective defence to a claim for breach of fiduciary duty, the principal's consent to the relaxation of the fiduciary's liability must be fully informed. The burden of establishing informed consent for conduct which would otherwise constitute a breach of fiduciary duty lies on the fiduciary. In order to show that the consent was fully informed there must be clear evidence that it was given after the fiduciary made "full and frank disclosure of all material facts". :The key is disclosure – "sunlight bleaches"". The principal's consent will be "watched with infinite and the guarded jealousy" by the court.
>
> The materiality of information to be disclosed is determined not by whether it would have been decisive (although, if it would have been decisive, then it clearly was material), but rather by whether it may have affected the principal's consent. Thus, it is no defence to a claim for breach of fiduciary duty for the fiduciary to argue that the principal would have acted in the same way even if the information had been disclosed. Further, consistent with equity's focus on substance rather than form, disclosure is treated in a functional, rather than formalistic, way, so that the sufficiency of disclosure depends on the sophistication and intelligence of the person to whom disclosure is required to be made.
>
> The fiduciary must disclose the nature of his interest in the transaction, not merely the existence of the interest. Where the existence of the interest is disclosed, but not the precise nature of that interest, the principal's fully informed consent may not have been obtained, although the fact that the existence of the interest is known to the principal can result in a reduced range of remedies being available to the principal.
>
> Consent can be inferred where the circumstances are sufficiently clear to justify such an inference.
>
> Where the principal knows that the agent will receive a commission and could have discovered the level of commission by making inquiries, failure to do so (and consequent misapprehension as to the amount of commission) does not negate informed consent. This, however, does not apply where the commission is not a customary usage and is not readily ascertainable from an available source which the principal has failed to take the trouble to discover.
>
> The principal's consent can be sought before the breach of fiduciary duty occurs, but it may also be sought after the breach has taken place. Where it is argued that the principal has consented to or affirmed the fiduciary's breach after the fact, it must be shown that the principal was aware at the time of affirmation of the material facts which constituted the breach."

45. I adopt this as a helpful general statement of the law in this regard.

(4) "Accessory" liability: third parties

[40] McGhee and Elliott (eds), *Snell's Equity*, 34th ed (2020) at [7-015] (omitting footnotes).

(a) The definition of a secret commission or bribe

46. As I have noted, this is not a case where Mr Pengelly seeks any remedy against his fiduciary (assuming, for the present, UFMS to be his fiduciary). The remedy – rescission of the Mortgage – is one that is sought against Finance 4 (drawing no distinction, for these purposes, between Finance 4 and CFBL[41]).

47. I have set out Slade J's definition of a bribe in paragraph 18 above, which I accept as a current statement of the law in this regard. I note that Slade J treated the terms bribe and secret commission as synonymous, as I do in this judgment. Leggatt J defined a bribe similarly (albeit more pithily) in *Anangel Atlas Compania Naviera SA v. Ishikawajima-Harima Heavy Industries*:[42]

> "A commission or other inducement which is given by a third party to an agent as such, and which is secret from his principal."

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.

49. In *Novoship (UK) Ltd v. Mikhaylyuk*,[43] Christopher Clarke J described the accessory liability for bribes or secret commissions in the following terms:

> "106. The essential character of a bribe is, thus, that it is a secret payment or inducement that gives rise to a realistic prospect of a conflict between the agent's personal interest and that of his principal. The bribe may have been offered by the payer or sought by the agent. There is no need to establish dishonesty or corrupt motives. This is irrebutably presumed…A bribe encompasses not just a payment of money but the conferring of any advantage or benefit, and may be an actual benefit or merely the promise of a benefit held out by the payer or an expectation of one. The motive for the payment or inducement (be it a gift, payment for services or otherwise) is irrelevant…
>
> 107. The payments (or other benefits) do not have to be made directly to the fiduciary. Bribes may be paid to third parties close to the agent, such as family members or discretionary trusts, or simply to those whom the agent wishes to benefit. The test is whether the payment (or other benefit) puts the fiduciary in a real (as opposed to a fanciful) position of potential conflict between interest and duty.
>
> 108. The recipient of the bribe (or the person at whose order the bribe is paid) must be 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. There is, however, no need to show that the payer intended the agent to be influenced by the payment or whether he was *in fact* influenced thereby. There is an irrebuttable presumption as to both…

[41] As to this, see footnote 9 above.

[42] [1990] 1 Lloyd's Rep 167 at 171.

[43] [2012] EWHC 3586 (Comm).

> 109. The payment need not be linked to a particular transaction…It is sufficient if the agent is tainted by the bribery at the time of the transaction between the payer of the bribe and the payee's principal. If that is so, the agent's conflict of interest means that the principal has been deprived by the other party to the transaction of the disinterested advice of his agent and is entitled to a further opportunity to consider whether it is in his interests to affirm it. It follows that subsequent transactions may be tainted by payments linked to an earlier transaction between the parties, or by a payment not linked to any particular transaction…"

(b) Accessory liability

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.[44]

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.

52. Assuming the secret commission or bribe to the fiduciary constitutes a breach of fiduciary duty on the part of the fiduciary, what more needs to be shown in order to render the third party, the conferrer of the benefit, liable for the payment of a bribe?

53. In *Logicrose Ltd v. Southend United Football Club Ltd*,[45] Millet J stated the law as follows:[46]

> "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. Any such private interest, whether actual or contemplated, which is not known and consented to by his principal, disqualifies him…It is immaterial whether the agent's mind has been affected or whether the principal has suffered any loss as a result: "the safety of mankind requires that no agent shall be able to put his principal to the danger of such an inquiry as that"…The principal, having been deprived by the other party to the transaction of the

[44] In accordance with the law set out in paragraph 44 above.

[45] [1988] 1 WLR 1256 at 1260*ff*.

[46] Omitting the authorities cited. Emphasis added.

disinterested advice of his agent, is entitled to a further opportunity to consider whether it is in his interests to affirm it."

Millett J then considered whether, in this case, the principal had been deprived of the disinterested advice of the fiduciary. He then went on to consider the extent to which the third party needs to know of this:

"For this purpose they must establish that they were deprived of the disinterested advice of their agent by or at least to the knowledge of the [third party]. Is this condition satisfied? I have no doubt that it is. It is, of course, immaterial whether the initiative for the agent's taking an interest of his own came from the agent himself or from the other party to the transaction. It must also be immaterial whether the other party provided it directly or knowingly assisted the agent to obtain it, for example by diverting to himself or an associate a payment intended for his principal. In all the reported cases, the other party has provided it himself and has been fully aware of the agent's personal interest. There is, accordingly, no direct authority on the degree of knowledge which he must possess of the existence of the agent's personal interest. With one reservation to which I shall come in a moment, however, and which goes only to the facts of which knowledge must be proved, I accept the submission made on behalf of the [third party] that nothing less than actual knowledge or wilful blindness will suffice. In particular, constructive notice will not do. Parties to negotiations do not owe each other a duty to act reasonably, but only to act honestly. In the present context, the principal's right is a right to rescind for fraud, not negligence. There is in my judgment a close parallel with the cases on knowing assistance in a breach of trust. The same facts may give rise to different remedies, and as the present case demonstrates it will often be impossible to distinguish between the payment of a bribe or secret commission properly so-called and the diversion of the principal's money into the agent's pocket. There cannot in truth be any real difference between the secret payment to the agent of a sum additional to the purchase price and the payment to him of part of the purchase price of which his principal is unaware. In my judgment, the difference between the two lines of authority (that is to say the "bribery" cases and the "knowing assistance" cases) lies not in the factual background but in the remedy sought; and the state of mind necessary to make the other party liable ought to be the same whether the claim is for an account of the money which he helped the agent to misappropriate or rescission of the transaction itself.

My one reservation, which I make for the sake of completeness, is this. It is clear that, where one party to a transaction takes what Collins LJ described as "the hazardous course" of making a payment for the personal benefit of the other's agent, and does not disclose it to the principal, he cannot afterwards defend the transaction by claiming that he believed the agent to be an honest man who would disclose it himself…Where, therefore, knowing that the agent has an interest of his own he does not himself disclose it to the other party, then in the words of Collins LJ…"he must at least accept the risk of the agent's not doing so." In my judgment, the converse must equally apply: if a man deals secretly with another's agent behind the back of his principal, knowing that the agent intends to conceal the dealing from his principal and that he *may* be intending to obtain some private advantage for himself, he takes the risk that he *does* intend to do so. The two are only different aspects of the same general principle, expressed in varying terms and contexts but always forcibly and to the same effect: "any surreptitious dealing between one principal and the agent of the other principal is a fraud on such other principal, cognizable in this court"…:

54. Provided the payment is a bribe or secret commission – in the sense that its receipt constitutes a breach of fiduciary duty, such that the fiduciary would be obliged to account for it to his or her principal – what needs to be shown (basing myself on the three limbs of Slade J's test at paragraph 18 above) is:

(1) That the bribe or secret commission is made to the fiduciary. I stress that nothing in this is intended to derogate from the width of this, as stated by Christopher Clarke J in *Novoship*: the bribe or secret commission may be paid indirectly, or not paid but promised or expected. This formulation is intended to reflect the first limb of Slade J's test, set out in paragraph 18 above. I have used the term "fiduciary" in preference to that of "agent" for the reasons given in paragraphs 29 to 35 above.

(2) That the third party knew of the capacity in which the recipient of the bribe or secret commission was acting. Although this is based on Slade J's second limb, I am conscious that this is not Slade J's formulation. Slade J referred to the "agent of the other person with whom he is dealing".[47] However, I am concerned to avoid both the term "agent" and the term "fiduciary". An agent is not necessarily a fiduciary; and the term "fiduciary" is a technical term best avoided when seeking to describe the third party's knowledge or state of mind. In my judgment, the third party must know the facts that constitute a person a fiduciary, but does not need to know that the legal consequence of those facts is that the payee is a fiduciary. In other words, provided the fiduciary was in law a fiduciary, the third party must know enough of the facts in order for that to be a conclusion that could be drawn as a matter of law.[48]

(3) That the third party fails to disclose to the principal that he or she has made a payment to the fiduciary. The law is unclear as to precisely how much the third party must disclose. Clearly, it would be inappropriate for the third party to seek to vary the nature of the relationship between the principal and the fiduciary by obtaining the principal's consent to the bribe or secret commission, but in my judgment, apart from the question of consent, the disclosure provided by the third party to the principal must be the full disclosure described in *Snell* and set out in paragraph 44 above.

55. The third party can, of course, rely upon the fiduciary to disclose the bribe or secret commission to his principal in such a way as to avoid breaching his or her fiduciary duty. If that occurs, then neither the fiduciary not the third party will be exposed to a claim from the principal, because full disclosure will have been made. However, to the extent that the fiduciary fails properly to inform his or her principal, the third party will be exposed. As Asplin LJ stated in *Prince Arthur Ikpechukwu Eze v. Conway*:[49]

> "…it is not in dispute that the payee or promisor takes a "hazardous course" if he does not tell the person with whom he intends to contract and whose agent is to be the recipient about the payment or promise rather than trusting to the payee to do so. Only actual disclosure will do…"

[47] See paragraph 18 above.

[48] If and to the extent that the Judge read more into limb (ii) than this, I consider that he erred: see paragraph 20 above.

[49] [2019] EWCA Civ 88 at [36]. See also *Grant v. Gold Exploration and Development Syndicate*, [1899] 1 QB 233 at 249 (*per* Collins LJ) and the passage in *Logicrose* quoted at paragraph 53 above.

(C) "Half-secret" commissions

56. Both of the parties – both before the Judge and before me – referred me to the decision of the Court of Appeal in *Hurstanger Ltd v. Wilson*.[50] This was primarily a case turning on aspects of the Consumer Credit Act 1974. However, the question of secret commissions arose at first instance by way of amendment, although no evidence was called in relation to the point.[51] Moreover, neither before the trial judge nor before the Court of Appeal was the law in this area fully addressed. At the end of the appeal, the Court of Appeal asked for and in due course received written submissions on this point.[52] It is, therefore, necessary to approach both the facts and the law with some care.

57. The facts were as follows:

(1) The defendants – I shall refer to them as the **Principals** – were in arrears under their mortgage. They applied – through a broker (the **Fiduciary**) – for a loan from a third-party lender (the **Third Party**).[53] The loan sought from the Third Party was in the amount of £8,000 and was intended:

(a) To repay the arrears of some £5,500.

(b) To pay the Fiduciary's "arrangement fee" of £1,000 (the **Arrangement Fee**).

(c) To provide a surplus (of some £1,500) to the Principals.[54]

(2) Upon receipt of the Principals' loan application via the Fiduciary, the Third Party sent three documents to the Principals for them to sign and return.[55] As to these:

(a) One of the documents authorised the payment of the Fiduciary's Arrangement Fee out of the loan proceeds.[56]

(b) Another document – headed with an injunction to the Principals to read it carefully before signing – contained a number of statements to be made by the Principals on their signing of the document to show (as Tuckey LJ put it) "that they knew what they were letting themselves in for".[57] One of these statements – at (d) – provided:[58]

> "The broker who assisted us in making this loan application is acting as our agent and is not tied in any way whatsoever to the [Third Party]. We have not been persuaded, pressured or induced in any way to accept this loan or to borrow more money than we require or can comfortably afford to repay together with interest.

[50] [2007] EWCA Civ 299.
[51] *Hurstanger* at [30].
[52] *Hurstanger* at [32].
[53] *Hurstanger* at [2].
[54] *Hurstanger* at [2].
[55] *Hurstanger* at [2].
[56] *Hurstanger* at [3].
[57] *Hurstanger* at [4].
[58] *Hurstanger* at [4]. Emphasis supplied.

> In certain circumstances [the Third Party] does pay commission to brokers/agents. In as far as it is able to do so, it endeavours to ensure that the broker conducts their business activities in a fair and proper manner. We [i.e. the Third Party][59] will pay moneys to your broker [i.e. the Fiduciary] strictly in accordance with your signed authority by the deduction from this advance; this is not a condition of the loan."

(3) On completion of the transaction, a second charge was effected over the Principals' home and the proceeds of the loan were dispersed as described in paragraph 57(1) above. Thus, £1,000 (the Arrangement Fee) was paid to the Fiduciary.[60] Although not stated explicitly by the Court of Appeal, it is obvious that this payment was a payment made by the Principals to the Fiduciary in return for the Fiduciary's services. Of course, the payment was made out of the monies advanced by the Third Party to the Principals, but that cannot affect the nature of the transaction. The Third Party was simply authorised by the Principals to pay the Arrangement Fee to the Fiduciary out of the loan. Presumably, there was some form of agreement between the Principals and the Fiduciary. The arrangements were described at [30] of the Court of Appeal's decision in *Hurstanger* (*per* Tuckey LJ):

> "As I have already said this issue only arose by amendment made at trial. The first defendant [one of the Principals] did not give or call any evidence about it. A letter from the [Fiduciary] was put before the recorder saying he was not tied to the [Third Party] and that "it was an expectation that we would receive a commission from the lender in addition to the broker fee negotiated with the borrower". The [Third Party] called Mr Fellowes, one of its directors, who explained that the tertiary or non-status lending market was highly competitive and that it had become necessary for small companies like the [Third Party] to pay commission to brokers to attract their business. Such commissions were a matter of separate discussion or negotiation and the rates were largely dictated by market forces. The recorder notes that he was not invited to make any finding that this was a trade practice because, if there was a such a practice, it was not suggested that the [Principals] were aware of it. However, he did find that there was nothing unusual about the circumstances in which the commission was paid in this case or its amount (3%) which he described as conventional."

It is thus important to note that there was no contemporaneous documentation (or other contemporary evidence) regarding the relationship between the Principals and the Fiduciary. The letter put before the recorder and the evidence of Mr Fellowes referred to by Tuckey LJ were (in the case of the letter) after the event and (in the case of Mr Fellowes) a general description of the market in which the Third Party operated.

(4) As well as the Arrangement Fee, the Third Party paid to the Fiduciary a "commission" (the **Commission**) of £240.[61] To be clear, this money did not represent any kind of payment from the Principals to the Fiduciary. It was a payment by the Third Party to the Fiduciary.

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[59] The drafting is very poor. Clearly, the first "We" ("We have not been persuaded…") refers to the Principals. This "We" must – looking at the context – refer to the Third Party, but this is certainly an element of confusion that should have been avoided.

[60] *Hurstanger* at [5].

[61] *Hurstanger* at [5].

(5) In due course, the Principals failed to maintain the payments under the loan and fell into arrears. The Third Party commenced mortgage possession proceedings against them. As has been described,[62] the question of secret commission arose by amendment at trial and was considered on appeal by the Court of Appeal.

58. The Court of Appeal summarised the decision of the recorder in the following way:[63]

> "The recorder proceeded on the basis that it was common ground that where a person (in this case the [Third Party]) makes a payment to the agent of another person with whom he is dealing (in this case the [Principals]) knowing of the agency and fails to disclose that he is making or has made that payment, the other is entitled to rescind the contract. The dispute before the recorder was purely factual: was the £240 commission paid by the [Third Party] to the [Fiduciary] secret? Relying on the document which said that the [Third Party] did pay commission to brokers in certain circumstances the recorder held that the payment was not secret. He said that anybody reading that document, as the [Principals] were enjoined to do, would appreciate that the [Fiduciary] might receive a direct commission from the [Third Party]. Such notice would have enabled the [Principals] to challenge the [Fiduciary], insist on a term that no commission be paid or approach a different broker. If the borrower simply proceeded with the transaction without comment or inquiry "the inference must be that he or she would not be troubled if commission is in fact paid to the broker by the lender". He therefore concluded that the commission was not secret."

59. Of course, I accept that this is merely a summary of the recorder's reasoning on a point that was not fully argued before him. Nevertheless, there are two points that can be made:

(1) First, the recorder summarised very clearly the law that I have described more fully in the preceding paragraphs, namely that the mere payment of money by a third party to a fiduciary, knowing the facts that render that person a fiduciary, is of itself sufficient to enable any contract between the third party and the principal to be rescinded. The Court of Appeal did not consider this proposition any further in its judgment, save simply to repeat in substance what the recorder had stated:[64]

> "A third party paying commission knowing of the agency will be an accessory to such a breach. The remedies for breach of fiduciary duty are equitable: they of course include rescission and compensation."

(2) Secondly, the recorder concluded that the commission in this case was not secret, because of the limited disclosure made to the principal. Contrary to the law as set out in paragraph 44 above, the recorder did not require informed consent to obviate what would otherwise be a breach of fiduciary duty, but permitted something less – a putting "on inquiry" of the principal – to suffice. The Court of Appeal corrected this error, by making clear that – in order for either the fiduciary or the third party to avoid liability – full disclosure to the principal was necessary, as was the principal's consent in light of that disclosure:

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[62] See paragraph 56 above.

[63] *Hurstanger* at [31].

[64] *Hurstanger* at [34]. See also *Ross River Ltd v. Cambridge City Football Club Ltd*, [2007] EWHC 2115 (Ch) at [205].

"33 Certain things are clear. The defendants retained the broker to act as their agent for a substantial fee. The contract of retainer contained the usual implied terms, but the relationship created was obviously a fiduciary one. As a fiduciary the agent was required to act loyally for the defendants and no put himself into a position where he had a conflict of interest. Yet he agreed that he would be paid a commission by the other party to the transaction which his clients had retained him to procure. By doing so he obviously put himself into a position where he had a conflict of interest. The defendants were entitled to expect him to get them the best possible deal, but the broker's interest in obtaining a further commission for himself from the lender gave him an incentive to look for the lender who would give him the biggest commission.

34 The broker could only have acted in this way if the defendants had consented to his doing so "with full knowledge of all the material circumstances and of the nature and the extent of [his] interest": *Bowstead & Reynolds on Agency*, 18th ed (2006), art 44, para 6-055 – duty to make full disclosure. An agent who receives commission without the informed consent of his principal will be in breach of fiduciary duty. A third party paying commission knowing of the agency will be an accessory to such a breach. The remedies for breach of fiduciary duty are equitable: they of course include rescission and compensation.

35 What amounts to sufficient disclosure for these purposes? *Bowstead & Reynolds* says, at para 6-057:

> "Consent of the principal is not uncommon. But it must be positively shown. The burden of proving full disclosure lies on the agent and it is not sufficient for him merely to disclose that he has an interest or to make such statements as would put the principal on inquiry: nor is it a defence to prove that had he asked for permission it would have been given."

I think this is an accurate statement of the law. Whether there has been sufficient disclosure must depend upon on the facts of each case given that the requirement is for the principal's informed consent to his agent acting with a potential conflict of interest.

36 There is some doubt as to whether the agent's duty of disclosure requires him to disclose to his principal the amount of the commission he is to receive from the other party. *Bowstead & Reynolds* says, at para 6-084:

> "where [the principal] leaves the agent to look to the other party for his remuneration or knows that he will receive something from the other party, he cannot object on the ground that he did not know the precise particulars of the amount paid. Such situations often occur in connection with usage and custom of trades and markets. Where no usage is involved, however, the principal's knowledge may require to be more specific."

The cases cited support these propositions. Here I think the requirement is more special. Borrowers like the defendants coming to the non-status lending market are likely to be vulnerable and unsophisticated. A statement of the amount which their broker is to receive from the lender is, I think, necessary to bring home to such borrowers the potential conflict of interest.

37 There is nothing about any of this which should come as a surprise to any lender or broker working in the non-status lending market. In November 1997 the

Office of Fair Trading issued revised guidelines ("Non-Status Lending: Guidelines for Lenders and Brokers") which told such lenders to:

> "15 …warn that the broker or other intermediary may not be in a position to give unbiased advice if they are tied to the lender or are paid a fee or commission by the lender…
>
> 16 The contract documentation and any customer booklet or leaflet …should…indicate if any commission or other payment is payable by the lender to the broker, and should explain the purpose and nature of any such commission and the basis of calculation."

and told such brokers to:

> "20 …disclose, both orally and in writing at an early stage, the existence and nature of any commission or other payment payable by the lender…They should explain clearly the implications of any such commission for the broker's role with regard to the borrower. This is in order that the borrower is clear as to any potential conflict of interest on the part of the broker. The [Office of Fair Trading] would encourage brokers to disclose the amount or likely amount or percentage of the commission, since such transparency will help to reassure borrowers that they are receiving appropriate advice from the broker. Where this is not done, the broker should disclose the factors which will determine its calculation, including whether it will be a percentage of the loan or a fixed sum, and whether it is intended to reject the actual costs incurred by the broker in arranging the loan or is linked to the total volume or value of business brought to the lender over a given period. All such disclosures should be made in writing before the borrower enters into the loan agreement, and preferably before the loan application is submitted to the lender."

60. Clearly, on this basis, there was no full disclosure to the Principals of the secret commission or consent by them to it. In these circumstances, on the law as it stood up to *Hurstanger*, absent some kind of ratification by the Principals, or perhaps through the operation of *laches*, the Principals ought to have been permitted to set aside the transaction entered into with the Third Party. However, that was not the conclusion that the Court of Appeal reached:

> "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.
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> 39 But "the real evil is not the payment of money, but the secrecy attending it": Chitty LJ in the leading case of *Shipway v. Broadwood*, [1899] 1 QB 369, 373. 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. There is no authority which sheds any light on this question. We have been referred to *Bartram & Sons v. Lloyd*, (1904) 90 LT 357, where a secret commission had been agreed and paid but the question there was whether the principal had elected to affirm the contract with the other party at a later meeting when he was given some information about what had happened. The court held that he had not, but the decision turned upon whether the principal had made his election with full knowledge of the material facts and not upon the consequences of an inadequate initial disclosure.

40 So what is the position in this case? Mr Say [counsel for the Principals] submits that the disclosure to the defendants was entirely inadequate and did not negate secrecy. It simply said that a commission might be paid to the broker but should have said that a commission was to be paid and stated the amount because these facts were known at the time the defendants were asked to sign the document relied upon by the claimant. The defendants' fully informed consent to the payment of commission had not therefore been obtained. Furthermore he submits that the notice was ambiguous: having said that in certain circumstances the claimants did pay commission it went on to say it would "pay moneys to your brokers strictly in accordance with your signed authority by deduction from this advance".

41 Mr Seymour [counsel for the Third Party] submits that it was for the defendants to establish that there had been inadequate disclosure. The allegation that the claimant had paid a secret commission or bribe was serious and yet the defendants had called no evidence to substantiate it. We do not know what, if anything, they were told by the broker or what they understood from the document which they signed. It had not been established that the claimant had procured any breach of duty by the broker. Nevertheless Mr Seymour submits that there was sufficient disclosure. Secrecy had been negated by informing the defendants that commission might be paid and the payment did not become secret simply because they were not given the actual details of the amount paid. Nor, Mr Seymour submits, was the notice ambiguous. Read carefully, as the borrower was told to do, the passage relied upon by Mr Say referred first to a payment by "the company" "in certain circumstances", and then two sentences later to moneys payable by the borrower which they had authorised to be dispersed out of the proceeds of the loan. In other words, the document is referring to different payments by the lender and the borrower. The payment by the lender to the broker would only be made in certain circumstances; the payment by the defendants out of the proceeds of the loan would be made to the broker in any event.

42 Having looked at the pleadings, the written submissions and the recorder's judgment it seems to me that it was common ground between the parties at trial that the only disclosure made to the defendants was by means of the claimant's document which the defendants signed. The broker's letter said nothing about any disclosure which he had made; nor did Mr Fellowes suggest that anything else had been disclosed by anyone. By signing the document the defendants must be taken to have understood what it said but no more. Quite apart from this, the passage from *Bowstead & Reynolds on Agency* which I have cited in [35] says that it is for the agent to establish that sufficient disclosure has been made. Here the claimant knew that the broker was the defendants' agent and so it had to show that it paid commission to him in circumstances where its borrowers had given their informed consent to such a payment. That was obviously the

purpose of the document the defendants were asked to sign. The question is whether it achieved that purpose.

43 Did it negate secrecy? I think it did. 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. This was the recorder's view and I agree with him.

44 Was the defendants" informed consent obtained? I do not think it was. The passage which I have quoted was muddled although, read carefully, for the reasons given by Mr Seymour, it may not in fact have been ambiguous. But it could and should have been clearer and informed the defendants that a commission was to be paid and its amount and done so in terms which made it clear that the defendants were being asked to consent to this. I also think this statement should have been accompanied by the warning recommended by the Office of Fair Trading to the extent that its payment to the broker might mean that he had not been in a position to give unbiased advice.

45 So for these reasons I do not accept either party's submissions about the disclosure. This is a half-way house case. The claimant did not pay the broker a secret commission but procured the broker's breach of fiduciary duty by failing to obtain the defendants' informed consent to the broker acting in the way he did.

46 This conclusion means that the defendants are not entitled to deploy the full armoury of remedies which would have been available if this had been a true secret commission case. If it had been, a difficult question would have arisen as to whether they were entitled to rescission as of right. As the loan agreement was voidable and the defendants had elected to avoid it, the argument would be that the agreement had gone and they were entitled to rescission simply on terms as to counter-restitution. In other words the equitable remedy of rescission would simply be deployed in aid of the common law to ensure that its consequences were dealt with fairly between the parties.

47 But no such difficulty arises when considering the appropriate remedy for breach of fiduciary duty for which purely equitable relief is available. Here there is no doubt that the court has a discretion as to whether or not to grant rescission. This is illustrated by *Johnson v. EBS Pensioner Trustees Ltd*, [2002] Lloyd's Rep PN 309 where this court had to consider, among other things, whether a guarantee given by one of the defendants as security for a loan made by solicitors to his company should be rescinded because the solicitor acting for him had a conflict of interest and had been in breach of his fiduciary duty by failing to disclose that his firm received service charges on the loan. The court (Mummery, Dyson LJJ and Douglas Brown J) upheld the judge's refusal to grant rescission and rejected the submission that rescission was available as of right in such circumstances. The remedy was discretionary. Dyson LJ said, at para 79:

> "When exercising its equitable jurisdiction the court considers what fairness requires not only when addressing the question of the precise form of relief, but also when considering whether the remedy should be granted at all."

48 In *Johnson*'s case the court ordered the solicitor to account for the service charge to his client. In this case, the broker could similarly have been required to account to the defendants for the £240 commission he received from the claimant. But no such claim has been made against the broker and so, alternatively, the defendants have a claim for equitable compensation against the claimant as it procured the broker's breach of fiduciary duty. This mirrors the common law right to claim the return of a bribe as money had and received.

> 49 I think the defendants are also entitled to interest on the £240 from the date it was received (5 August 2003). Mr Seymour says only "ordinary" interest should be awarded. I would award simple interest at the loan agreement rate of 1.29% per month.
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> 50 The only remaining question is whether we should order rescission of the loan agreement and its related legal charge. As I have said we have a discretion as to whether or not to make such an order. I do not think we should do so. The agreement and charge are fair and have been held to be enforceable except for the £295. The defendants will be fully compensated by an award of £240 plus interest. To rescind the transaction altogether would be unfair and disproportionate. This is my view irrespective of whether the defendants would be able to make counter-restitution."

61. As Tuckey LJ recognised,[65] *Hurstanger* is (or was) new law. It is impossible to imagine that there have not been cases before *Hurstanger* where a fiduciary or a third party paying a fiduciary has made a disclosure of that payment falling short of the full disclosure that the law requires, yet there is no clear authority, before *Hurstanger*, for the proposition that partial disclosure of a bribe or secret commission might affect the remedies available to the principal.[66] In the first edition of *The Law of Rescission*, the development in *Hurstanger* is described in the following terms:[67]

> "Section 2(2) of the [Misrepresentation Act 1967] was introduced because it was believed that rescission on grounds of innocent misrepresentation could have a disproportionate effect, and that the general law did not contain the resources necessary to ameliorate this effect. More recently, however, the courts have asserted a discretion under the general law to refuse rescission in cases where the effect would be disproportionate, and to award a pecuniary remedy in lieu…This power has only been exercised in one clear case, *Hurstanger v. Wilson*, which was a case involving non-disclosure of a commission by a fiduciary loan broker. The result in that case may be understood as involving the development of a new bar under the general law parallel to the bar created by section 2(2) in relation to non-fraudulent misrepresentation. The scope of the new bar and the principles by which it applies remain to be elaborated by the courts."

62. Since *Hurstanger*, there have been a number of cases where the principle of "half-secret" commissions has been recognised and (as necessary) applied.[68] These include the two authorities referred to by the Judge,[69] *Commercial First Business Limited v. Pickup*[70] and *Wood v. Commercial First Business Limited*.[71] Neither assist in terms of the principles by which the *Hurstanger* jurisdiction is to be exercised, although both accept that in cases of "half-secret" commissions, rescission may not be appropriate for that reason. The Judge considered that these decisions reached "diametrically opposed conclusions";[72] but this was in relation to the question of whether a fiduciary relationship existed at all, which is a question that I have already considered and it is

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[65] *Hurstanger* at [39].

[66] That is not to say that the remedy is not a discretionary one: however, there are clear grounds on which rescission can be refused, and this was not one.

[67] O'Sullivan, Elliott and Zakrzewski, *The Law of Rescission*, 1st ed (2008) at [28.28].

[68] In some cases, the discussion was *obiter* because (for example) no fiduciary relationship had been found to exist.

[69] Judgment at [16], quoted in paragraph 21(2) above.

[70] [2017] CTLC 1. The case does not appear to have a neutral citation number.

[71] [2019] EWHC 2205 (Ch).

[72] Judgment at [16], quoted in paragraph 21(2) above.

unnecessary for me to refer to these decisions. Similarly, *Nelmes v. NRAM plc*[73] and *Medsted Associates Ltd v. Cannaccord Genuity Wealth (International) Ltd*[74] accepted the principle in *Hurstanger*, without further elaborating the principles by which it applies.

63. The clearest articulation of the new law in this area is Briggs J's in *Ross River Ltd v. Cambridge City Football Club Ltd*,[75] which was decided shortly after *Hurstanger*.

> "203 Bribery is committed where one person makes, or agrees to make, a payment to the agent of another person with whom he is dealing without the knowledge and consent of the agent's principal. Where a contract ensues from those dealings, the principal is entitled to rescission if he neither knew nor consented to the payment. If he knew of it, but did not give his informed consent, the court may award rescission as a discretionary remedy, if it is just and proportionate to do so: see *Wilson v. Hurstanger*, [2007] EWCA Civ 299, *per* Tuckey LJ at[47] to [51], following *Johnson v. EBS Pensioner Trustees Ltd*, [2002] Lloyd's Rep PN 309.
>
> 204 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, free from the potentially corrupting influence of an interest of his own…"

E. THE SECRET COMMISSION

(1) Was there a fiduciary relationship?

64. I turn to the grounds of Mr Pengelly's appeal that relate to the question of secret commission. It is necessary to consider first whether there was a fiduciary relationship between Mr Pengelly and UKMFS such that the latter owed to the former fiduciary duties.

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.[76] 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.

66. In this case, and for the reasons set out in [19] to [21] of the Judgment (which I have quoted in paragraph 17 above), the Judge found no fiduciary relationship to exist. This is a question of mixed law and fact – the definition of a fiduciary is one of law; whether a person falls within that definition, one of fact. To the extent that this is a question of fact, the Judge's decision must be accorded considerable respect. The Judge was the tribunal that heard and evaluated the evidence at first hand.

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[73] [2016] EWCA Civ 491 at [34] to [37].

[74] [2019] EWCA Civ 83 at [43] and [46].

[75] [2007] EWHC 2115 (Ch) at [203].

[76] See paragraph 23(3) above.

67. This respect that must be accorded to the fact-finding tribunal was emphasised by the Court of Appeal in *Prince Arthur Ikpechukwu Eze v. Conway*.[77] The Court of Appeal cited with approval a statement of Sales LJ in the earlier decision of *Smech Properties Ltd v. Runnymede Borough Council*:[78]

> "…Where an appeal is to proceed, like this one, by way of a review of the judgment below rather than a re-hearing, it will often be appropriate for this court to give weight to the assessment of the facts made by the judge below, even where that assessment has been made on the basis of written evidence which is also available to this court. The weight to be given to the judge's own assessment will vary depending on the circumstances of each particular case, the nature of the finding or factual assessment which has been made and the nature and range of evidential materials bearing upon it. Often a judge will make a factual assessment by taking into account expressly or implicitly a range of written evidence and making an overall evaluation of what it shows. Even if this court might disagree if it approached the matter afresh for itself on a re-hearing , it does not follow that the judge lacked legitimate and proper grounds for making her own assessment and hence it does not follow that her decision was "wrong"."

68. In this case, taking full account of the importance of the Judge's findings of fact, I find that the Judge erred in his characterisation of the relationship between Mr Pengelly and UKMFS as <u>not</u> fiduciary. I consider that the relationship <u>was</u> fiduciary in nature. I have reached this conclusion for the following reasons:

(1) The Judge equated agency with fiduciary relationship, and adopted an unduly restrictive interpretation of what an agent was. In [20] to [21] of the Judgment (which I have quoted in paragraph 17 above), the Judge defined agency as a relationship between a principal and an agent whereby the agent has the authority to affect the principal's relations with third parties. In this case, the Judge held that there was no agency relationship, because UKMFS had no power to contract with CFBL on Mr Pengelly's behalf.

(2) The Judge's definition of agency focusses on what may be the paradigm instance of agency, but it is on any view too narrow. As the Court of Appeal noted in *Prince Arthur Ikpechukwu Eze v. Conway*,[79] the effect of which I have described, agency is a peculiarly wide term, and it is one that is clearly capable of embracing relationships wider than the one focussed on by the Judge. The relationship between Mr Pengelly and UKMFS was, in my judgment, clearly one of agency:

(a) The Terms made clear that UKMFS would be "acting on your [i.e., Mr Pengelly's] behalf". Whilst by no means determinative, this is a clear indicator of agency.[80]

(b) Furthermore, whilst UKMFS had no authority to bind Mr Pengelly, UKMFS had full authority to negotiate with third parties on Mr Pengelly's behalf,[81] and Mr Pengelly would no doubt have been responsible for any

[77] [2019] EWCA Civ 88 at [31] to [34].

[78] [2016] EWCA Civ 42 at [29].

[79] [2019] EWCA Civ 88.

[80] See paragraph 11 above.

[81] See paragraph 4 of the "acceptance" set out in paragraph 12 above.

representations UKMFS made on his behalf to any third party with whom he (Mr Pengelly) ultimately contracted with.[82]

(c) Yet still further, UKMFS was tasked with researching the market, and recommending to Mr Pengelly an appropriate lending package to meet his individual circumstances and needs.[83]

(3) Whether this agency gave rise to a fiduciary relationship as between Mr Pengelly and UKMFS is, of course, a different question, and not one that the Judge asked himself. The Judge equated agency with fiduciary relationship and – given his narrow definition of agency – it was inevitable that he would, in my judgment erroneously, conclude that no fiduciary relationship existed in this case.

(4) Furthermore, the Judge erred in considering that the fact that Mr Pengelly knew that UKMFS might receive commission from banks, such that UKMFS might not be acting with undivided loyalty, automatically rendered any relationship between UKMFS and Mr Pengelly non-fiduciary.[84] As I have described,[85] absent agreement to the contrary between the principal and his fiduciary, the fiduciary owes his principal a duty of undivided loyalty. However, it is possible for that duty to be varied by agreement,[86] and that is precisely what occurred in this case. Of course, that variation may be such as to render what would have been a fiduciary relationship not, but that is not necessarily the outcome: it is perfectly possible to attenuate fiduciary duties, so that they are less extensive, whilst maintaining and not eliminating the overall fiduciary relationship. In my judgment, in this case, the effect of the Terms was to attenuate the fiduciary duties owed to UFMS to Mr Pengelly – but not to eliminate them altogether.

(5) To my mind, having full regard to the Terms brought to Mr Pengelly's attention, and the Acceptance signed by him, the relationship between Mr Pengelly and UKMFS was a fiduciary one. UKMFS was tasked with bringing to Mr Pengelly the best deal (for him) on the market. The fact that Mr Pengelly was happy with the terms of the Mortgage is, of course, relevant, but the Judge was wrong to say that "that was where [Mr Pengelly's] interest began and ended".[87] Mr Pengelly may have been happy with the outcome, but that is not the point. He was entitled to the best possible deal that UKMFS could provide. Their duty of loyalty was not to come up with something Mr Pengelly was "happy" with – but to get the best deal they could. The proposition can be tested in the following way: suppose UKMFS were able to present Mr Pengelly with two proposed mortgage deals, both better than Mr Pengelly's existing arrangements, and both exactly the same except for the rate of interest, which was materially better in one than the other. If presented with both deals, Mr Pengelly would obviously pick the most advantageous to him; and he would – or ought to be – aggrieved if one such offer

[82] As where the statements of a broker, acting for an intended assured, in proposing a contract of insurance, will be attributed to the broker's principal.

[83] See, again, the Terms.

[84] See [20] of the Judgment, quoted in paragraph 17 above.

[85] See paragraphs 38 to 39 above.

[86] See paragraph 44 above.

[87] Judgment at [19], quoted in paragraph 17 above.

was withheld from him, even if he was "happy" with the single deal presented to him.

69. It follows, there was a fiduciary relationship between Mr Pengelly and UKMFS, and that fiduciary duties came into being as between them.

(2) Breach of fiduciary duty by the fiduciary

70. In paragraphs 36 to 43 above, I considered the fiduciary duties of undivided loyalty and not to make a profit out of the fiduciary relationship. Although Mr Pengelly's case focussed only on the latter duty (the duty not to profit), it is necessary to consider both.

71. In this case, UKMFS's duty of undivided loyalty was attenuated by the Terms. The Terms made clear that UKMFS might "receive fees from lenders with whom we place mortgages".[88] This was not a statement that UKMFS would inevitably act for two masters or receive commission from them, but in my judgment it is clear from the Terms that if UKMFS did so, then Mr Pengelly would have no right to complain, provided the (also attenuated) duty to account set out in the Terms was followed by UKMFS.

72. If – contrary to his findings – there was a fiduciary relationship between Mr Pengelly and UKMFS, then the Judge considered this to be a case of a "half-secret" commission. In other words, although there had been a failure by UKMFS to obtain Mr Pengelly's informed consent to the commission paid by CFBL, and so a breach of fiduciary duty, there had been sufficient disclosure to trigger the *Hurstanger* rule and so restrict or limit the remedies that Mr Pengelly could claim.

73. In concluding that there had been a breach of fiduciary duty, I consider the Judge to have been clearly right. However, whilst no doubt the *Hurstanger* rule applies where a principal claims against his or her fiduciary for breach of fiduciary duty, this is not such a case. Mr Pengelly was not seeking any remedy against UKMFS: his counterclaim was only against Finance 4 as CFBL's assignee. Accordingly, it seems to me more appropriate to consider the question of the nature of UKMFS's breach of fiduciary duty, and whether the commission received was "secret" or "half-secret" in the context of the counterclaim against Finance 4. At this stage, therefore, I express no view as to the Judge's conclusion that this was a case of a "half-secret" commission.

(3) Accessory liability: the counterclaim against Finance 4

74. I should begin by reiterating that no point was taken – whether before the Judge or before me – that the assignment of the Mortgage from CBFL to Finance 4 provided Finance 4 with any additional defences over-and-above those that would have been available to CBFL itself. It seems to me most unlikely that that would be the case – for a debtor should not be prejudiced by the assignment of his obligations. However, the point has not been argued, and I simply proceed on the basis that I can equate Finance 4 with CBFL.

[88] See the Terms at paragraph 11 above.

75. As I have described, not only was the duty of undivided loyalty amended by the Terms – so that UKMFS could properly receive payments from banks they approached on behalf of their clients – but so were the rules regarding secret commissions or bribes. Such secret commissions were permissible but only if UKMFS undertook the disclosure as set out in the Terms:

> "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."

76. Mr Pengelly was not told anything about the fees received by UKMFS from CBFL.[89] As I have noted, these would have been in excess of £250,[90] and so written confirmation of the exact amount was required by the Terms.

77. I consider that the Terms have attenuated – made less stringent – the fiduciary obligations that UKMFS was subject to. I consider that the duty of full explanation and consent was varied, so that a mere notification of the exact amount of any fee – if over £250 – would mean that UKMFS had complied with its fiduciary duties and had not breached them. But I consider that these attenuated obligations had to be strictly complied with, and the Judge found that they were not complied with at all.

78. Accordingly, UKMFS was in breach of fiduciary duty, and the Judge was clearly right to make this finding. CBFL/Finance 4 are equally accessory to that breach. Taking the three-limbed test of Slade J:[91]

(1) The payment was made to Mr Pengelly's fiduciary, UKMFS.

(2) CBFL/Finance 4 knew all of the facts relevant to UKMFS's status as fiduciary: that is plain from the evidence of Mr Barbour, which I have set out in paragraph 13 above.

(3) There was a failure to disclose the secret commission to Mr Pengelly. As Millett and Asplin LJJ have noted,[92] CFBL/Finance 4 took the "hazardous course" of not themselves telling Mr Pengelly about the payment. They relied on UKMFS to comply with the Terms, and UKMFS did not do so. Only actual disclosure to the fiduciary will do – and that did not take place in this case.

79. It follows that Mr Pengelly's counterclaim must succeed, and the appeal must be allowed. The only remaining question is whether this was a case of a "half-secret" commission such as to engage the *Hurstanger* principle. As to this:

(1) For the reasons given by Tuckey LJ in *Hurstanger*, I consider that Mr Pengelly was in a position where *(i)* he could not himself ascertain the fees that would be received by UKMFS and *(ii)* the quantum of these fees would be material.

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[89] See paragraph 14 above.

[90] See paragraph 14(1) above.

[91] Set out in paragraph 17 above and as expanded in paragraph 54 above.

[92] See paragraphs 53 and 55 above.

Indeed, that much appears to be implicit in the drafting of the Terms themselves, which differentiated between fees under £250 and fees over £250.

(2) Contrary to the Judge's views, I consider that any principal in Mr Pengelly's position would have wanted to know what fees from banks UKMFS was earning. It seems to me that such commissions would be material to know, because they would affect the extent to which the mortgage recommended to the principal reflected what was best for the principal, rather than the bank prepared to pay the highest fee. Nor do I consider that Mr Pengelly would have been indifferent to UKMFS's recommendation. Of course, I accept that Mr Pengelly was happy with the terms of the Mortgage. But that does not mean to say he would have been indifferent to the possibility of a different mortgage on better terms. Since UKMFS was seeking to identify the best mortgage for Mr Pengelly, Mr Pengelly had a clear interest in knowing about inducements that might affect that outcome. Indeed, the disclosure requirement in the Terms recognise this interest.

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

80. In short, the breach of fiduciary duty committed by UKMFS was both extremely serious and resulted in a non-disclosure, not a partial disclosure, of the secret commission received by UKMFS from CBFL/Finance 4. This was not, in short, a "half-secret" commission, but a secret commission or bribe, and in my judgment rescission is a remedy to which Mr Pengelly is entitled, provided he is able to make counter-restitution.

F. SECTION 140A OF THE CONSUMER CREDIT ACT 1974

81. Section 140A concerns unfair relationships between creditors and debtors, and permits a court to intervene where it determines that the relationship between the creditor (here: CBFL/Finance 4) and the debtor (here: Mr Pengelly) arising out of the agreement between them (here: the Mortgage) is unfair to the debtor in the various respects specified in section 140A(1).

82. No point of law regarding section 140A arose before the Judge, and the Judge was simply concerned with the essentially factual question of whether the Mortgage was "unfair" within the meaning of the 1974 Act. In [25] to [27], the Judge set out his reasons for concluding that no unfairness arose in this case. I consider those reasons to be unimpeachable, and can see no reason for interfering in any way with the Judge's findings, which are essentially ones of fact.[93]

[93] Including, to be clear, the finding that "Mr Pengelly was aware or deemed to be aware of the possibility of the commission and made no inquiries about it". I do not regard this finding as inconsistent in any way with the conclusions I have expressed in above. The Terms were certainly enough to make Mr Pengelly aware of "the possibility" of commission being paid.

G. DISPOSITION

83. For the reasons I have given, the appeal insofar as it relates to Finance 4's accessory liability (as assignee of the actual accessory, CFBL) for UMFL's breach of fiduciary duty is allowed. Subject to Mr Pengelly making satisfactory proposals for counter-restitution, I will make an order setting aside the Mortgage. However, I will make no such order absent satisfactory proposals, which the parties should seek to agree, failing which the matter should be restored to me for determination at a further hearing.

84. The appeal in relation to section 140A of the Consumer Credit Act 1974 fails and is accordingly dismissed.

ANNEX 1

TERMS USED IN THE JUDGMENT

(footnote 1 in the judgment)

TERM	PARAGRAPH IN THE JUDGMENT IN WHICH THE TERM IS FIRST USED
Acceptance	§11
Arrangement Fee	§57(1)(b)
Bowtead and Reynolds	§31 fn 27
bribe	§43
CFBL	§1
Commission	§57(4)
fiduciary	§24
Fiduciary	§57(1)
Finance 4	§1
Judgment	§3
Mortgage	§1
principal	§24
Principals	§57(1)
Property	§1
secret commission	§43
Terms	§11
third party	§43
Third Party	§57(1)
UKMFS	§9