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Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/10/2024

Case No: CA-2023-001453

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON SECOND APPEAL FROM THE COUNTY COURT AT CARDIFF
HIS HONOUR JUDGE JARMAN KC
ON APPEAL FROM THE COUNTY COURT AT NEWPORT
DEPUTY DISTRICT JUDGE SANDERCOCK
Claim No J03YX090

Between :

MARCUS GERVASE JOHNSON	**Appellant/ Claimant**
- and -	
FIRSTRAND BANK LIMITED (London Branch) T/A MOTONOVO FINANCE	**Respondent /Defendant**

AND

Case No: CA-2024-00353

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON SECOND APPEAL FROM THE COUNTY COURT AT BIRMINGHAM
HIS HONOUR JUDGE WORSTER
ON APPEAL FROM THE COUNTY COURT AT STOKE ON TRENT
DEPUTY DISTRICT JUDGE HARROP
Claim Number J00SQ921

Between :

ANDREW WRENCH	**Appellant/ Claimant**
- and -	
FIRSTRAND BANK LIMITED (London Branch) T/A MOTONOVO FINANCE	**Respondent /Defendant**

AND

Case No: CA-2024-00482

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT AT HULL
DEPUTY DISTRICT JUDGE MORRIS
Claim Number K00KH177

Between :

(1) AMY LOUISE HOPCRAFT	**Appellants/ Claimants**
(2) CARL HOPCRAFT	
- and -	
CLOSE BROTHERS LIMITED	**Respondent /Defendant**

Before :

LADY JUSTICE ANDREWS
LORD JUSTICE BIRSS
and
LORD JUSTICE EDIS

- - - - - - - - - - - - - - - - - - - -
- - - - - - - - - - - - - - - - - - - -

Appeal CA-2023-001453
Robert Weir KC, Jonathan Butters and Thomas Westwell (instructed by **HD Law Ltd**) for the **Appellant**
Matthew Hardwick KC and Simon Popplewell (instructed by **Eversheds Sutherland (International) LLP**) for the **Respondent**

Appeal CA-2024-00353
Robert Weir KC, Jonathan Butters and Thomas Westwell (instructed by **Consumer Rights Solicitors**) for the **Appellant**
Matthew Hardwick KC and Simon Popplewell (instructed by **Eversheds Sutherland (International) LLP**) for the **Respondent**

Appeal CA-2024-00482
Robert Weir KC, Jonathan Butters and Thomas Westwell (instructed by **Consumer Rights Solicitors**) for the **Appellants**
Ian Wilson KC and William Day (instructed by **Walker Morris LLP**) for the **Respondent**

Hearing dates: 2, 3 and 4 July 2024
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Approved Judgment

This judgment was handed down remotely at 10.30am on 25 October 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Andrews, Lord Justice Birss and Lord Justice Edis:

INTRODUCTION

Background

1. These three appeals, which were heard together, concern the common situation in which a consumer seeks to buy a car from a motor dealer, and is offered the option of finance which the dealer says he can arrange. If the consumer takes up that suggestion, the price for the vehicle is agreed before the dealer approaches the prospective lender on their behalf. Sometimes, as an additional incentive to choose the finance option, this will be lower than the indicative cash price. The dealer then obtains pertinent information about the consumer's financial situation, which he takes to a lender or a panel of lenders.

2. The dealer then presents an offer of finance to the purchaser on the basis that he has selected an offer which is competitive and suitable for their needs. Sometimes he will give an express assurance to that effect, but, for reasons we will explain, that would be a matter of necessary implication in this scenario even in the absence of such a statement. He may go further and state, or imply, that the offer is the most suitable or the best he can find. If that offer is accepted, the dealer sells the car to the lender, and the lender enters into a hire-purchase or conditional sale agreement (collectively referred to in this judgment as "a credit agreement") with the consumer.

3. The consumer knows the price for the car, the amount of any downpayment, the rate of interest on the loan element of the arrangement, and how much they will have to pay the lender in instalments over the period of the credit agreement. They would expect the dealer to make a profit on the sale transaction, namely the difference between the cost of his initial acquisition of the vehicle and the price he receives. But, at least until the Financial Conduct Authority ("FCA") introduced new rules with effect from 28 January 2021, the consumer may have been surprised to discover that the dealer, who arranged the finance on their behalf, also received a commission from the lender for introducing the business to them, financed by the interest charged under the credit agreement. Indeed, only quite sophisticated consumers may be aware that a dealer in this situation is fulfilling two different commercial roles in what the consumer is likely to regard as a single transaction. The dealer is acting as a seller of the cars, and also as a credit broker. A credit broker offers services to help people to find credit by considering the market (or a particular section of the market) and introducing them to a potential lender who can offer them a deal which is suitable for their requirements. There is no hint in the evidence in any of these cases that the consumers concerned were aware of this.

4. The commission is paid under a side arrangement made between the lender and the dealer to which the consumer is not party. In some cases, but not all, there may be some reference to that arrangement in the body of the credit agreement, in the lender's standard terms and conditions, or in one of the other documents presented to the consumer. However, even if there is, and even if the consumer were to read the small print, it would not necessarily reveal the full details (including the amount of the commission and how it is calculated).

5. Prior to the regulatory changes in January 2021 the commission could be based on a "difference in charge" ("DIC") model, whereby the lender would permit the dealer to

decide or negotiate the total charge of credit, including the interest rate, and pay the dealer commission calculated as a percentage of the difference between the lowest rate of interest in the permitted range and the agreement rate. (This is a form of "revenue share of interest" or "RSI" model and sometimes that terminology is used to describe it). The amount of commission payable to the dealer would vary as a result, and the dealer would have an obvious incentive to fix the rate of interest as high as possible within the range in order to maximise his gain. These types of agreement are now banned by the FCA. Further or alternatively, the commission might be calculated as a fixed percentage of the amount borrowed by the customer – this is known as a Revenue Share of Advance or "RSA" model.

6. In each of these three appeals the claimants were financially unsophisticated consumers on relatively low incomes who, prior to January 2021, engaged car dealers as their credit brokers to arrange hire-purchase agreements (and in one case, an additional personal loan) on their behalf, to enable them to acquire a second-hand car for less than £10,000. On each relevant occasion (there were two transactions in the case of Mr Wrench) only one offer of finance was presented to, and accepted by, the claimant. Although different car dealers were involved, the same lender, FirstRand Bank Ltd (trading as MotoNovo Finance) ("FirstRand") provided the finance in Mr Johnson's and Mr Wrench's transactions. The lender in Miss Hopcraft's case was Close Brothers Ltd ("Close").

7. The dealer made a profit on the sale of the car, but also received a commission from the lender for introducing the business to them. In one of the transactions (the 2017 transaction in *Wrench*) the dealer/broker received two lots of commission, one based on the DIC model and the other calculated as a fixed percentage of the sum advanced.

8. In one of the cases, *Hopcraft*, there is no dispute that the commission was kept secret from the claimant. In the other two cases, *Wrench* and *Johnson*, the claimant did not know and was not told that a commission was to be paid. However, the lender's standard terms and conditions made reference to the fact that "a commission may be payable by us [i.e. the lender] to the broker who introduced the transaction to us." In *Johnson* alone, the dealer/broker supplied the claimant with a document called "Suitability Document Proposed for Mr Marcus Johnson", which he signed. This said, near the beginning, "…we may receive a commission from the product provider". This document provides a possible explanation for why Mr Johnson's case is put in a different way from that of Mr Wrench by Mr Robert Weir KC, who represents them both.

9. Each of the claimants brought proceedings in the County Court against the defendant lenders seeking, among other things, the return of the commission paid to the credit brokers. All three claimants contended that the brokers owed them a duty to provide information, advice or recommendation on an impartial or disinterested basis, ("the disinterested duty"), which was held in *Wood v Commercial First Business Ltd* [2021] EWCA Civ 471; [2022] Ch 123 ("*Wood"*) to be sufficient to found a claim for the disgorging of a secret commission, and that they were "agents" within the broad definition of that term adopted in *Wood* at [51], namely:

> "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".

10. Miss Hopcraft's case, and Mr Wrench's primary case, is that the commission paid to the credit broker was secret (this is accepted by Close in Miss Hopcraft's case, but disputed by FirstRand in Mr Wrench's case). They contend that the lenders made payment of the commissions knowing of the "agency" relationship between the borrowers and the brokers, and failed to disclose the payment, and therefore they were entitled to rescission of the credit agreements and to payment of the commission as damages or as money had and received.

11. Mr Johnson's case, and Mr Wrench's alternative case, is that even if the lender did not pay a secret commission, the brokers never obtained the claimants' fully informed consent to the payment. Although the credit agreement indicated that commission *might* be paid, the claimants were not told that it *would* be, nor the amount nor any other material facts about the commission (e.g. how it was to be calculated). Thus the situation was of the type identified in *Hurstanger Ltd v Wilson* [2007] EWCA Civ 299; [2007] 1 WLR 2351 ("*Hurstanger*") as a "half-way house" and the commission was what was described in *Wood* as "half-secret." Although that expression (and the converse expression "fully secret") are convenient shorthand, and were used as such in the judgments below and by counsel before us, we find them imperfect and potentially misleading: something is either secret or it is not. Therefore in this judgment we will refer to the "half-way house" scenario as one of "partial disclosure". "Disclosure" in this context means taking reasonable steps to ensure that the fact actually comes to the attention of the consumer in a way which makes its significance apparent.

12. It is submitted by Mr Weir that in all three cases the brokers owed the claimants the disinterested duty, or alternatively, if that does not suffice for these purposes, an *ad hoc* fiduciary duty, and the lenders, in making payment of the commission knowing of the "agency" relationship, are liable as accessories to the brokers' breach of that duty. All three claimants also made claims under sections 140A-C of the Consumer Credit Act 1974 ("the 1974 Act") on the basis that the relationship between the borrower and the lender arising out of the credit agreements was unfair within the meaning of those provisions because of the lender's non-disclosure of the amount of the commission and/or because of the payment of the commission in circumstances which rendered the broker in breach of the disinterested duty. For reasons which we will explain, only Mr Johnson's claim under the 1974 Act is considered in this judgment.

The history of the three appeals

13. *Johnson* was the first of the three cases to be decided. Mr Johnson was unsuccessful in his claim before the deputy district judge ("DDJ") on all grounds. On the first appeal, Mr Johnson abandoned his original contention that the commission was "fully" secret, and the argument proceeded on the basis that it was a partial disclosure case. HH Judge Jarman KC agreed with that characterisation. He held that there had been sufficient disclosure to negate secrecy, but also a failure to obtain the principal's fully informed consent. However, on his interpretation of the decision in *Wood*, the existence and breach of the disinterested duty would only entitle the principal to recover a commission if it was "fully" secret. He held that in a partial disclosure case, nothing short of a fiduciary duty would suffice to enable the claim for the return of the commission to succeed under the general law, and there was no such fiduciary duty. He remitted the claim under the 1974 Act to the DDJ for further fact-findings to be made concerning the disclosure of the commission, which he considered essential to the evaluation of unfairness.

14. Mr Wrench succeeded in his claim under common law or equitable principles at first instance, and the DDJ decided that it was therefore unnecessary for him to determine the statutory claim. However the DDJ's decision was overturned on FirstRand's appeal. HH Judge Worster rejected the proposition that in order to negate secrecy, the terms referring to the payment of commission would have to be drawn expressly to the borrower's attention. He held that this was a partial disclosure case and that in order to succeed in his claim, Mr Wrench had to establish that he was owed a fiduciary duty by the credit broker and that the duty was breached. He followed the reasoning of HH Judge Jarman KC in the *Johnson* case. The judge declined an invitation to consider the claim under s.140A of the 1974, because the court at first instance had not considered the matter and had made no relevant fact-findings. That aspect of Mr Wrench's claim is therefore not part of his appeal to this Court.

15. Miss Hopcraft's claim was dismissed by the DDJ. He held that the dealers were not her agents nor were they credit brokers, and that they owed her no disinterested duty or fiduciary duty. He also dismissed the claim under the 1974 Act: Miss Hopcraft has not appealed against that aspect of the decision.

16. In both *Johnson* and *Wrench* permission for a second appeal was granted by Birss LJ. On 27 February 2024 HH Judge Sarah Richardson transferred the appeal in *Hopcraft* to the Court of Appeal pursuant to CPR 52.23(1). She observed that:

> "This is one of what has become a very large number of cases brought in the County Court that raise the issue of what duty (if any) is owed where a commission is paid to a garage which has arranged for its customer to enter into a finance agreement with a finance company. The number of cases is likely to increase given the publicity surrounding the possibility of making such claims, including on high profile money advice websites. The sheer volume of current cases is causing significant case management and trial management challenges within the County Court….
>
> There is currently a lack of binding authority on the central issues that are raised in these cases; this includes the question of whether a duty is owed in "secret" or "half secret" commission cases and/or whether the Claimant can rely on sections 140A to 140C of [the 1974 Act] …
>
> I have become aware that there have been differing views at first instance and there are some appeal decisions at County Court level that have largely but not wholly agreed with the decision of the Deputy District Judge in the present case.
>
> Clarity is required from the Court of Appeal and given the large number of cases currently in the court system (and the potential for yet more to come) the current appeal raises an important point of principle ..."

17. On 28 March 2024 Birss LJ accepted the transfer up and gave directions that the appeal in *Hopcraft* be expedited and listed together with the appeals in *Johnson* and *Wrench*. He acknowledged that a large number of cases of this type were coming through the County Court and that an authoritative ruling on the issues was required. We heard the appeals over three days in the first week of July 2024. We are grateful to all counsel

involved for their clear and attractive presentation of the rival submissions both in writing and orally.

Our decision in summary

18. For the reasons set out in this judgment, we allow all three appeals. The dealers were the sellers of the cars, but they were also acting as credit brokers on behalf of the claimants. In the latter role, their task was to search for and offer the customer a finance deal from their panel of lenders which was suitable for their needs and competitive. In some cases they undertook to find the best deal or the one which was most suitable for the customer. They therefore owed the claimants the "disinterested duty" described in *Wood*. The relationship was also a fiduciary one. In all three cases there was a conflict of interest and no informed consent by the consumer to the receipt of the commission. However, that would be insufficient in itself to make the lender a primary wrongdoer. In order to give rise to a primary liability on the part of the lender, the commission must be secret. If there is partial disclosure which suffices to negate secrecy, there is binding authority (*Hurstanger*) that the lender can only be held liable in equity as an accessory to the broker's breach of fiduciary duty.

19. On the facts, there was no disclosure in *Hopcraft* and, we find, insufficient disclosure in *Wrench* to negate secrecy. The payment of the commission in those cases was secret, and the lenders were therefore liable as primary wrongdoers. In the light of the concession which was made below, we must treat the situation in *Johnson* as similar to that in *Hurstanger,* where there was sufficient disclosure to negate secrecy, but insufficient disclosure to procure the consumer's fully informed consent to the payment. We find that the lenders in *Johnson* are liable as accessories for procuring the brokers' breach of fiduciary duty by making the commission payment to them in the circumstances in which they did.

20. So far as the statutory claim is concerned, the mere fact that there has been no disclosure of the commission, or only partial disclosure, will not necessarily suffice to make the relationship between lender and consumer "unfair" for the purposes of the 1974 Act. However on its specific facts, Mr Johnson's claim under the 1974 Act succeeds.

THE ISSUES

21. The appeals raise five broad issues, namely:

(1) Does a statement in the terms and conditions of the credit agreement that commission may or will be paid have the effect of negating secrecy, even where the borrower has neither read the statement nor been directed to read it?

(2) For the purposes of establishing an accessory liability on the part of the payer of commission in a partial disclosure case, is it necessary for the broker to have owed a fiduciary duty to the claimant, or does the "disinterested duty" suffice?

(3) If there is a fiduciary duty in a partial disclosure case, what are the necessary requirements to establish accessory liability on the part of the lender?

(4) Did the broker owe the relevant duty to the claimants in these cases?

(5) Is the lender liable for the repayment of the commission?

22. Three additional issues arise in the *Johnson* appeal, namely:

(1) Was the relationship between Mr Johnson and FirstRand unfair for the purposes of sections 140A-C of the 1974 Act ?

(2) Was the judge wrong to remit the claim under the 1974 Act to the deputy district judge for further fact-findings?

(3) If the answer to both of these questions is "yes", should this court assess the appropriate remedy or should the case be remitted for a determination of that question in the County Court?

THE FACTS

Hopcraft

23. In early 2014 Miss Hopcraft, then a student nurse with a part-time job, was looking for a replacement car. She found one she wanted at Jordans, a large motor dealership in the Hull area. As she explained to the sales representative, she was unable to afford that car without some form of finance. He confirmed that Jordans were able to help her to secure the necessary financing, and took details from Miss Hopcraft of her financial circumstances. Miss Hopcraft, described by the judge as "a little naïve and perhaps vulnerable in some aspects," assumed that Jordans would get her the best deal.

24. The sales representative then uploaded the information onto an electronic platform that connected Jordans with a panel of lenders with whom they worked. Close, which was one of those lenders, subsequently made a proposal for finance under a hire-purchase agreement which set the instalment payments slightly higher than the budget Ms Hopcraft had indicated to Jordans, and depended upon her father agreeing to act as guarantor. It is unknown whether any other lender made an offer, but Close's proposal was the only one that the Jordans representative took back to Miss Hopcraft for consideration.

25. When they were notified that the proposal had been accepted, Close sent a number of documents to Jordans for provision to the customer. These included the Hire Purchase Agreement, their standard form Terms of Business, a two- page document entitled "Pre-Contract Credit Information" which set out all the information required to be supplied to a consumer by section 55 of the 1974 Act, and a document entitled "Key Facts about this Agreement" which summarised its main provisions.

26. There was also a document entitled "Supplier's declaration to Close Motor Finance" which the dealer was required to sign and return to Close before the finance was advanced. This contained a request by the dealer to Close to purchase the car from Jordans at the cash price stated on the invoice, so as to enable Close to enter into the Hire Purchase Agreement with the customer. In that document Jordans were required to confirm, among other matters, that they had complied with all the requirements of the 1974 Act and that they had witnessed the customer sign the Hire Purchase Agreement.

27. None of these documents made any mention of the payment of commission by Close to Jordans. In fact, Close paid a commission of £183.26 to Jordans in consideration of

its introduction of the Hopcraft transaction to it. Although Close disclosed an example of the standard form March 2014 "Terms of Business" between itself and motor dealers such as Jordans, which provide by Clause 3 for the payment of commission "calculated in accordance with Schedule 1", the Schedule itself has been fully redacted. It is therefore not possible to ascertain how this figure was calculated in Jordans' case. Close's witness, Miss Shaw, accepted in cross-examination that in 2014 the disclosure of any commission was not required by Close and was not part of their practice (*Hopcraft* judgment, [36]).

28. Miss Hopcraft was unaware that Jordans were being paid a commission. She told the judge that if she had known about the commission she would have shopped around, but he found that she was focused on buying the car and as long as the monthly payments were "about right", she was happy with the situation (*Hopcraft* judgment, [34]).

29. On 10 January 2014, Miss Hopcraft signed a hire-purchase agreement with Close under which they provided her with credit in the sum of £8,280. The total cash price of the car was £8,530. She paid a deposit of £250. The monthly instalments were £144.42. The interest rate was fixed at 5.5% (12.3% APR) and the total interest charges were £2,452.42 which were split and payable in instalments over the terms of the agreement.

30. Miss Hopcraft repaid the loan in full earlier than scheduled in around September 2016. The claim form was issued in March 2023. Close did plead a limitation defence, but that does not appear to have been pursued.

Wrench

31. Mr Wrench was a postman with a penchant for fast cars. He entered into two hire-purchase agreements with FirstRand which were arranged through different dealers, Fast Lane Motor Cars Ltd ("Fast Lane") and TT Sports and Prestige Ltd ("TT"). The first agreement, relating to a used Audi TT coupe, was signed on 23 May 2015 and the second, relating to a used BMW 3 Series, on 11 March 2017. On each occasion the sales representative told Mr Wrench that the dealership would get him the best rate from their panel of lenders. Mr Wrench had not looked online or sought finance from any providers prior to going to the dealers.

32. The purchase price of the Audi was £8,995. Mr Wrench paid a deposit of £3,000, leaving £5,995 to be financed by the credit agreement, which was over a period of 48 months. The interest rate was 8.75% per annum (19.3% APR). The pack of documents Mr Wrench was presented with in 2015 comprised a vendor's invoice and warranty, a one-page document entitled "Pre-contractual explanations for a Hire Purchase Agreement and a Fixed Sum Loan Agreement regulated by the Consumer Credit Act 1974," which he signed, a "Pre-Contract Credit Information" document containing the information required by section 55 of that Act, the Hire Purchase Agreement, consisting of three pages, and some standard terms and conditions, which are three further pages of very small print. Mr Wrench signed the Agreement, but he did not sign the standard terms and conditions.

33. On the signature page of the Hire-Purchase Agreement is a "Declaration of Customer" which signifies that by signing the agreement, among other things, the customer declares that he or she has had his/her attention drawn to Clause 10 "overleaf". There is no express incorporation of the lender's standard terms and conditions into the

contract, but it is not disputed that the reference to Clause 10 in the body of the Hire-Purchase Agreement was a reference to Clause 10 of those standard terms. The appeals here and below were argued on the assumption that the standard terms and conditions were incorporated.

34. Clause 10, entitled "Our Liability" deals with statutory implied terms, and exemptions from liability. Clause 12, entitled "General", included at 12.6 the following:

> "A commission may be payable by us to the broker who introduced this transaction to us. The amount is available from the Broker on request."

The expression "Broker" is not a defined term and the capital letter is possibly a typographical error.

35. The covering letter from FirstRand to the dealer thanked them for placing the enclosed agreement with FirstRand and told them that in order to ensure that the agreement was processed as quickly as possible they should arrange for the completion of the enclosed forms. This included obtaining the customer's signature "to confirm the oral disclosure of an adequate explanation has been given" [sic]. There was no specific direction to the dealer to draw the attention of the customer to Clause 10 of the standard terms, let alone any aspect of Clause 12.

36. The purchase price for the BMW was £9,750. This time the deposit was £1,000. The balance of £8,750 was financed by a credit agreement over 48 months at an interest rate of 4.32% per annum (10.2% APR). The documents provided to Mr Wrench in 2017 were similar to those in 2015, including the "Declaration of Customer" and the express reference to Clause 10 in the body of the Hire-Purchase Agreement, but the lender's standard terms and conditions had been revised. Clause 12.6 of the 2015 standard terms was reproduced in identical form as Clause 13.6 of the 2017 standard terms, again under the heading "General".

37. Mr Wrench neither read nor was directed to read any statement pertaining to commission, nor was he told about the commission prior to entering into either agreement. He did not sign any document which stated that he had read information about commission prior to entering into the credit agreement. In reality, there was a negligible prospect of the consumer reading any of the standard terms and conditions, and FirstRand must have appreciated this. It is therefore unsurprising that Mr Wrench (a) did not read them and (b) had no idea that the dealer was receiving a commission.

38. FirstRand was unable to find a copy of its agreement with Fast Lane but their witness, Scott Wood, said that it appeared from FirstRand's records that the commission was 3% of the amount borrowed (£179.85), and the DDJ accepted that evidence.

39. FirstRand did manage to find a copy of the agreement it had with TT. It incorporated FirstRand's "Dealer Terms of Business" which by Clause 5.1 provided for payment of commission "on such dates, at such rates and in such amounts as are agreed between the parties from time to time." Mr Wood's evidence was that the agreement with Fast Lane would also have incorporated these terms. The Dealer Terms of Business provided by Clause 2.1 as follows:

> "The Dealer shall introduce Applicants to [FirstRand] by submitting Proposals to [FirstRand] using the online system or by using the Self-Serve model within the online system, or by fax or by any other agreed means (solely at the discretion of [FirstRand]. The Dealer agrees not to refer any Applicant to any party other than [FirstRand] unless the Dealer has first submitted a Proposal in relation to the Applicant to [FirstRand] and [FirstRand] has declined to accept such Proposal.
>
> The Dealer shall use reasonable endeavours to introduce Applicants to [FirstRand] in line with the rates and terms agreed from time to time…"

40. The commission agreement with TT was based on a DIC model. It gave TT the right to set the interest rate on the credit agreements it arranged for customers with FirstRand between a range of 3.25% and 8.25%. TT would receive as commission 80% of the difference in charge between the lowest rate and the agreement rate. In addition, it would receive a commission of 1.25% of the total advance. In Mr Wrench's case, TT received commission of £408.98, of which £299.60 comprised DIC commission (80% of the difference between 3.25% and 4.32%.)

Johnson

41. In July 2017 Mr Johnson, then aged 27 and a factory supervisor, had just passed his driving test and wished to purchase his first car. Before approaching any dealer he obtained a finance quote online. He then went to a dealer in Cardiff, the Trade Centre Group Plc, trading as the "Trade Centre Wales", because they advertised at the factory where he worked and had a reputation for being quite cheap. He was shown a number of cars, and eventually found a Suzuki, which he took for a test drive and decided he wished to buy. However on discussion with the Trade Centre sales representatives, Mr Johnson discovered that the finance he had been offered online was insufficient to enable him to purchase that car. He was unable to find an offer of alternative finance of the larger amount he needed on equivalent or similar terms to the original offer.

42. The "ticket price" for the car was £6499. Mr Johnson paid the dealer a non-refundable deposit of £100 which had the effect of reserving the car at that price for 3 days. He then filled in and signed a "Finance Proposal Form" which the dealer used to obtain an offer from FirstRand. Mr Johnson's annual net income, as shown in the finance proposal form, was £13,200. The offer was for the balance of £6,399 at a flat rate of 8% repayable over five years. The APR was 18.1% on a hire-purchase element of £4803.69 and 15.1% on an associated personal loan of £1595.31. The deal was structured in this way because FirstRand would only offer hire-purchase of up to 100% of the Glass's Guide retail price for the car, which was £4803.69. The price at which the dealer was selling the car was therefore nearly £1,600 more than the guideline retail value. Mr Johnson was oblivious to this. Back in 2017 (unlike the situation today, when the information is readily available online, e.g. on comparative websites) it was quite difficult for a consumer to find out the Glass's Guide price for a second-hand car. The combined monthly instalment payment of £153.72 was higher than the amount in the first quote for finance Mr Johnson had independently obtained. Nevertheless, he took the deal.

43. Mr Johnson was presented with what he described as "an enormous amount of paperwork" and asked to sign the agreement then and there. He did not read through

the documents. He trusted the sales representative to be telling him all he needed to know. He was unaware that the dealer would be paid a commission. Mr Johnson's witness statement says:

> "22. At no point during the process was anything to do with commission mentioned, nor do I recall seeing anything about commission in the paperwork, although I did not get much chance to read it.
>
> 23. I have since been advised by my solicitors that MotoNovo made a commission payment to The Trade Centre in the sum of £1,650.95.
>
> 24. I understand that this represents almost 70% of the cost of credit of this agreement.
>
> 25. I also understand that at the time this statement was prepared MotoNovo have so far declined to confirm the basis on which the commission payment was calculated.
>
> 26. I had absolutely no idea that commission was commonly paid in this industry and was very surprised to learn exactly how much commission was paid under my agreement.
>
> 27. I understood that I paid interest as part of the agreement and assumed that all of the charges under the agreement were that interest.
>
> 28. I had always thought that car dealerships made their money by making a profit on the cars that they sell rather than by arranging finance.
>
> 29. If I had been told that the overwhelming majority of the cost of this agreement to me was just a commission payment to the dealer, I simply would have walked away and gone to a different dealership."

44. FirstRand called no evidence to prove that Mr Johnson was actually made aware of the commission which would be paid to the dealer by the lender. It relied on its documents, including its contract with the dealer. The Trade Centre Wales had an agreement with FirstRand entitled the "Rates and Terms". It incorporated the Dealer Terms of Business which were in materially identical terms to those in the *Wrench* case and, by clause 2.1 (set out at [39] above) obliged the dealer to give FirstRand a right of first refusal in respect of finance provided to its customers and to use reasonable endeavours to introduce its customers to FirstRand in line with the terms and rates agreed with FirstRand.

45. The section of the "Rates and Terms" document entitled "General Terms" provided among other things as follows:

> "**1.13 Suitability**
>
> You must take reasonable steps to ensure that the customer selects a product that is suitable for their needs. You must provide the customer with balanced information about the range of finance products that are

available to enable the customer to make an informed choice as to which product is right for the customer. We will supply you with supporting tools and material to help you explain our products to your customers. You will receive a documentation pack for each customer accepted by us, which will include the Pre-Contract Information (SECCI), a customer agreement to read and take away with them, the original customer agreement to be signed and the Customer terms & conditions. When selecting the most appropriate credit agreement for your customers, you will consider the customer needs and the special contract terms within the MotoNovo credit agreements. This could include the mileage clauses on early termination and full term under the HP and PCP products, use of the vehicle should the customer be considering taking the vehicle out of the UK and the motor insurance clause for fully comprehensive motor insurance for vehicles (motorcycles may hold third party fire & theft motor insurance).

1.14 Affordability

You must help us to gather the information that we required from the customer to undertake an affordability assessment. Where you are personally gathering the data from the customer, you must ensure that the information recorded is as provided by the customer and that all fields are populated. Where the information is being populated by the customer, you must help the customer to understand the questions that are being asked if required by the customer to do so.

1.15 Commission Disclosure

You agree to disclose to the customer early in the sales process in relation to each regulated finance agreement that commission may be payable to you for acting as a credit broker and/or credit intermediary. If requested to do so by the customer you will inform the customer of the amount of any commission and or other benefits payable by us to you in relation to the prospective or actual regulated." [sic]

46. As with Mr Wrench, the documents provided to Mr Johnson included the vendor's invoice and warranty, the "Pre-Contract Credit Information" which contained the information required by section 55 of the 1974 Act, an explanatory document, and a copy of the Hire-Purchase Agreement and Terms and Conditions (which were in substantially the same form as the Hire-Purchase Agreement and standard terms and conditions used in the 2017 transaction with Mr Wrench). The only mention of the commission in these documents was in clause 13.6 of FirstRand's standard terms and conditions (set out at [34] above).

47. However, by contrast with what happened in *Wrench*, the documents supplied by the dealer to Mr Johnson also included a "Suitability Document … Proposed for Mr Marcus Johnson" which he also signed without reading. It was created on a form used by the dealer. It contained the following statements:

"The Trade Centre Wales Ltd – Cardiff North Outlet is authorised and regulated by the Financial Conduct Authority (FCA) … and is permitted to advise on and arrange consumer credit contracts

Categories

C. Credit Brokerage …

…

We will undertake an assessment of your Demands and Needs for Consumer Finance and provide an illustration of the Consumer Finance product that best suits your individual requirements based upon the answers you provide.

We do not charge a fee for handling your application for Consumer Credit, but we may receive a commission from the product provider.

We do not offer a whole of market option for Consumer Credit; we offer products from a select panel of lenders, details of which can be seen below… (there follows a list of 22 lenders including FirstRand).

Consumer Finance Demands and Needs Assessment

The following pages provide a record of the responses given by you during the assessment of your Demands and Needs for Consumer Finance. The answers provided have been used to generate the following illustration of the Consumer Finance product that best meets your individual requirements.

Suitability

Given your requirements and responses to specific questions the Finance option which appears to be most suited to your requirements is

Hire Purchase/Conditional Sale

Which Finance Company has been selected to provide funds…

FirstRand Bank Limited.

….

Within our organisation there are a number of finance options we are able to provide. Based on our discussions and your responses to our questions we will have narrowed down this selection to the one that may be most appropriate given your personal circumstances and requirements. We do however believe that it is important that in making the decision you are aware of all finance options we have available (some of which may not be applicable in your particular circumstances) and have relevant information on the options available.

> Further information on the types of finance options we are able to offer can be obtained from organisations such as the Finance and Leasing Association www.F.A.org.uk or the Money Advice Service www.moneyadviceservice.org.uk."

48. Although it made reference to the possible payment of a commission, and made it clear that the broker was not going to search the whole market, there were a number of materially untruthful and misleading statements in the Suitability Document (see [153] to [156] below). In consequence the document created the false impression that the Trade Centre Wales were exercising their judgement in selecting a finance provider which "may be most appropriate" for the customer's needs from a panel of 22 lenders, when in fact there was an undisclosed obligation which tied the broker into giving FirstRand first refusal in every case. The misleading nature of the Suitability Document is a matter which is of some significance when we come to consider the claim by Mr Johnson under the 1974 Act.

49. The Suitability Document and the Dealer Terms of Business appear to us to be of considerable significance. Despite this, no mention was made of them in the judgments or skeleton arguments below. The documents were, we were told, in the bundle, but counsel who appeared at the trial and at the first appeal did not refer either of the judges to them. We do not know how or why that happened, but we find it surprising.

50. The Rates and Terms gave the broker discretion to set the interest rate on credit agreements within the range of 8% to 13%. A commission was payable at 80% of the amount by which the interest rate exceeded the lowest level in the range, 8%. In addition to that, a further RSA commission was payable at 25% of the sum advanced. As it happened, in Mr Johnson's case, interest was charged at a flat rate of 8%, so the rate of commission was based solely on the amount of the loan. Nevertheless, the total amount of the commission was £1,650, approximately 25% of the total sum advanced by FirstRand to Mr Johnson. This was financed by the interest paid by Mr Johnson.

51. Mr Johnson appears to have come to regret his somewhat hasty decision to enter into the transaction, and was never really happy with the vehicle. When he came into some money, Mr Johnson paid off the finance and sold the car in January 2021.

THE LAW

52. As David Richards LJ said when summarising his conclusion in *Wood* at [94],

> "…bribery is an actionable wrong at common law, as well as in equity, for which common law remedies as well as equitable remedies are available. The remedies include rescission of the transaction in connection with which the bribe or secret commission was paid. The payer of the bribe is rightly viewed not as an accessory but as a primary wrongdoer."

53. It will be necessary to examine *Wood* in more detail below, but this is a good place to start because it sets the scene both in what is said and also in what is absent. The passage does identify major topics which need to be addressed in this case, namely, the idea of a "secret" commission, which is treated in the same way as a bribe; and the position of the person making the payment as an accessory or a primary wrongdoer.

However it does not mention the relationship, fiduciary or otherwise, between the recipient of the payment and the victim of the act of bribery (or breach of fiduciary duty caused by receipt of the secret commission). That was no accident, because David Richards LJ's purpose was to explain his rejection of the contention before him that "the liability of the third party depends on the third party being an accessory to the agent's conflict and breach of fiduciary duty."

54. In the *Hopcraft* appeal, Close contend that this court should hold that *Wood* is wrong and should not be followed. We reject that submission. None of the criteria specified in *Young v Bristol Aeroplane Co Ltd.* [1944] KB 718 are satisfied in this case, and so we are bound by *Wood*. In any event, *Wood* appears to us to be an example of the orthodox application of settled principles pertaining to bribes and secret commissions.

55. Detailed consideration of the law relevant to these appeals starts with *Hurstanger*. The leading judgment was given by Tuckey LJ, with whom Waller and Jacob LJJ agreed. In that case the defendants Mr Wilson and Ms Burton applied for a secured loan of £8,000 from the claimant lender, Hurstanger, through a broker, Mr Dunk. £5,500 of that loan was to pay off mortgage arrears owed to their building society, £1,000 was to pay the broker's arrangement fee and the balance was to provide funds for the defendants' use. One of the documents signed by the defendants included within it the statement that: "In certain circumstances this company does pay commission to brokers/agents." Hurstanger paid a £240 commission to the broker.

56. The defendants fell into arrears and the claimant brought mortgage possession proceedings. One of the defendants' defences was that the loan agreement was void or voidable owing to the £240 fee. At first instance the issue was approached on the basis that the defendants' right to rescission turned on the purely factual question whether the £240 commission was secret or not. The recorder held it was not secret owing to the statement in the signed document mentioned above.

57. The Court of Appeal examined the circumstances in more depth. The first step was to characterise the nature of the relationship between the defendant borrowers and the broker (at [33] – [34]). It was obviously a fiduciary one and yet the broker had put himself in a conflict of interest by agreeing to accept a commission from the other party to the transaction which the defendants had retained him to procure. The defendants were entitled to expect him to get the best deal for them, but the commission was an incentive to get the deal which paid the best fee. The broker could only act this way with the informed consent of the defendants. Receiving a commission without informed consent is a breach of fiduciary duty and a third party paying such a commission knowing of the agency may be liable as an accessory to the breach. The remedies for breach of fiduciary duty are equitable, including rescission.

58. At [35]-[36] the court examined what would amount to sufficient disclosure for the purposes of obtaining informed consent. Putting the principal on inquiry would not be sufficient. Borrowers in this non-status lending market are likely to be vulnerable and unsophisticated and in this context a statement of the amount their broker is to receive is likely to be necessary to bring home to such borrowers the conflict of interest.

59. Next at [38] to [39] the judgment examined whether there is what it refers to as a "half-way house". The reasoning is as follows. If there was *no* disclosure (emphasis in the original) then the agent broker would have received a secret commission, which is

considered to be a bribe. In the case of bribery, alternative remedies are available against both the briber and the agent (citing *Mahesan s/o Thambiah v Malaysia Govt Officers Housing Cooperative Society* [1979] AC 374, 383 and *Panama and South Pacific Telegraph Co v India Rubber, Gutta Percha and Telegraph Works Co* (1875) LR 10 Ch App 515, at 527, 532-533). At [39] the judgment also identifies the well-known observation of Chitty LJ in *Shipway v Broadwood* [1899] 1 QB 369, at 373 that "the real evil of bribery is not the payment of money, but the secrecy attending it."

60. Therefore the half-way house question, on which no authority could be found, was whether one can have a case in which there has been sufficient disclosure to negate secrecy but nevertheless the principal's informed consent has not been obtained. The answer given in *Hurstanger* is yes. As Tuckey LJ put it in [39]:

> "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."

61. Turning to the facts, the court held that the statement in the document which the defendants had signed was indeed sufficient to negate secrecy ([43]). This was because if you tell someone that something may happen, and it does, then the person who was told cannot claim that what happened was a secret. However ([44]-[45]) the defendants' informed consent was not obtained in these circumstances and this therefore was a "half-way house" case. The full armoury of remedies in a true secret commission case were not available, but equitable relief for breach of fiduciary duty was. That includes a discretionary remedy of rescission. On the facts the defendants were awarded £240 with interest as equitable compensation, but rescission of the agreement was refused on the ground that the agreement and the charge were fair and enforceable (subject to a now irrelevant detail). To rescind the transaction would be unfair and disproportionate.

62. *Hurstanger* was followed in four subsequent Court of Appeal cases: *McWilliam v Norton Finance UK Ltd* [2015] EWCA Civ 186, [2015] 1 All ER (Comm) 1026 ("*McWilliam*"); *Nelmes v NRAM* [2016] EWCA Civ 491, [2016] CTLC 106 ("*Nelmes*"); *Medsted Associates Ltd v Canaccord Genuity Wealth (International) Ltd* [2019] EWCA Civ 83, [2019] 1 WLR 4481("*Medsted*"); and *Prince Arthur Ikpechukwu Eze v Conway* [2019] EWCA Civ 88 ("*Prince Eze*").

63. *McWilliam* has a number of features which are strikingly similar to those in the cases with which we are concerned. The claimants, Mr and Mrs McWilliam, engaged credit brokers ("Norton") to arrange a loan on their behalf and also to obtain payment protection insurance ("PPI"). The loan and PPI documentation provided that the claimants would pay fees to Norton plus an unquantified commission based on a proportion of the PPI premium. Unbeknownst to the claimants, the two providers of the loan and the PPI also paid Norton commissions for introducing the business to them. One of the issues which arose was whether Norton owed the claimants a fiduciary duty such that it was liable to account to them for the additional commissions received without their informed consent.

64. The evidence was that Norton would feed information provided by applicants for finance into a computer which generated available loans from their panel of lenders, and then tell the applicant of the one with the most competitive interest rate which matched their criteria. The Court of Appeal (Tomlinson LJ, with whom Mitting J and Sir Robin Jacob (a member of the constitution in *Hurstanger*) agreed) held that the task of the broker was to identify that lender willing to lend to the borrowers which offered them the most advantageous terms. Even though Norton offered no advice and made no recommendation, they implicitly told the claimants that the terms offered by the lender were the most competitive to which they had access. They acted in a capacity which involved the repose of trust and confidence by the borrowers, who were people of relatively modest means with a history of credit problems, and vulnerable in that they had substantial debt and needed assistance in finding a loan which would ease the burden of servicing that debt. Therefore the relationship was a fiduciary one. Indeed Tomlinson LJ described the case at [43] as a "paradigm instance of a relationship of that description."

65. The application form for the loan, signed by Mrs McWilliam, contained a declaration that Norton would receive a commission from the lender if the loan completed *and* that the borrowers consented to Norton retaining the commission. It also drew express attention to a "Borrower Information Guide" which included provisions clearly explaining the role of a credit broker and that the lending company would pay commission to the broker. The claimants did not read that document. The Guide also explained the various ways in which such a commission might be calculated. But the borrowers were not told how much the brokers would actually receive. The Court of Appeal held that because of this, they did not give their fully informed consent. That was enough to give rise to an obligation on the part of Norton to account for the commissions; since Norton had become insolvent, the claimants indicated that they intended to seek compensation from the Financial Services Compensation Scheme.

66. *McWilliam* was not a case in which the Court of Appeal considered whether the lenders would have been liable to the claimants and if so, on what basis. There is nothing in the judgment which characterises it as a "fully" secret or partial disclosure case, as it was unnecessary to do so, but an application of the reasoning in *Hurstanger* would seem to place it in the latter category. In *Wood*, that is certainly how David Richards LJ viewed it at [84].

67. It is also worth highlighting *Medsted*, in which a broker was introducing experienced and wealthy investors to an investment institution. The broker had disclosed to the clients the fact that commissions would be paid but not the amount. The court analysed the scope of the duty owed in that case, and by contrast with the facts of *Hurstanger* (and *McWilliam*) held that in those circumstances, even though the relationship was a fiduciary one ([32]), the scope of the fiduciary duty did not extend to a requirement to disclose the amounts of the commissions.

68. Turning to *Wood*, that appeal involved two separate cases (*Wood* itself and *Business Mortgage Finance 4 Plc v Pengelly ("Pengelly")*) in which the question was whether a borrower is entitled to rescission of a secured loan agreement and its accompanying mortgage, arranged through a broker, where the broker has received an undisclosed commission from the lender. In both cases rescission had been ordered (subject to counter-restitution). In *Wood* itself the trial judge had held that in a case about an undisclosed commission – i.e. a bribe for the purposes of civil law - a fiduciary

relationship between broker and borrower was not required for relief. The trial judge held that all that was required was, in summary, in a situation in which A is dealing with B, a payment by A to B's agent C when A knows that that C is acting as B's agent and when A fails to disclose to B that he has made that payment. The judge contrasted this with *Hurstanger* in which the partial disclosure means that the payment is not in law a bribe but, where there is a fiduciary relationship, equitable remedies are available if the disclosure is insufficient for informed consent.

69. By contrast, although in *Pengelly* the judge below (hearing the matter as an appeal from the County Court) had awarded rescission, he had held that a fiduciary relationship was a necessary precondition to such relief. Nevertheless on the facts both judges found that the relevant relationship between borrower and broker was a fiduciary one and found that the commissions were secret and there was no partial disclosure as found in *Hurstanger*.

70. The Court of Appeal (David Richards LJ, with whom Males and Elisabeth Laing LJJ agreed) identified three issues in the appeals. The first and main issue was whether a fiduciary relationship between the client and the broker was a necessary precondition to the grant of relief against the payer of the undisclosed commission. The second issue was whether there was a fiduciary relationship in these cases, and the third was whether the commissions in the cases were in fact to be characterised as partially disclosed.

71. On the main issue David Richards LJ starting by noting that the law has for a long time set its face against bribery as a corrosive practice ([42]) and then expressed a concern that the risk of requiring a fiduciary relationship as a precondition for relief would mean that the term "fiduciary relationship" would have to be applied so widely as to virtually deprive it of content in order to grant relief in appropriate cases (see [43] to [47]).

72. The essential conclusions are stated at [48] and [49] as follows:

> "48. To ask in cases of this kind whether there is a fiduciary relationship as a pre-condition for civil liability in respect of bribery or secret commissions is, in my judgment, an unnecessarily elaborate, and perhaps inaccurate, question. The question, I consider, is the altogether simpler one of whether the payee was under a duty to provide information, advice or recommendation on an impartial or disinterested basis. If the payee was under such a duty, the payment of bribes or secret commissions exposes the payer and the payee to the applicable civil remedies. No further enquiry as to the legal nature of their relationship is required.
>
> 49 This is not to say that, in the many cases in which a fiduciary relationship clearly exists, the remedies available cannot be analysed in terms of the consequences of a breach of fiduciary duty. If a fiduciary relationship exists, it is a breach of that duty for the fiduciary to accept a secret commission or the offer of a secret commission, and in such a case the payer or offeror will be procuring or assisting a breach of fiduciary duty. Both will be liable to a range of remedies: accounts of profits, compensation for loss and rescission of transactions."

Therefore a fiduciary duty was not a precondition. What was required for liability was that the person receiving the payment was under a disinterested duty (as defined in [9] above).

73. David Richards LJ went on to say at [50] that:

> "while it may sometimes be appropriate to describe a duty to give disinterested advice or information as "fiduciary", it is not necessary to do so. It is the content of the duty, not the label attached to it, that matters."

He then conducted a thorough review of the relevant authorities (from [53] to [92]) in order to demonstrate that these conclusions were consistent with them, albeit that a number of the cases use the term "fiduciary" to describe the relevant relationship. At [92] he concluded that in those authorities the suggested requirement for a fiduciary relationship was, in this type of case, no more than saying that the recipient of the bribe or secret commission must owe a disinterested duty. It is the duty to be honest and impartial that matters.

74. In consequence of this analysis, at [94] David Richards LJ rejected the idea that the existence of a fiduciary relationship was essential for relief against the payer of the bribe or secret commission. He went on to make the points identified at [52] above, including that bribery is an actionable wrong at common law, as well as in equity, and that the payer of the bribe is a primary wrongdoer, not merely an accessory.

75. Turning to the second issue on the appeals in *Wood*, the court held that the brokers did owe Mrs Wood and Mr Pengelly a type of duty which engaged the law of bribes and secret commissions, i.e. the disinterested duty ([110]). They had a duty to make a disinterested selection of mortgage products to put to the client in each case. The court also held that to the extent it was necessary, the courts below were also correct to hold that the brokers owed a fiduciary duty of loyalty in the performance of their duties. On the third issue, the court rejected on the facts the submission that there had been a partial disclosure of the commissions akin to what happened in *Hurstanger.* There is no need to examine the second and third issues of *Wood* at this stage, although when addressing the application of the relevant principles to the facts of the present cases it will be necessary to return to them.

76. Standing back, therefore, for cases of this kind involving a broker, a lender and a borrower in which the lender has paid the broker a commission, and subject to a submission of the appellants which we will consider below, the law currently has two limbs. In effect one is *Wood* and the other is *Hurstanger*.

77. For the law relating to bribes and secret commissions to be engaged *Wood* holds that the broker must owe the borrower a disinterested duty, but it is unnecessary to show that the relationship was a fiduciary one (though it may be). In such a case, if the lender pays a secret commission to the broker, the borrower will have a claim against the lender as a primary wrongdoer. That will include a claim for the disgorging of the secret commission and for rescission of the transaction as of right, subject to counter-restitution. If the payment of the commission was not secret but there was only partial disclosure, then the question will be whether the broker owed the borrower a fiduciary duty such that the borrower's informed consent to the inevitable conflict of interest

caused by the commission was required. That will depend on what exactly was disclosed and on all the circumstances. The facts of *Hurstanger* with unsophisticated borrowers and *Medsted* with wealthy experienced investors provide a contrast.

78. The claimants submit that this court should extend the requirement in *Wood* for a disinterested duty into the partial disclosure cases. The submission is that the change wrought by *Wood*, which put to bed the idea that a fiduciary relationship was a precondition for relief, should apply just as much to cases like *Hurstanger* as to the fully secret commission cases. The major problem with that submission is that the reasoning in *Wood* was specific to bribery. Essentially what the court did in *Wood* was examine and properly characterise the boundaries of an existing kind of actionable wrong. To accept the appellants' submission would extend the disinterested duty to cases which do not involve bribery (or a payment which is treated as akin to a bribe). That is a step which runs counter to the logic of *Wood*.

79. Moreover *Wood* itself clearly recognised and treated a *Hurstanger* type case as falling within a different category: see especially David Richards LJ's explanation of Tuckey LJ's approach in *Hurstanger* as drawing a distinction between the receipt of a bribe or secret commission as a breach of fiduciary duty, and the payment and receipt of a bribe or secret commission as an actionable wrong in its own right ([83]). It is also unclear where the boundaries of this suggested new approach would lie.

80. Furthermore, as a matter of authority, we are not persuaded that that step would be open to this court. The ratio of *Hurstanger* is that when the commission is not secret, but yet there has not been fully informed consent to its payment, a fiduciary duty is required to found accessory liability on the part of the lender, and the ratio of *Wood* does not alter that.

81. A significant difference between these two kinds of case is that, as we have said, with bribery the payer of the bribe is a primary wrongdoer, whereas in a *Hurstanger* type of case the liability of the lender who paid the commission to the broker depends on their being liable as an accessory to the latter's breach of fiduciary duty. Even if the disinterested duty approach were to be extended to cases of partial disclosure, it does not necessarily follow that that would turn the payer of the partial disclosure commission into a primary wrongdoer in the same way as they would be with a secret commission. The concept of someone being liable as accessory to breach of a "disinterested duty" is an entirely novel one; fortunately it is unnecessary for us to explore that concept further for the purposes of determining these appeals. Suffice it to say that we envisage that it could encounter formidable obstacles both legally and factually.

82. We have concluded that in *Johnson* and *Wrench,* when they held that where a situation arises of the type identified in *Hurstanger* as a "half-way house"*,* a fiduciary duty is essential to found any liability on the part of the lender, and that any such liability will be as an accessory rather than as a primary wrongdoer, HH Judge Jarman KC and HH Judge Worster correctly identified the legal principles set out in *Hurstanger* which they, and we, are bound to apply in such a case. The question for us is whether they applied those principles correctly to the facts.

WHAT DUTIES WERE OWED BY THE BROKERS TO THE CONSUMERS?

Did the brokers owe a disinterested duty?

83. The first step in the analysis is to characterise the relationship between the consumers and the brokers. As *Medsted* makes clear, the context is important. Here, we are dealing with a particular but very common situation, where the car dealer is acting both as a seller and as a credit broker and the consumer relies on him to obtain an offer of finance from a panel of lenders to which the dealer, but not the consumer, has access.

84. In situations in which a broker is acting purely as an intermediary, and has no other means of remuneration, one of the parties to whom he provides his services might reasonably assume (or be expected to assume) that if they do not remunerate him, the other party will. But in the present context, the purchaser/borrower would view the procuring of the finance as an adjunct to the sale transaction, and would not expect the dealer to receive a commission from the lender for the introduction of the business, unless he tells them. Indeed, the claimants in these three cases believed that the dealers would make their money from the profit on the sales.

85. In the introductory section of this judgment, at [3], we explained what the function of a credit broker is and the type of services which they provide. The expression "credit broker" is defined in the FCA handbook ("CONC") as "a person that carries on an activity, by way of business, of the kind specified in article 36A of the Regulated Activities Order" (the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001). Article 36A defines the type of activities carried out by a credit broker as including:

> "effecting the introduction of an individual or relevant recipient of credit who wishes to enter into a consumer hire agreement to a person ("P") with a view to P entering into by way of business as owner a regulated consumer hire agreement."

They also include presenting or offering an agreement which would (if entered into) be a regulated credit agreement; and assisting an individual or relevant recipient of credit by undertaking preparatory work with a view to that person entering into a regulated credit agreement.

86. All of the dealers in these cases were undoubtedly acting as credit brokers, a role they undertook on behalf of the claimants they were introducing to the lenders, and the DDJ in *Hopcraft* was wrong to find the contrary. Indeed in *Hopcraft* the standard terms of business between Close and Jordans expressly "set out the terms and conditions upon which [Close] shall deal when the Dealer *introduces a Customer* to [Close]" (our emphasis) and the dealer, in this case Jordans, acknowledged and agreed that "it will be carrying out Credit Intermediary Activities". It matters not for these purposes whether the dealer offered to source the finance, or whether the customer asked him to.

87. As in *McWilliam*, irrespective of whether they provided advice or made recommendations, it was part of the credit broker's role in these cases to provide information to the lenders on the customer's behalf, and to the customer about the available finance. The very nature of the duties which the credit broker undertook gave rise to a "disinterested duty" unless the broker made it clear to the consumer that they

could not act impartially because they had a financial incentive to put forward an offer from a particular lender or lenders. The broker could do this, for example, by saying: "I may offer you a product which may be chosen because it benefits me directly, even though it may not be the best product for you. Are you happy with that?" Of course, in most cases the disclosure would be more subtle than that; but it must be sufficient to bring home to the customer the fact that the person he is engaging to find an offer of finance is free to promote his own self-interest at the customer's expense.

88. Therefore in all these cases the dealers owed a disinterested duty to the claimants. In the case of *Hopcraft*, the existence of that duty is sufficient for the appeal to succeed, because it is common ground that there was no mention of the commission in any of the documents or in any of the pre-contractual discussions. The other cases turn on the sufficiency (or insufficiency) of such disclosure as was made in the documents, there being no evidence and no finding that disclosure was made orally. We anticipate that many of the cases of this nature which come before the County Court are likely to relate to transactions which took place several years ago, and consequently there is unlikely to be a clear recollection of what was said at the time. The documents are therefore likely to prove crucial in determining whether the disclosure in a given case was sufficient to negate secrecy and, if so, whether there was or was not informed consent.

89. The findings of fact made by the DDJ in *Johnson* at [53] referred to by HH Judge Jarman KC at [18], to the effect that Mr Johnson "did not rely on the dealer for information and did not care to enquire" do not negate the existence of the disinterested duty, which arises from the role undertaken by the dealer as credit broker in these particular circumstances. Those findings must also be put in context; the "information" to which the DDJ was referring, by reference to answers given by Mr Johnson to questions in the witness box (which he set out earlier in his judgment) was information about the deal: how much he was going to pay overall, the amount of each instalment, the amount of interest, and how long the agreement would run. It was not information about commission, nor about the closeness of the relationship between the dealer and FirstRand. Mr Johnson was not specifically told that the brokers could not act impartially, because (a) they were contractually obliged to introduce the business to FirstRand rather than to another lender on their panel and (b) they stood to earn commission from FirstRand if the deal went ahead. The impact of the disclosure that was made in his case is something that we will address in a later section of this judgment, at [120] to [122] below.

Did the brokers owe a fiduciary duty and if so, how far did it extend?

90. As David Richards LJ confirmed in *Wood,* both when addressing the first issue and when rejecting the submissions of the appellants on the second issue in that case, in order to give rise to a fiduciary relationship it is unnecessary for the broker to be an agent in the strict legal sense of being authorised to enter into a contract on behalf of his principal. The question is whether the broker was acting on behalf of the customer in a capacity which involved an obligation of loyalty and the repose of trust and confidence in him in relation to the specific duties he was tasked to perform: see the well-known passage in the judgment of Millett LJ in *Bristol and West Building Society* v *Mothew* [1998] Ch 1 at p.18A-C and E-F, the observations of David Richards LJ in *Wood* at [36] to [37] and [110], and the judgment of Tomlinson LJ in *McWilliam* at [40] to [43].

91. In all three of the present cases, just as the court decided on the fiduciary duty issue in *Wood*, there was an *ad hoc* fiduciary duty running in tandem with the disinterested duty, arising from the nature of the relationship, the tasks with which the brokers were entrusted, and the obligation of loyalty which is inherent in the disinterested duty. The scenario in these cases is analogous to that in *McWilliam.* In that case, however, the PPI was an unnecessary adjunct which the claimants chose to take out, albeit that they probably thought it desirable at the time to ensure that they could service the loan. In the present cases, the claimants needed the finance to be able to afford to acquire the car they wanted, which made them more vulnerable than someone who might have had the choice to pay in cash. Mr Johnson had already obtained an offer of finance himself before approaching the dealer, but it transpired that the existing offer would not generate sufficient funds to enable him to afford the car he liked, and he was unable to find an offer of a larger loan on the same terms. All three claimants relied on the dealer to find them an offer which met their needs and which was, at the very least, competitive with other readily available sources of finance.

92. By virtue of s.56 of the 1974 Act, a credit broker is deemed to be the agent of the *lender* for certain purposes, including the purposes of negotiating the terms of the credit agreement and making any representations to the debtor or hirer. The respondents sought to use this as a justification for negating any agency relationship with or fiduciary duty to the borrowers. However, there is no reason in principle why the same person cannot act on behalf of one putative contracting party for certain purposes, and act on behalf of the other party for other purposes. The question is not whether the brokers owed fiduciary duties at large; it is whether they owed such duties in relation to the specific tasks they undertook on behalf of the claimants. In our judgment they clearly did. Indeed in this context, it went hand in hand with the disinterested duty. All the judges in the lower courts were wrong to find that the relationship was not a fiduciary one.

93. The brokers were not carrying out a purely ministerial function. They did not simply effect an introduction and leave it to the lender and borrower to contract between themselves. Their relevant role, which they willingly undertook, related to sourcing and selecting a lender who offered the most advantageous, (or at the very least, in Miss Hopcraft's case, competitive) and suitable terms. It was indistinguishable from the role of the brokers in *McWilliam*. As Mr Weir submitted, the service they provided was materially the same as that provided by other credit brokers of consumer finance. They communicated with lenders and entered into any necessary discussions or negotiations with them on behalf of the customers with a view to finding the most suitable lender from their panel of lenders to provide the finance which would enable the customers to purchase the cars they wanted at the prices the dealers were asking. The claimants had no direct contact with the lending panel or with the chosen lender. They entrusted the broker with information about their financial circumstances, and left it to them to pass that information on to prospective lenders and procure an offer.

94. The fact that in each case the broker presented the claimant with just one offer from one lender does not affect this analysis, even if it was done on a "take it or leave it" basis, particularly given that in each case the offer from that lender was expressly or by necessary implication put forward as the most suitable (from the range of lenders ostensibly considered). In *Johnson*, the only case involving a written document setting

out the services to be provided by the brokers, the Suitability Document, (see [46] above) the dealers expressly stated that they would:

> "undertake an assessment of your Demands and Needs for Consumer Finance and provide an illustration of the Consumer Finance Product that best meets your individual requirements based on the answers you provide".

95. These relatively financially unsophisticated individuals undoubtedly placed trust and confidence in the brokers to secure an agreement which was affordable and which was, at the very least, competitive. In *Wrench,* albeit that there was no specific mention of the lending panel, an express assurance that the dealer's representative would select or had selected the product most suitable for the borrower's needs was given orally on both occasions.

96. At the time of the *Wrench* and *Johnson* transactions the brokers had obligations under CONC 4.5.3R to:

> "disclose to a customer the existence of any commission when knowledge of the existence or amount of the commission could actually or potentially (1) affect the impartiality of a credit broker in recommending a particular lender or (2) have a material impact on the customer's transaction decision".

That duty is premised on credit brokers having a duty to be impartial in the first place.

97. In *Hopcraft*, where the transaction pre-dated the coming into force of CONC, the claimant told the dealer's representative how much money she was hoping to pay each month; as in *Wood*, the broker's task was to select the lender based on what she said she was looking for. We note that in *Wood,* when addressing the second of the three issues, the fiduciary duty issue, at [106] and [110], the court expressly endorsed the findings of the judge at first instance, based on dicta in earlier authorities, that:

> "…even where an agent gives no advice or recommendation but instead simply proposes or arranges a particular contract, there is "at the very least an implied representation that the proposed contract was "competitive" (*McWilliam*, para 38; *Medsted*, paras 30 and 32) thereby resulting in the principal reposing trust and confidence in the agent and, accordingly, giving rise to a fiduciary relationship (*Medsted,* para 33)".

98. That analysis applies with equal force to the present cases. The brokers did not "randomly source lenders". In the case in which a selection was made, *Hopcraft*, they selected a lender based on what the customer said they were looking for (in terms of affordability and the period of the credit agreement, for example). This necessarily involved the exercise of judgment on the part of the broker, as David Richards LJ said in *Wood* at [113]. The instalments were slightly higher than Miss Hopcraft had told the broker she wanted to pay, but she was satisfied with the offer they procured. They had a role in the decision-making process in relation to the transaction in question.

99. In the cases involving FirstRand as lender, where the brokers were tied in to an arrangement to give FirstRand first refusal, and the only selection involved would have

related to products offered by them, the brokers were even in a position to determine, or at least influence, the rate of interest charged and to adjust it in a manner which would affect the rate of commission they were to receive.

100. It is precisely because the brokers were in a position to take advantage of their vulnerable customers and there was a reasonable and understandable expectation that they would act in their best interests, that they owed them fiduciary duties. There was obviously reliance on them to act in good faith, just as there was in *Hurstanger* and *McWilliam*. *Medsted* is distinguishable on its facts because the borrowers in that case were financially sophisticated and, unlike any of the claimants, knew that commission was payable to the brokers by the financial institution to whom the brokers had introduced them, though they did not know how much. Even in *Medsted*, the relationship was held to have been a fiduciary one, see the discussion and conclusions on that issue at [32]: the difference was that the fiduciary duty did not extend to expressly informing the clients how much commission the broker would be paid. They could be expected to have asked, if they wished to know. Put another way, on the specific facts of *Medsted* there was sufficient disclosure for there to have been informed consent. In this case, as in *Hurstanger*, *McWilliam*, *Wood* and *Pengelly*, there was an obligation to tell the claimants the amount of the commission and there could be no informed consent if the claimants did not know how much it was. It was not good enough for the lenders to tell the claimants that the amount would be available from the brokers on request.

101. If and to the extent that the judges in the lower courts considered that the absence of payment of a fee by the customer to the broker negated any fiduciary duty (as, for example, the DDJ did in *Johnson*, at [55] to [57]) they were wrong. The payment of a fee by the customer would make it even more obvious that the relationship was a fiduciary one, as it did in *Hurstanger* and *McWilliam*, but it is not an essential ingredient. In *Wood* a fiduciary duty arose in respect of the arranging of all three loans, including the second, in which the broker waived its fee from the client (see at [13]). In fact there is no requirement for there to be a contractual relationship between the customer and the fiduciary; see the discussion in *Medsted* at [29] to [32].

102. The judges in the lower courts appeared to consider that the fact that the brokers were also selling the cars somehow precluded their owing fiduciary duties to the consumers for whom they were acting in procuring the finance. The respondents submitted that the purpose of the credit broking was to sell the vehicle and that therefore there was a clear conflict between the interests of the credit broker and the customer. It was in the broker's interest for the customer to obtain finance, regardless of whether it was in the customer's interests to do so, because the broker wished to sell the vehicle and to profit from doing so. The brokers were therefore acting in their own selfish interests in facilitating the sale by procuring the finance.

103. That analysis is flawed, not least because there is no such inherent conflict of interest between the broker and the consumer. On the contrary, as Mr Weir pointed out, the broker's interest is aligned with that of the customer. Both of them are keen to facilitate the sale at the price that the broker/dealer is prepared to accept, and the customer is willing to pay. That price is agreed before there is any approach to the lender. It is in both their interests for the customer to obtain affordable finance for that purpose, but that does not mean that the consumer can expect the broker to take a personal advantage from the situation at their expense. On the contrary, these financially unsophisticated

consumers expected (and were entitled to expect) the broker to be loyal and to act in their best interests.

104. HH Judge Jarman KC observed in the *Johnson* case at [19] that:

> "It is difficult to see how in practice or in principle a car dealer could offer single minded loyalty to a customer when dealing with the finance, but not when selling a car to the same customer which gives rise to the need for finance."

In *Wrench* HH Judge Worster made observations to a similar effect. We respectfully disagree. There is no reason why the absence of a fiduciary duty under a sale and purchase agreement should be an obstacle to the dealer/broker owing a fiduciary duty to the person on whose behalf they are arranging the necessary finance. The dealer is undertaking two independent commercial roles. In any event, if the offer of finance is accepted the dealer would sell the car to the lender, not the consumer. If and to the extent that HH Judge Jarman's objection depends on there being a sale "to the same customer" and therefore on the broker and consumer being on opposite sides of the sale transaction, the premise is erroneous.

105. In our judgment, as in *Wood,* in this particular context the dealers/credit brokers would owe both a disinterested duty and a fiduciary duty of loyalty to their customers, unless they made it clear that they did not accept such duties. Indeed in this context the latter duty necessarily arises from the finding of the former duty. David Richards LJ specifically acknowledged in *Wood* (at [50]) that it may sometimes be appropriate to describe a duty to give disinterested advice or information as "fiduciary", though that is not always necessary. It is appropriate to do so in this particular context. The key question in each case is whether sufficient disclosure was made to make it clear that the broker was free to prefer his own interests to those of the consumer. In *Hopcraft* the answer to that question is obviously no, since no disclosure was made. The answer in the other two cases depends on a closer examination of the facts.

106. Finally, on this topic, in *Wrench,* FirstRand raised the objection that Mr Wrench's pleaded case had been confined to alleged breaches of the disinterested duty and it was not pleaded that a fiduciary duty arose in respect of the procuring of the finance in either of the two transactions with which he was concerned. There had been no application for permission to amend the particulars of claim to cure this alleged deficiency.

107. However, in our view the facts relied on in support of the existence of the disinterested duty, which in turn gave rise to the fiduciary duty, were sufficiently pleaded. There is no question of FirstRand being taken by surprise or suffering any prejudice, and the fiduciary duty issue arose squarely in *Johnson,* a case in which FirstRand was also the lender. FirstRand cannot claim to have been unaware of the case it had to meet on the existence of the fiduciary duty, and its counsel, Mr Matthew Hardwick KC and Mr Simon Popplewell, have addressed the legal arguments fully in writing and orally. In those circumstances we consider that Mr Wrench should not be precluded from raising the arguments that rely upon breach of a fiduciary duty, though for reasons which will become clear he does not need to rely upon them in order to succeed in his claim.

WERE THE COMMISSIONS IN *WRENCH* SUFFICIENTLY DISCLOSED TO NEGATE SECRECY?

108. Mr Wrench's unchallenged evidence was that he was not orally told about the commission on either occasion. There was a difference of opinion between the DDJ, who considered this was a "fully secret" commission case, and HH Judge Worster, who decided that *Wrench* was a *Hurstanger* type case because of the reference to payment of a commission in clause 12.6 (or, in 2017, clause 13.6) of the lender's standard terms and conditions, which we have quoted in full at [34] above. We consider that the DDJ was right in his conclusion, albeit not for the reasons that he gave, which were that no steps were taken to draw the clause specifically to the attention of the consumer. That is a relevant factor when considering if disclosure was adequate to negate secrecy, but it is not decisive.

109. The adjective "secret" is defined in the Oxford English Dictionary as "not known or seen or not meant to be known or seen by others." We cannot fault the logic of Tuckey LJ's observation in *Hurstanger* at [43] that:

> "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."

That said, it seems to us that for the purpose of making disclosure that is necessary to obtain informed consent, there is a distinction between referring to the possibility that a commission *may* be paid (especially if the circumstances in which that might happen are not defined) and telling someone that it *will* be paid.

110. We also accept that in general terms the person concerned cannot claim "this information was kept secret from me" if the information in question would be clearly and openly conveyed to any reader in a document that they deliberately do not read, especially if that document is designed for that purpose, they were directed to read it carefully, and they signed it. That is what happened in *Hurstanger*. On the other hand, it was confirmed in *Hurstanger* that putting someone like these unsophisticated consumers on inquiry does not constitute disclosure.

111. As Tuckey LJ said in *Hurstanger* at [35], whether there has been sufficient disclosure must depend upon the facts of each case, given that the requirement is for the principal's informed consent to his agent or fiduciary acting with a potential conflict of interest. In *Hurstanger* itself, express steps were taken by the lender to draw the attention of the borrowers to the fact that a commission would be paid to the broker. The very purpose of the document which the defendants were asked to sign was to show that they had given informed consent to the payment of the commission [42], even though it did not achieve that purpose because the amount of the commission was not stated. In those circumstances, the statement in the document the defendants signed was held to be enough to negate secrecy in that particular case.

112. Arguably, the same approach might be taken to the statement about the possible payment of commission in the Suitability Document which was signed in Mr Johnson's case. On that basis we can appreciate why the concession was made that *Johnson* was a *Hurstanger* type case and not a *Wood* type case. That is not to say that we would have necessarily agreed with HHJ Jarman KC that that was the correct analysis, had the point

remained open for argument in the *Johnson* appeal. However, since Mr Weir did not seek to withdraw the concession, and it was effectively common ground before us that *Johnson* was a case of partial disclosure, the point does not arise.

113. No document similar to the Suitability Document was given to Mr Wrench in 2015 or 2017. The problem in the *Wrench* case is that the statement that a commission may be paid to the broker was "hidden in plain sight". It was tucked away in a sub-clause of the lender's standard terms and conditions, under the heading "General". As we said at [37] above, the prospect that the borrower would read those terms was negligible. FirstRand can have had no real expectation that they would do so; it did not even incorporate them expressly into the Hire-Purchase Agreement, but relied on the dealer to provide the customer with a copy. The only references in the Agreement to Terms and Conditions are to clauses which concern the liability of the lender (in Clause 10) and some obligations of the hirer which are irrelevant for these purposes (in Clauses 6 and 7). FirstRand appears to have gone out of its way to try and ensure that the statement about commission made at clause 12.6 (or 13.6 as it became) was as inconspicuous as it could be. It took no steps to require that the borrower did read it, let alone to obtain their confirmation that they had done so. The prominent reference to Clause 10 gave rise to the misleading implication that this was the only provision of any significance of which the customer needed to be made aware. By signing the agreement, Mr Wrench declared that his attention had been drawn to the provisions of *that* clause.

114. Moreover, Clause 12.6 (or 13.6) refers to the putative recipient of the commission as "the broker who introduced the transaction to us" and then states that the amount of the commission "is available from the Broker on request". An unsophisticated consumer would not necessarily understand this expression as being a reference to the car dealer. HH Judge Worster asked rhetorically "who else is being referred to?" at [26]. But that ignores the fact that these were standard terms and conditions, and for all the consumer knew, all kinds of other lending business might be introduced to FirstRand by professional brokers who were not car dealers. Whereas the Suitability Document in Mr Johnson's case specifically informed the reader that the dealer was acting as a credit broker, and was regulated as such by the FCA, there was nothing similar in Mr Wrench's case to put him on notice that the expression "broker" (with or without a capital letter) might be a reference to the dealer who was selling the car.

115. In those circumstances, although the standard terms made reference to the fact that a commission might be paid to a broker who effected an introduction of the business to the lender, it would be inaccurate to say that Mr Wrench was "told" (or even put on notice) that the car dealer might or would receive a commission, let alone that he was told about every relevant aspect of the relationship between the broker and FirstRand (including the tie which obliged the broker to offer it first refusal, and the DIC basis for the 2017 commission) and required to consent to the conflict of interest. The possibility of the payment of the commission to the dealer was buried in the small print, and it is difficult to reach the conclusion that this was anything other than deliberate, bearing in mind the distraction of the specific reference to Clause 10. It was not meant to be known or seen.

116. We note in this context that on the third issue in both the appeals in *Wood* the appellants contended that the case fell into the "half-way house" category recognised in *Hurstanger* and that there was partial disclosure by reason of a paragraph in the brokers' standard terms of business. This provided as follows:

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

117. The appellants, pointing to the first sentence of that paragraph, relied on Tuckey LJ's observation in *Hurstanger* which we have quoted at [109]. Both judges at first instance in *Pengelly* and *Wood* rejected their submission, on the basis that as well as informing the borrower of the possibility that a commission might be paid, there was an implied representation in the rest of the paragraph that if the broker did not give them express notification of the commission, it could be assumed by the borrower that no commission had been paid at all. The Court of Appeal agreed with that analysis, finding at [134] that the second, third and fourth sentences of that term imposed an unqualified obligation on the brokers to inform the borrower of the amount of the fee and that without such disclosure, the borrowers were not on notice that any commission might be paid. On the contrary, the only conclusion to be drawn from the absence of such notification was that no commission was to be paid.

118. It follows that the presence of a term in either the lender's or the broker's terms of business which makes reference to the possibility that a commission may be paid by the lender to the broker is not necessarily fatal to a finding that the commission was secret. The question in each case will be whether enough was done to bring the salient facts to the attention of the borrower in a way which made their significance apparent.

119. Bearing in mind the mischief that the rules on bribery are designed to address, we take the view that in Mr Wrench's case there was no "disclosure" in any meaningful sense and that the provision buried in the small print of FirstRand's standard terms was not enough to negate secrecy. Lenders should not assume that they can escape primary liability for the payment of a secret commission merely by making a general reference to the possibility of such payment in a carefully concealed sub-clause of their standard terms, especially when there is an attempt to divert attention from it in the manner which occurred here. In our judgment, *Wrench*, like *Hopcraft* and *Wood,* was a fully secret case. FirstRand was therefore under a primary liability to Mr Wrench as the payer of a secret commission.

IF THERE WAS PARTIAL DISCLOSURE SUFFICIENT TO NEGATE SECRECY, WAS THERE FULLY INFORMED CONSENT?

120. The only aspect of the transaction in *Johnson* that potentially created a distinction between that case and the others was the Suitability Document. In the *Johnson* case, as in *Hurstanger*, the possibility that the dealer might receive a commission from FirstRand was accepted to have been sufficiently drawn to the attention of the claimant to negate secrecy. However, like the borrowers in *Hurstanger* and *McWilliam*, and like Miss Hopcraft and Mr Wrench, Mr Johnson was relatively financially unsophisticated. In order for there to have been fully informed consent, Mr Johnson would have to have been told all material facts that might have affected his decision to enter into the hire-purchase agreement with FirstRand. The relevant principle was adumbrated in this way in *Hurstanger* at [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.""

The question whether those matters would in fact have affected his decision is immaterial, though Mr Johnson's evidence was that it would.

121. The documents, had he read them, would not have informed Mr Johnson that commission would (as opposed to might) be paid to the dealer for introducing the business, let alone revealed the highly significant fact that it was payable under an agreement between FirstRand and the dealer which obliged the latter to give FirstRand first refusal. He was not told how much the commission would be, nor how it was to be calculated. He was unaware that a significant proportion of the inflated price he was paying for the car would be used to finance the payment of the commission. As in *Hurstanger*, Mr Johnson was not told about the commission in terms which made it clear that he was being asked to consent to its being paid, and there was no warning statement to the effect that its payment to the broker might mean that the broker had not been in a position to give unbiased advice (see *Hurstanger* at [44]). On the contrary, the broker went to some lengths to conceal the true position from him. Had Mr Johnson read the Suitability Document he would have been deceived into thinking that he was getting impartial advice from the broker and that FirstRand had been chosen by them as the most suitable lender from a panel, which would only have served to reinforce the impression that he had already been given.

122. It is therefore clear that Mr Johnson did not give his fully informed consent to payment of the commission, and if and to the extent that any of the observations in the DDJ's judgment in his case can be interpreted as a finding that he did, that finding was plainly wrong.

123. For the sake of completeness, although we have held that there was no disclosure of the secret commission in his case and the issue therefore does not directly arise for determination, Mr Wrench did not give his fully informed consent to the payment of the commission in either of the transactions to which he was party, any more than Mr Johnson did. The material facts that were not disclosed to Mr Wrench included the rate of the commission, the basis on which it was calculated, the "tie" between the dealer/broker and FirstRand, including the obligation to give FirstRand first refusal, and that in the 2017 transaction, at least, the commission was partly based on a DIC arrangement.

ACCESSORY LIABILITY OF THE LENDER IN *JOHNSON v FIRSTRAND*

124. In *Johnson,* which was conceded to be a case of partial disclosure for the purposes of the non-statutory claim, any liability of FirstRand would arise in equity as an accessory to the broker's breach of fiduciary duty. That was clearly established in *Hurstanger* (though in his oral submissions, Mr Weir reserved the right to argue, should this matter go further, that the lender is under a primary liability even in a partial disclosure case). Unfortunately, none of the parties addressed the issue of what was needed to found such accessory liability in their skeleton arguments, and the oral arguments did not engage in any depth with the requirements as to the lender's state of mind or knowledge. No findings were made by the DDJ or HH Judge Jarman KC about FirstRand's state of mind because they found, wrongly, that there was no fiduciary duty. However, there is

no need to remit this case to the DDJ for any further fact-findings. On the facts as found, there was the clearest possible breach of fiduciary duty because the payment was made in circumstances in which the broker (and the lender) could not establish that Mr Johnson gave his fully informed consent to it.

125. In *Hurstanger*, which appears to be the only case cited to us in which the liability of the lender in a case of partial disclosure has been considered, it was said that the claimant lender 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 ([35] and[42] of that judgment) (our emphasis). Having then found that the lender 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 ([45]), all that Tuckey LJ said about the lender's liability at [48] was that the defendants had a claim for equitable compensation against the lender "as it procured the broker's breach of fiduciary duty." *Hurstanger* therefore seems to suggest that all that is required to establish accessory liability is to prove that the lender knew of the fiduciary relationship and paid the broker the commission in circumstances in which, as a matter of fact, there was a failure to obtain the borrower's informed consent. In *Wood* David Richards LJ appears to endorse that analysis.

126. That is a simple enough approach, though we consider, with respect, that when at [45] the court in *Hurstanger* identified the behaviour which procured the breach of fiduciary duty as being a failure by the lender to obtain the borrower's informed consent, it fell into error. The breach of duty lay in the receipt by the broker of the commission, which put him in a position of conflict *unless* the borrower gave their informed consent. The lender brought about the breach of duty by making the payment to the borrower's agent in circumstances in which such consent had not been obtained, *not* by failing to obtain the principal's consent, which in any event was the agent's primary responsibility.

127. It is not altogether straightforward to reconcile the approach in *Hurstanger* with the leading authorities concerning the mental state or state of knowledge necessary to found accessory liability for breach of fiduciary duty, none of which appears to have been cited in *Hurstanger*. For the purposes of the appeal in *Johnson* (and the fallback position in *Wrench* if we had found that there was partial disclosure) Mr Weir accepted that in order for there to be an accessory liability in equity for assisting in a breach of fiduciary duty, the lender must act dishonestly, in the sense explained in *Twinsectra Ltd v Yardley and others* [2002] UKHL 12, [2002] 2 AC 164 ("*Twinsectra")*.

128. Mr Hardwick submitted that if the lender specifically required the broker to disclose the existence of the commission, or even the fact that a commission *may* be payable (without giving any further details), they could not be found to be dishonest. He sought to rely on clause 1.15 of the general terms in the Rates and Terms agreed between FirstRand and the Trade Centre Wales, which we have set out at [44] above. However, dishonesty, in this context, means knowing about, or deliberately turning a blind eye to, the breach of the broker's fiduciary duty to their principal. Once it is aware that the dealer is acting as credit broker for the consumer, the lender knows that the broker cannot receive payment of a commission or fee from the lender unless there has been full disclosure and the consumer/borrower has consented. The lender cannot assume that there *has* been full disclosure of the commission simply because the lender (or even the regulator) requires the broker to make such disclosure. If the lender does not take it upon itself to give full disclosure to the consumer, it deliberately takes the risk that the

broker will not do so, and that is what happened in these cases. That risk was obvious: the brokers plainly had a motive for keeping quiet about the amount of commission, or how it was calculated, particularly if a DIC model was used.

129. In any event, clause 1.15 cannot avail FirstRand, as it falls a long way short of requiring full disclosure of all material facts (and, indeed, implies that it would be proper for the broker to withhold information about the amount of the commission unless and until the customer makes a specific request). If anything, that provision demonstrates that FirstRand was actively encouraging the broker *not* to make full disclosure, and therefore that it neither wanted nor expected full disclosure to be made. In particular, the Dealer Terms do not require disclosure of the tie between FirstRand and the dealer and this renders FirstRand complicit in the concealment of that highly material fact. That is enough, in our judgment, to meet the requirements of *Twinsectra*.

130. FirstRand cannot gain any comfort from clause 1.13 of the Rates and Terms either. That provision, entitled "Suitability", which we have also quoted at [44] above, is ambiguous and potentially misleading. At first sight, the first two sentences appear to oblige the broker to select the most suitable product from any lender. But it would be impossible for the broker to comply with such an obligation without breaching its obligations under clause 2.1 of the Dealer Terms to give FirstRand first refusal. If, on the other hand, the clause obliges the dealer/broker to select the most suitable product from the range offered by FirstRand itself, it serves to reinforce the tie which is being kept secret from the consumer.

131. Mr Weir referred us to the recent decision of the Supreme Court in *Lifestyle Equities CV and another v Ahmed and another* [2024] UKSC 17; [2024] 2 WLR 1297, in which Lord Leggatt JSC (with whom Lord Lloyd-Jones, Lord Kitchin, Lord Stephens and Lord Richards JJSC agreed) held at [135] that at common law, a person who knowingly procures another person to commit an actionable wrong will be jointly liable with that person for the wrong committed, and that liability will be an accessory liability. It is enough to establish liability in this context to prove that the person who procures the wrongful act knows, or deliberately turns a blind eye to, the essential facts which make the act unlawful. Although this conclusion specifically addressed the position at common law, Lord Leggatt had already recognised the same concept in equity at [96] to [98] when discussing *Twinsectra* and the earlier decision of the Privy Council in *Royal Brunei Airlines Sdn Bhd* v *Tan* [1995] 2 AC 378.

132. Applying that analysis to the particular circumstances underlying these appeals, the essential facts which make the receipt of the commission a breach of fiduciary duty are (i) the fiduciary relationship between the credit broker/dealer and the consumer and (ii) the payment of a commission to the fiduciary, which puts him in a position of conflict *unless* there is full disclosure and consent by his principal (here, the consumer) to his receiving that payment. There will be no breach of duty if the payment is made with the informed consent of the consumer, but informed consent is a defence to the claim for breach of fiduciary duty; lack of consent is not an ingredient of the cause of action. As *Hurstanger* confirmed, it is incumbent on the fiduciary (or the lender as the case may be) to establish that there was fully informed consent, which they cannot do in a partial disclosure situation.

133. It should be relatively easy to establish the requisite knowledge of the essential facts. The lender in this and similar cases undoubtedly knows of the "agency" relationship

which gives rise to the fiduciary duty. It knows that the credit broker/dealer is acting for and on behalf of a financially unsophisticated consumer in seeking to obtain a suitable, competitive offer of finance to enable the consumer to acquire a car, and that the consumer would naturally expect and trust the broker to act in their best interests in doing so. Taking a commission from the lender for effecting the introduction of the business to them would plainly put the credit broker in a position of conflict and the lender would know that. Indeed, any lender which included a provision in its contract with the dealer requiring disclosure of the existence of the commission must have done so because they were aware of that potential conflict of interest.

134. Since the lender is paying the commission, it also knows about the fact of the payment, its amount, and how it is calculated, including whether it is on DIC or RSA terms or both. In FirstRand's case it also knew that because of Clause 2.1 of the Dealer Terms of Business (see [39] above and [155] below) there was a contractual tie which obliged the dealer to approach it in priority to any of its competitors on the lending panel to make an offer, irrespective of whether that was competitive or the most suitable or the best offer they could obtain. That gave rise to a separate and additional conflict of interest. Quite apart from the requirement to disclose only the bare minimum of information about the commission payment, there is nothing in the Dealer Terms of Business which requires the dealer to tell the consumer about those other matters. Even on the assumption that FirstRand did not know about the "Suitability Document" and the lies it contained, it was effectively turning a blind eye to the dealer painting an entirely misleading picture of its role to the consumer simply by appearing to act as an ordinary credit broker. Most people would regard that as dishonest.

135. We are satisfied, therefore, that FirstRand knew that payment of a commission to the Trade Centre Wales would put the dealer in breach of fiduciary duty unless Mr Johnson had given his informed consent to the payment. It made the payment in that knowledge. There was in fact no informed consent and there was nothing to suggest to FirstRand that informed consent had been given.

136. The next question is whether the consumer must also establish that the lender knew or turned a blind eye to the fact that informed consent had not been obtained, or whether (as *Hurstanger* suggests) because the receipt of the commission from the lender by the broker is on the face of it a breach of fiduciary duty, it is for the lender to prove that in fact there was no such breach because there was informed consent. As we have said, informed consent would be a defence if the claim were made against the broker, and the burden of establishing it would lie on them. For that reason, we consider that the same must follow if the claim is brought against the lender as an accessory. The lender would not be able to defend the claim on the basis that it had genuinely tried (but failed) to obtain informed consent itself – as the lender, who was held liable, did in *Hurstanger*.

137. In a "half-way house" case, which we must assume *Johnson* to be for the purposes of this issue, the fact that there is no informed consent follows automatically from the finding that there was only partial disclosure, and on that analysis, the lender must be liable as an accessory for procuring the breach of duty. This appears to be consistent with the decision in *Hurstanger*. Just in case this is wrong, however, and it is incumbent on the claimant to prove that the lender knew or turned a blind eye to the fact that the borrower's informed consent had not been obtained, we will consider the state of FirstRand's knowledge concerning the extent of any disclosure.

138. One practical problem in cases of this nature is that, as we have said, the responsibility for obtaining informed consent in this context lies primarily on the fiduciary. The lender has no direct dealings with the consumer. If the lender is in a contractual relationship with the dealer/broker, it can include a term which requires full disclosure about the commission to be made to the customer, but as the lender has no direct contact with the borrower it has no way of finding out if that obligation has in fact been met, short of requiring the broker and/or the consumer to certify that it has. The only way for the lender to be certain that the consumer is aware of all the salient facts pertaining to the payment of the commission is for the lender to provide the information to them itself and, preferably, to require confirmation that the consumer has understood the position and consented to it, as the lenders unsuccessfully attempted to do in *Hurstanger* and in *McWilliam*. This should be no hardship, since the lender is intending to enter into a direct contractual relationship with the borrower and can readily spell out the position in the finance documentation or in a covering letter which the borrower is required to countersign.

139. FirstRand had the means of telling the prospective borrowers with whom it was about to contract that it was going to make a payment to their fiduciary for introducing that business to it, how much that payment would be and how it would be calculated, but it failed to do so. Indeed, as we have already noted, it appeared to go to great lengths to ensure that Mr Johnson would *not* become aware of the commission by looking through the package of documents which it provided to the dealer to give him. There was no reference to the commission on any document he was asked to sign. He was not asked for confirmation that he had been told about the commission or that he had read clause 13.6. FirstRand could not have expected Mr Johnson to read the standard terms and conditions. The prospect that he would do so was negligible. FirstRand made no attempt to ensure that they were even incorporated in the Hire Purchase Agreement. It buried Clause 13.6 in the "General" section whilst deliberately drawing attention to Clause 10 on the face of the page of the Hire Purchase Agreement where the consumer was required to make certain declarations before signing. In any event, Clause 13.6 was insufficient to negate secrecy even in the highly unlikely scenario that the consumer would read it.

140. FirstRand knew that Mr Johnson's informed consent had not been obtained by FirstRand itself, though it would have been easy enough for it to have done so. It also took no steps whatsoever to satisfy itself that the broker/dealer had obtained fully informed consent. It left it to the dealer to make disclosure in circumstances where Clause 1.15 of its own agreement with the dealer indicated that FirstRand did not expect the dealer to tell the consumer how much the commission was, or how it was calculated, unless that information was specifically requested. There was no requirement at all to tell the consumer about the tie in Clause 2.1 of the Dealer Terms of Business. FirstRand must have appreciated, since it was obvious, that it was not in the dealer's interest to reveal how much it was being paid, or to tell Mr Johnson about the tie, given that once Mr Johnson appreciated the true facts, he would almost certainly have refused to go ahead with the deal. FirstRand made no inquiries of the Trade Centre Wales to find out what it had told Mr Johnson and it did not require them to certify that they had told him anything about the commission.

141. In those circumstances, FirstRand were on notice, and must have suspected that Mr Johnson had not given his fully informed consent to the payment. So far as they were

aware, he had not done so. Were it necessary to find that FirstRand deliberately turned a blind eye to the fact that Mr Johnson's informed consent was not obtained by the broker, we do so, for the reasons set out above.

142. Accordingly we find that Mr Johnson is entitled to equitable compensation from FirstRand for its accessory liability and that the measure of that compensation is the amount of the commission, plus interest from the date on which it was paid. Given the length of time which has passed since the transaction was effected and the fact that Mr Johnson has long since sold the car, we consider that this is not an appropriate case in which to make an order for rescission of the Hire Purchase Agreement.

THE CONSUMER CREDIT ACT CLAIM: *JOHNSON* V *FIRSTRAND* ONLY

The relevant statutory provisions

143. Section 140A of the 1974 Act provides, so far as material, as follows:

> **"140A Unfair relationships between creditors and debtors**
>
> (1) The court may make an order under section 140B in connection with a credit agreement if it determines that the relationship between the creditor and the debtor arising out of the agreement (or the agreement taken with any related agreement) is unfair to the debtor because of one or more of the following—
>
> (a) any of the terms of the agreement or of any related agreement;
>
> (b) the way in which the creditor has exercised or enforced any of his rights under the agreement or any related agreement;
>
> (c) any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement).
>
> (2) In deciding whether to make a determination under this section the court shall have regard to all matters it thinks relevant (including matters relating to the creditor and matters relating to the debtor).
>
> (3) For the purposes of this section the court shall (except to the extent that it is not appropriate to do so) treat anything done (or not done) by, or on behalf of, or in relation to, an associate or a former associate of the creditor as if done (or not done) by, or on behalf of, or in relation to, the creditor."

144. Mr Johnson contends that the relationship between him and FirstRand was unfair, because the relationship resulted in a hire purchase agreement and associated personal loan agreement being concluded when the commission agreement between FirstRand and the Trade Centre Wales had not been disclosed in a way which actually brought it to his attention, and explained its true significance. He contended that this was "a thing….not done…on behalf of [the lender]" by the broker which gave rise to an unfair relationship.

145. It was conceded by FirstRand below that as a consequence of the personal loan he broker was to be treated as the agent for the lender for these purposes, because of section 56(1)(c) and (2) of the 1974 Act.

146. Mr Johnson contends that the court should therefore exercise its power under section 140B(1)(a) to:

> "require the creditor, or any associate or former associate of his, to repay (in whole or in part) any sum paid by the debtor or by a surety by virtue of the agreement or any related agreement (whether paid to the creditor, the associate or the former associate or to any other person);"

He also relies on section 140B(9) which says:

> "If in any such proceedings the debtor or a surety alleges that a relationship between the creditor and the debtor is unfair to the debtor, it is for the creditor to prove to the contrary."

The first instance judgment on this issue

147. The facts are summarised at [41] to [51] above. As we have noted at [44] the commission was £1,650.45 on a total sum borrowed of £6,399. FirstRand would only pay the Glass's Guide price for the vehicle when entering into a hire purchase agreement, and this was £4,803.69. Mr Johnson agreed to pay an additional sum, financed by a personal loan, of £1,595.31. DDJ Sandercock said:

> "Had he read the agreement or even given it little more than a cursory glance it would have been obvious to him that he was paying £1,595.31 more than the cash price for the car of £4,803.69. In effect, he was paying a third more for the car than it was worth. He must have accepted this, because he signed the "contract of sale" and the hire purchase agreement."

148. The DDJ approached the question of whether the relationship arising out of the Hire Purchase Agreement and associated Loan Agreement between Mr Johnson and FirstRand was unfair for the purposes of s.140A of the 1974 Act by setting out a series of 10 factual propositions and concluding that "there was nothing unfair in the agreement or the surrounding circumstances which would cause the court to consider making an order under section 140B". The factual propositions were:

> "a. I find that the claimant displayed an almost wilful disregard of the pre-contract information and the terms and conditions of the agreement. This is shown by the claimant's statements noted at Paragraphs 21 (l) and (m) above.
>
> b. The claimant persisted in the mistaken assertion that the amount of commission was based on the interest payable under the agreement. I accept Mr Irving's evidence that the commission was based entirely on the amount of the capital of the loan.

c. It was submitted on the claimant's behalf that if the commission had been less the instalments would have been lower. There was no evidence to support this submission. I find that it was illogical in any event because the only variable in the arrangements between both claimant and defendant and defendant and TCW was the range of interest which the broker could have applied. Having applied the minimum rate available the claimant could not have paid any less.

d. The claimant's instalments would have been the same regardless of the amount of commission or if no commission was payable at all.

e. The claimant is not entitled to claim against the defendant if he has made a bad bargain over the price of the car. This is not an issue relating to the fairness of the credit agreement.

f. There was no evidence that the dealer/broker had caused the claimant to enter into an agreement for a higher sum of money than he needed. Had this applied it might have been an argument that the commission was inflated but this is not the case. It is not for the court to speculate about what might have happened in hypothetical circumstances.

g. The defendant had complied with CONC.

h. The claimant had made himself aware of interest rates and repayments and was content to enter into this agreement on its particular terms.

i. There is nothing in the agreement which is itself unfair.

j. The antecedent documents and clause 13.6 of the Terms and Conditions provided ample information and opportunity for the claimant to understand his position exactly but he chose not to read them."

149. The CONC Rules are dealt with at [85] and [96] above. It was agreed that the lender, FirstRand, was required to comply with these rules. At the time when Mr Johnson's case was pleaded, it was understood by his lawyers that the lender had paid the broker a "discretionary interest commission or fixed fee commission". The breaches of CONC were therefore pleaded as failures to disclose this kind of commission. The Defence admitted the commission but did not reveal any of the terms of the agreement between the dealer and the lender which gave rise to it, except to say that the dealer did not have an unfettered discretion on the rate of interest.

150. The DDJ held that the commission was not a discretionary interest commission or fixed fee commission, and therefore the pleaded allegations failed. He found that the commission was based on the capital, rather than the interest rate and that the interest rate charged was 8% which was the lowest rate the lender offered for cars up to 5 years old. He made no finding about whether the dealer had disclosed three important aspects of the agreement between the dealer and the lender:

i) The fact that the dealer was entitled to payment of a commission if the agreement was concluded. This entitlement arose out of an agreement between them which regulated their business.

ii) The agreement between the dealer and the lender required the dealer to offer all its business to the lender which had first refusal. No other lender was asked to quote for Mr Johnson's business and no "shopping around" the panel of lenders had occurred.

iii) The agreement guaranteed the dealer a commission which amounted to 25% of the total sum advanced.

The First Appeal

151. HHJ Jarman KC found that the DDJ's consideration of the fairness issue was flawed and remitted it to the judge for reconsideration. The principal flaw was that the DDJ had not made any finding about the key issue of the disclosure by the dealer to Mr Johnson of the commission. He had found that Mr Johnson had received the document containing clause 13.6, but he also found that he had not read it. He held that the CONC requirements did not apply because of the way the case was pleaded. But he did not make any factual finding about whether they were complied with if they did apply.

152. It is submitted by Mr Weir on behalf of Mr Johnson that the judge should not have remitted the case, but should have determined the issue himself in favour of Mr Johnson on the evidence available to him.

The Suitability Document and the Dealer Terms of Business

153. In the course of summarising the facts of the *Johnson* case earlier in this judgment, we referred to the "Suitability Document…Proposed for Mr Marcus Johnson" which was prepared by the dealer, the Trade Centre Wales. Its material terms are set out at [46]. As we observed at [47], the document is untruthful in a number of important ways.

154. First, the hire purchase agreement which was being offered by the lender was certainly not the most suitable for Mr Johnson's requirements. It was inadequate to fund the purchase because he was required to pay far more than the Glass's Guide price for the car. This transaction could only be achieved by an additional personal loan of £1,595.31. The proceeds of that loan were, in effect, required in order to pay the dealer the commission of £1,650.95. If that commission had not been payable, Mr Johnson would have been able to fund the purchase at the actual Glass's Guide price using the hire purchase agreement which the lender offered.

155. Secondly, as in Mr Wrench's case, the Dealer Terms of Business with FirstRand contained clause 2.1 (set out at [39] above) which tied the dealer in to giving it a right of first refusal. It is probably no coincidence that the Trade Centre Wales did not refer to clause 2.1 of these terms in the Suitability Document. It is notable that there is no contractual obligation in the "Rates and Terms" agreed between the dealer and the lender that the dealer was required to disclose this contractual tie between them. This is an omission of a key fact which is a suppression of the truth.

156. A reasonable reader of the parts of the Suitability Document described at [46] above would conclude that the dealer would canvass the "select panel of lenders" on behalf of the applicant and then "advise on" the result and "provide an illustration of the Consumer Finance product that best meets your individual needs". Nothing of the sort took place. In fact, what happened was that a single quote was obtained for an arrangement which was very disadvantageous to Mr Johnson (who was paying far more than the car was worth, as the DDJ found on the facts), and very beneficial to the dealer. Mr Johnson, as the DDJ found and as the dealer must have known, did not read any of the documents and did not understand what a very poor deal he was getting. That might be his fault, but he is hardly alone in dealing with complex legal documentation in this way, and the Consumer Credit Act protection exists in part for this reason.

The law

157. The principles are set out by Lord Sumption JSC in *Plevin v Paragon Personal Finance Limited* [2014] 1 WLR 4222, at [10], [17]-[20]. He begins his analysis with this, at [10]:

> "Section 140A is deliberately framed in wide terms with very little in the way of guidance about the criteria for its application, such as is to be found in other provisions of the Act conferring discretionary powers on the courts. It is not possible to state a precise or universal test for its application, which must depend on the court's judgment of all the relevant facts. Some general points may, however, be made. First, what must be unfair is the relationship between the debtor and the creditor. In a case like the present one, where the terms themselves are not intrinsically unfair, this will often be because the relationship is so one-sided as substantially to limit the debtor's ability to choose. Secondly, although the court is concerned with hardship to the debtor, subsection 140A(2) envisages that matters relating to the creditor or the debtor may also be relevant. There may be features of the transaction which operate harshly against the debtor but it does not necessarily follow that the relationship is unfair. These features may be required in order to protect what the court regards as a legitimate interest of the creditor. Thirdly, the alleged unfairness must arise from one of the three categories of cause listed at sub-paragraphs (a) to (c). Fourthly, the great majority of relationships between commercial lenders and private borrowers are probably characterised by large differences of financial knowledge and expertise. It is an inherently unequal relationship. But it cannot have been Parliament's intention that the generality of such relationships should be liable to be reopened for that reason alone."

158. *Plevin* was a PPI case where the debtor was to be taken as knowing the fact that a commission was payable to intermediaries out of the premium before it reached the insurer, see [18]. Lord Sumption said:

> "I turn therefore to the question whether the non-disclosure of the commissions payable out of Mrs Plevin's PPI premium made her relationship with Paragon unfair. In my opinion, it did. A sufficiently extreme inequality of knowledge and understanding is a classic source of unfairness in any relationship between a creditor and a non-

commercial debtor. It is a question of degree. Mrs Plevin must be taken to have known that some commission would be payable to intermediaries out of the premium before it reached the insurer. The fact was stated in the FISA borrowers' guide and, given that she was not paying LLP for their services, there was no other way that they could have been remunerated. But at some point commissions may become so large that the relationship cannot be regarded as fair if the customer is kept in ignorance."

159. What rendered the relationship between the creditor and the debtor unfair was that the debtor was not told of the size of the commissions. Lord Sumption held that the failure to disclose the amount of the commission was directly the responsibility of the lender (Paragon), see [20]:

> "On that footing, I think it clear that the unfairness which arose from the non-disclosure of the amount of the commissions was the responsibility of Paragon. Paragon were the only party who must necessarily have known the size of both commissions. They could have disclosed them to Mrs Plevin. Given its significance for her decision, I consider that in the interests of fairness it would have been reasonable to expect them to do so. Had they done so this particular source of unfairness would have been removed because Mrs Plevin would then have been able to make a properly informed about the value of the PPI policy. This is sufficiently demonstrated by her evidence that she would have questioned the commissions if she had known about them, even if the evidence does not establish what decision she would ultimately have made."

160. This was important because an act or omission of a third party would only be done "on behalf of" the creditor for the purposes of section 140A(1)(c) of the 1974 Act if done by an agent, and the broker in that case was not the lender's agent. Section 56 applies in the present case, see [145] above, but did not apply in the case of *Plevin*, see paragraphs [31] and [34] of that judgment.

Discussion

161. In this case, Mr Johnson said that he thought the dealer would make its profit from the sale of the car. This means that he did not think about who was paying it for its credit broking service. He did not know that the advertised price which he agreed to pay was substantially more than the Glass's Guide retail price, and that the difference was largely accounted for by commission which the lender had to pay to the dealer under existing contractual arrangements. He did not know that the dealer was contractually bound to the lender to offer a substantially different service from that promised in the Suitability Document. In effect, the dealer was obliged to place the business with the lender, however uncompetitive that may be, and in return was entitled to a very large commission (relative to the size of the deal) which would be paid ultimately by Mr Johnson.

162. It therefore did not occur to Mr Johnson that the dealer was being paid by the lender for the credit broking service. If he had been told the amount of the commission (and either the lender or the dealer could have done this) he would have been able to question why

it was so high. He may also have realised that the hire purchase agreement was inadequate to fund the "ticket price" of the car because that price was much higher than the Glass's Guide value.

163. The difficulty with the approach of the DDJ was that he was unduly affected by the fact that the claimant's pleaded case alleged that the commission was Discretionary Interest Commission or Fixed Fee Commission when it was not. This led him to reject pleaded allegations of breaches of the CONC Rules which were actually made out on the facts. An example is this paragraph from his judgment:

> "[It was pleaded that] … Contrary to rule 2.3.2R the broker, i.e., the salesman as agent for the defendant failed to explain key features so as to provide the claimant with an informed choice by failing to explain the existence and/or amount of the Discretionary Interest Commission or Fixed Fee Commission. I find that this rule did not apply since neither of these types of commission were paid or agreed for."

In fact the rule did apply. The way in which the pleading said it had been *breached* was in error - because it was settled before the lender had given disclosure of what had happened. This, if it mattered, could easily have been corrected at trial.

164. We have already expressed our surprise that neither the DDJ nor HH Judge Jarman KC were expressly referred to the Suitability Document and the Dealer Terms of Business. The fact that his attention was not specifically drawn to them allowed the DDJ to make a finding, for example, that:

> "[It was pleaded that]… Contrary to rule 2.5.8 (13)R the broker allowed preference to be given to a particular credit product with the object of personal gain rather than in the best interest of the claimant. I find that there was no evidence of this."

165. Again, the DDJ found that the rules on impartiality did not apply because of the way the breach was pleaded:

> "[It was pleaded that] …Contrary to rule 3.7.4G the broker failed to indicate to the customer in a prominent way the existence of any financial arrangements with a lender that might impact upon the firm's impartiality in promoting a credit product to a customer by failing to explain the existence and/or amount of the Discretionary Interest Commission or Fixed Fee Commission. I find that this rule did not apply since neither of these types of commission were paid or agreed for between the broker and the defendant."

166. In fact, the reality was that the Trade Centre Wales made no attempt to be impartial between different lenders in the interests of the consumer. All the business was offered to FirstRand. The dealer gave the customer the Suitability Document which actively concealed the reality. The dealer offered no service to Mr Johnson as a broker at all except to introduce him to one lender to whom it was tied by Clause 2.1 of the Dealer Terms of Business and from whom it took a lavish commission. The existence of the relationship between lender and dealer in this case was such as to require honest and accurate disclosure so that the customer could decide whether he wanted to buy a car

with finance obtained through a dealer/credit broker who would conduct at least some review of what the credit market, or a panel of lenders within it, might offer him.

167. We therefore agree with HH Judge Jarman KC that the way in which the DDJ dealt with the claim under section 140A was inadequate. However, we do not agree that the case should be remitted to the County Court. The judge's concern was that the trial judge had made no finding on the important question of what disclosure had been made to Mr Johnson about the commission arrangements. He did not remit that issue only, because he rightly held that the issue of fairness under the 1974 Act is to be considered in the light of all relevant matters, see section 140A(2).

168. On the evidence there is only one possible finding on the issue of disclosure, and that is that the commission was not disclosed. Mr Johnson's evidence is that the payment of commission was not disclosed to him orally, and that he was not aware of it because he did not read the Suitability Document or the lender's Terms and Conditions. No evidence to the contrary was adduced. Any finding that Mr Johnson was actually aware of the commission arrangements would be unsustainable on the evidence. This conclusion is reinforced by the fact that he was dealing with a dealer who had supplied the false Suitability Document. Why, having done that, would the dealer then volunteer the truth?

169. We consider that HH Judge Jarman KC was in a position to make a determination as to whether Mr Johnson is entitled to protection under section 140A of the 1974 Act, as are we. We are quite satisfied that the relationship between the lender and Mr Johnson arising out of the agreement was unfair to Mr Johnson because of things done (or not done) by, or on behalf of, the lender, FirstRand (either before or after the making of the agreement or any related agreement). Fairness in this context is a matter of degree, and the fact that the commission to the broker was 25% of the sum advanced is a key fact, as is the fact that the sum borrowed and paid to the dealer was much more than the car was worth. The fact that this very bad bargain arose from a relationship between the broker and the lender which was falsified by the broker, and not disclosed by the lender, is also critical.

170. A relationship will not necessarily be unfair for the purposes of the 1974 Act simply because a broker receives a commission from the lender and the borrower is not actually aware of that fact. The court is required to consider all the facts and to weigh their importance. If the commission is very high in relation to the sum borrowed that may, in itself, be enough to make the relationship unfair where nothing, or nothing of substance, has been done to disclose the relationship between the lender and the broker. It is not necessary to develop this analysis further for the purposes of the appeal in *Johnson* because the commission was very high in that case, and the true nature of the relationship between the lender and the broker was not disclosed by the lender and actively concealed by the broker (acting as agent for the lender by virtue of section 56 of the 1974 Act). It is a very clear case.

171. Ordinarily, this court would hesitate to reach conclusions on issues which have not been fully dealt with either at trial or on first appeal, but this kind of case requires rather less caution in that regard than others. The oral evidence of the appellant is, so far as it goes, very straightforward and uncontradicted. The relevant discussions took place many years before the trial (as will often be the case) and it is inevitable that the primary focus will be on the documents, including those which were available to Mr Johnson at the

time of the transaction and those which reveal the arrangements between the lender and the broker.

172. We did not hear submissions on remedy, but are of the view that the solution on that question also is clear. The commission of £1,650 should be repaid to Mr Johnson by the lender, together with the interest he paid on it under the hire purchase and personal loan agreements, and interest on the total of those two elements at an appropriate commercial rate from the date of the agreement, 29 July 2017. If the rate cannot be agreed we will consider written submissions about it.

CONCLUSION AND DISPOSAL

173. In conclusion, the answers to the issues we identified at [21] are as follows:

(1) Does a statement in the terms and conditions of the credit agreement that commission may or will be paid have the effect of negating secrecy, even where the borrower has neither read the statement nor been directed to read it?

Answer: not necessarily. The question whether the borrower has been told or informed about the commission will depend on the facts of each case, including the steps, if any, that are taken to bring the matter to his attention. Burying such a statement in the small print which the lender knows the borrower is highly unlikely to read will not suffice.

(2) For the purposes of establishing an accessory liability on the part of the payer of commission in a partial disclosure case, is it necessary for the broker to have owed a fiduciary duty to the claimant, or does the "disinterested duty" suffice?

Answer: a fiduciary duty is a necessary requirement but in a case such as this, a fiduciary duty arises in tandem with and in consequence of there being a disinterested duty.

(3) If there is a fiduciary duty in a partial disclosure case, what are the necessary requirements to establish accessory liability on the part of the lender?

Answer: knowledge of the existence of the fiduciary relationship and payment of the commission to the broker in circumstances in which the lender has not satisfied itself that the borrower has given their fully informed consent to the payment. Those circumstances will inevitably arise if the disclosure is partial, particularly if the lender has encouraged partial disclosure.

(4) Did the broker owe the relevant duty to the claimants in these cases?

Answer: yes. In all three cases there was a disinterested duty which was sufficient to give rise to a primary liability in the cases of *Hopcraft* and *Wrench*, which were secret commission cases. In all three cases there was also a parallel fiduciary duty which was sufficient to found the claim for accessory liability in the *Johnson* case and would have been sufficient in *Wrench* had it been a partial disclosure case.

(5) Is the lender liable for the repayment of the commission?

Answer: yes.

174. As to the three further issues which arise in the *Johnson* appeal:

(1) Was the relationship between Mr Johnson and FirstRand unfair for the purposes of sections 140A-C of the 1974 Act ?

Answer: yes.

(2) Was the judge wrong to remit the claim under the 1974 Act to the deputy district judge for further fact-findings?

Answer: yes.

(3) If the answer to both of these questions is yes, should this court assess the appropriate remedy or should the case be remitted for a determination of that question in the County Court?

Answer: this court had sufficient information to enable it to make the assessment and it would be contrary to the overriding objective to remit the case to the County Court as it would be a disproportionate use of court time and the parties would incur further costs unnecessarily in a case of relatively low value. We have directed that Mr Johnson be repaid the commission together with interest.

175. For the reasons we have explained above, we allow all three of these appeals.

176. We wish to add this by way of a postscript. There are tensions between *Hurstanger* and *Wood* which we have not found it easy to reconcile, though we have done our best. Both those authorities are binding on this court, and therefore we do not enjoy a free rein to start again from first principles. We acknowledge the force of Mr Hardwick's point that the language of bribery and fraud does not sit easily with the type of scenario with which the present cases are concerned, although the consumers were very poorly served by the brokers and the lenders alike, and it would seem invidious that they should be left without a remedy just because of a reference to the possibility of a commission payment buried in a mass of contractual documents that no-one concerned expected them to read. We also understand the judicial reluctance (expressed in *Hurstanger*) to visit a principal liability for payment of a secret commission upon a lender who (in stark contrast with the lenders in these three cases) has gone to some lengths both to notify the borrowers of the payment of the commission and obtain their consent to it, but has not quite done enough.

177. Yet the "half-way house" category of case recognised for the first time in *Hurstanger,* where there is only disclosure of some material information, gives rise to numerous difficulties, not least in terms of defining when the lender will be held liable as an accessory and how the dishonesty requirement, explained in *Twinsectra* (but nowhere

mentioned in *Hurstanger*), is satisfied in that scenario (especially when the lender's behaviour is not as blameworthy as we have found FirstRand's to have been).

178. We hope that our analysis will provide sufficient guidance for the County Court judges who have to deal with these types of claim on a virtually daily basis, but it may be that on some future occasion it will be felt desirable for the *Hurstanger* and *Wood* lines of authority to be considered in greater depth, and for a definitive pronouncement to be made by the Supreme Court about the circumstances in which the payment of a commission by a third party to another person's agent or fiduciary will give rise to a liability (whether as principal wrongdoer or an accessory) on the part of the payer.