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Gough Square Chambers' consumer credit column: September 2020

by Ruth Bala, Gough Square Chambers

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Ruth Bala, Lee Finch, Sabrina Goodchild and Thomas Samuels are all specialist consumer credit counsel at Gough Square Chambers. On a regular basis, they will share their views with Practical Law Financial Services subscribers on topical developments or key issues relating to consumer credit.

In the September 2020 column, Ruth Bala considers the law on secret commissions paid to brokers.

Broker secret commission: update

When I wrote a previous column on broker secret commissions in June 2016, the law on this subject was in a state of flux. I concluded with the sentence, "an appellate assumption that a mortgage broker is a fiduciary agent appears to have emerged, as if by accident, without the issue ever having been argued before the Court of Appeal". I am now revisiting this topic. Despite a number of appellate decisions in the interim, the law remains deeply unsettled.

Is a fiduciary relationship required?

Where commissions are "half-secret" (that is, the fact of, or possibility of commission has been disclosed to the borrower, but not the amount), it is uncontroversial that the claimant borrower must prove that the broker was their fiduciary. This is because the relevant cause of action is in equity, for breach of fiduciary duty.

On the other hand, where commissions are "fully-secret", it appears that the claimant borrower need only prove that the broker was their agent (and not necessarily their fiduciary). This is because the claimant is able to rely on the common law causes of action for "money had and received" and fraud, without needing to call upon the equitable cause of action for breach of fiduciary duty. See Slade LJ's three stage test in *Industries and General Mortgage Co Ltd v Lewis [1949] 2 All ER 573*, which only refers to "agency", and the recent case of *Wood v Commercial First Business Ltd (in liquidation) and Others [2019] EWHC 2205 (Ch)*; [2020] CTLC 1, at [129]-[130] and [142]. However, note that in the even more recent case of *Pengelly v Business Mortgage Finance 4 plc [2020] EWHC 2002 (Ch)*, Marcus Smith J sought to "improve" Slade LJ's test at [54] by substituting its references to agency with references to fiduciary duty.

When will brokers be agents?

Brokers will almost always be the agent of the borrower, at least where the borrower pays a broker fee. In *Plevin v Paragon Personal Finance Ltd [2014] 1 WLR 4222*, Lord Sumption refers at [33] to the broker being the borrower's agent (in the different context of whether the broker's omission was "on behalf of" the creditor for the purposes of the "unfair relationship" provisions). The High Court in *Wood v Commercial First* cited this passage at [96] as authority that, in the normal course of events, the broker will be the borrower's agent.

Are all agents fiduciaries?

No: in *Prince Arthur Ikpechukwu Eze v Conway [2019] EWCA Civ 88*, Asplin LJ stated at [39]:

"It is clear from the authorities that in order for the law of bribery and secret commissions to be engaged there must be a relationship of trust and confidence ... which puts the recipient in a real position of potential conflict ... Not all agents will be in such a position ... Although the relationship of principal and agent is a fiduciary one, not every person described as an 'agent' is the subject of fiduciary duties...".

When will brokers be fiduciaries?

It is "meaningless" to attempt to define a fiduciary in general terms, because "fiduciary" is an umbrella term for a wide variety of relationships, each of which attracts their own rules and principles (See Paul D Finn,

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Fiduciary Obligations (Law Book Company, 1st ed, 1977) at [2]). Therefore, the question is when the broker-borrower relationship will be fiduciary.

Relevance of role being "advised"

A broker may operate either on an "advised" or an "information-only" basis. In *McWilliam v Norton Finance (UK) Ltd t/a Norton Finance in liquidation [2015] C.T.L.C. 60*, Tomlinson LJ held at [46] that the fact the broker was acting on a non-advised basis was "not relevant" to whether the broker assumed a fiduciary duty: "the reliance upon which the trust and confidence which gives rise to fiduciary obligations is based is not the same sort of reliance as gives rise to a tortious duty of care"; it is the fact that the principal relies on the fiduciary so as to leave them vulnerable to disloyalty.

However, the original rationale for the secret commission cause of action is that the commission deprives the borrower of the disinterested advice of their agent (per Millett J in *Logicrose Ltd v Southend United Football Club Ltd (No 2) [1988] 1 WLR 1256*, at p1260-1261). If the agent is not tasked with providing advice, it is difficult to see what mischief results from the lender's payment of commission.

Whether broker is tasked with finding best deal

Where the borrower has paid a broker fee, the only recent appellate case where it has been found that the broker was not a fiduciary is *Commercial First Business Ltd v Pickup and Vernon [2017] C.T.L.C. 1* (although I note that the borrowers had only paid a broker fee in relation to the first loan). HHJ Raynor QC (sitting as a Deputy High Court Judge) stated at [53] that all that occurred was that the borrowers "simply received a quotation ... leading to the application form being completed..." This approach reflects many of the county court decisions distinguishing *Hurstanger Ltd v Wilson [2007] 1 WLR 2351*, which I referenced in my 2016 column.

All of the other recent cases where the borrower has paid a broker fee involve the finding of a fiduciary relationship. This is generally justified by describing the broker's role as to find the "best possible deal".

In *McWilliam v Norton*, Tomlinson LJ concluded at [99] that, even where the broker acted on an information-only basis, the broker's task was to identify the lender with the most advantageous terms for these borrowers. It is questionable whether this is the correct analysis of an information-only transaction, which involves the provision of information so as to enable the borrower to select the best deal.

In *Medsted Associates Ltd v Canaccord Genuity Wealth (International) Ltd [2019] EWCA Civ*, Longmore LJ found at [32] that a fiduciary relationship had arisen because the broker had "impliedly represented" to the investors that the respondent's terms were "competitive".

Whether there was such an implied representation should be fact-sensitive, especially in an information-only context. However, in *Wood v Commercial First*, Mr James Pickering (sitting as a Deputy High Court Judge) said at [130(6)] that wherever an information-only broker proposes a particular contract to a borrower, there is an implied representation that the proposed contract is "competitive", thereby resulting in a fiduciary relationship.

Similarly, in *Pengelly v Business Mortgage*, Marcus Smith J found that the broker acted as a fiduciary, relying at [68(5)] on the characterisation of the broker as "tasked with bringing to Mr Pengelly the best deal (for him) on the market".

Effectively, this means that in all cases brokers will be fiduciaries, irrespective of whether they act on an advised or information-only basis. This despite the fact that any implied "recommendation" would mean that the transaction was in substance advised and should be treated as advised for the purposes of FCA rules.

It is suggested that this is unsatisfactory; a better test would be whether the transaction was, in substance, advised. If the transaction was advised, then the lender's payment of commission would have deprived the borrower of the disinterested advice which their broker was obliged to provide them, properly generating a right to relief.

On the other hand, if the broker's role was merely introductory, involving the provision of information so as to enable the borrower to select the best possible deal, then receipt of commission from the lender with whom the borrower ultimately contracts does not place the broker in any conflict of interest.

Nonetheless, given the recent caselaw it seems that compliance with the current provisions in the Consumer Credit sourcebook (CONC) on commission disclosure will not suffice. While CONC 4.5.3R obliges a broker to disclose the existence of commission, CONC 4.5.4R only obliges the broker to disclose the amount upon the customer's request.

What does "unfair relationships" add?

In *Nelmes v NRAM plc [2016] EWCA Civ 491*, the Court of Appeal found that there was an "unfair relationship" under section 140A of the Consumer Credit Act 1974, on the ground of fully-secret broker commission.

Astonishingly, in *Pengelly v Business Mortgage*, Marcus Smith J found that there was no "unfair relationship", despite also finding that there was a fully secret commission, entitling the borrower to rescission.

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In *Wood v Commercial First*, the High Court noted at [167] that "unfair relationships" was a different cause of action arising out of the same wrong. Quite properly, the court found it inappropriate to grant additional relief, given that the secret commission authorities have long established the nature and extent of the relief that may be granted.

There may be limitation benefits to relying on "unfair relationships" insofar as recovery of the amount of commission is sought; notably in *Wood* the High Court found that rescission was not a remedy that was subject to any time bar.

Gough Square Chambers' consumer credit columns

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