**Secrets Revisited – *Wood v Commercial First* in the Court of Appeal**

[2021] EWCA Civ 471[1]

Before: Lord Justice David Richards, Lord Justice Males and Lady Justice Elisabeth Laing

In November 2019, I wrote on the first instance decision of Mr James Pickering (sitting as a Deputy Judge of the High Court) in *Wood v Commercial First Business.* The case has recently found its way to the Court of Appeal alongside the decision of Mr Justice Marcus Smith in *Business Mortgage Finance 4 Plc v Pengelly*. Both cases raise similar issues of secret and half secret commissions and the law applicable to bribes made to agents.

The Court of Appeal addressed the following central issues: (1) does a claimant principal need to establish that the bribed party owes them a fiduciary duty? (2) when will the level of disclosure suffice to render a commission "half-secret"?

***The Facts***

Both cases involved the same basic relationship. A borrower, utilising a broker to obtain a secured loan from a commercial lender. In each case the broker received a percentage commission payment from the lender which was not clearly disclosed to the borrower. The lender entered liquidation in November 2018 and was dissolved in December 2019 with the loans being securitised and assigned to third-parties.

In both cases the borrowers defaulted on repayments and sought rescission of the loan agreements and accompanying mortgages on the basis of the broker's fully secret commission. In *Wood,* Mrs Wood issued proceedings to set aside the loan agreement after enforcement proceedings had been taken against her and possession orders made. Mr Pickering found in her favour and rescinded the mortgage. The assignees appealed.

In *Pengelly*, at first instance HHJ Carr dismissed Mr Pengelly's defence and counterclaim and gave the assignee mortgagee liberty to enforce its possession order. Marcus Smith J allowed Mr Pengelly's appeal on the point of rescission. Again, the assignee appealed this decision.

The significant point of difference between the two High Court judges was whether a fiduciary relationship was a pre-requisite to the principles concerning bribes being engaged as against the lender. Mr Pickering found that no such duty was necessary whereas Marcus Smith J held that it was.

***The Decision***

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

The central issue in the decision is issue 1. Lord Justice David Richard's considered review of the authorities resulted in the determination that a fiduciary relationship was *not* a prerequisite to the application of the stricter law on bribes as applies to fully secret commissions.

Firstly, as to what constitutes a relevant bribe the Court endorsed the dicta of Romer LJ in H*ovenden v Millhof*:

[1] . https://www.bailii.org/ew/cases/EWCA/Civ/2021/471.html

> *"If a gift be made to a confidential agent with the view of inducing the agent to act in favour of the donor in relation to transactions between the donor and the agent's principal and that gift is secret as between the donor and the agent – that is to say, without the knowledge and consent of the principal – then the gift is a bribe in the view of the law."*

The second point for consideration concerned the nature and content of the relationship between the broker and borrower in the decisions under appeal. As stated at [47]:

> *"The present cases do not involve relationships, such as trustee and beneficiary or director and company, which without more clearly qualify as fiduciary. They fall within a broad and common set of relationships which involve a contractual or other legal duty to provide information or advice or recommendations. The precise scope of the duties of the brokers in the present cases, as in all cases, will require examination by reference to the terms of their engagement."*

David Richards LJ held that to ask whether there was a fiduciary relationship as a pre-condition for liability in respect of bribes was "an unnecessarily elaborate, and perhaps inaccurate, question." The Court preferred to formulate the question as "*whether the payee was under a duty to provide information, advice or recommendation on an impartial or disinterested basis... No further enquiry as to the legal nature of their relationship is required.*"

The broader formulation of the test with its reduced emphasis on fiduciary status is particularly useful in the context of agents. Whereas certain relationships quintessentially import the full range of fiduciary duties, such as with directors and express trustees, the relationship of agency spans a broader spectrum.

It is suggested that the test formulated by the Court of Appeal in *Wood* benefits from ease of access and application rather than effecting a change of substance. Instead of seeking to ascertain whether a sufficient relationship of trust and confidence exists[2] to create fiduciary status, courts and advisers will be able to ask the altogether more straightforward question above when considering the status of the agent when a bribe is in issue.

However, given that the core obligation of a fiduciary is one of single-minded loyalty[3] and the obligation identified in *Wood* requires impartial or disinterested action the ultimate facts engaging remedies for bribes will be similar if not the same albeit with a different question to be asked.

David Richards LJ provided the following comment on the breadth of the test: "*It is enough, in my view, that the person who is offered or paid a secret commission is, "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*.""

The court concluded that

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

[2] The classic test in *Bristol & West Building Society v Mothew* [1998] Ch. 1 at 18

[3] See *Bristol & West* Ibid. On the basis that the applicable duty is one demanding loyalty which is itself the hallmark duty of a fiduciary it is arguable that the court of appeal did require the bare minimum fiduciary status to be established but simply preferred to state the test in more commercial terms.

In the case of agents, emphasis will doubtless be placed upon the terms of any retainer, taken together with a broader analysis of the authority of the agent and the role the agent was to undertake.[4] It will undoubtedly be easier to analyse these factors against the test as formulated in *Wood* than the more amorphous idea of a relationship of trust and confidence.

***Remedies***

The remedies available in the case of a fully secret commission are generous in line with the law's policy objectives in this area. The borrower in this context is entitled to:

- Rescission of the loan/mortgage *as of right,* subject to making any necessary counter-restitution.
- Recovery of the amount of the bribe from the agent or briber without the requirement to show any loss resulting from the agent's conduct, stated as a remedy for money had and received.
- Alternatively, damages for the tort of fraud against the agent or briber for loss sustained in consequence of entering into the contract in respect of which the bribe was paid.

Usefully, the claimant is not required to elect as to her remedy until the time of judgment.

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

In both decisions under appeal, it was correctly held that the brokers owed fiduciary duties to the borrowers as principals. Brokers in *Hurstanger*[5] were held to owe fiduciary duties notwithstanding terms in their retainer which permitted commissions to be paid. Furthermore, the court determined that the brokers could only rely upon such a term if it was expressly drawn to the borrower's attention.

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

A "half-secret" commission arises where a principal is aware, or would have been aware if they read the applicable terms and conditions, that the broker may be paid fees by the lender. The assignees in each case accepted that the borrower was not told the quantum of the commission and the payment thereof was therefore half-secret. A half-secret scenario arises where there has been sufficient disclosure to negate secrecy but insufficient disclosure to obtain the borrower's informed consent.

The Court of Appeal disagreed with the appellants, relying upon the terms of the retainers to hold that in order for sufficient disclosure to be given the brokers would have needed to state the quantum of the commission which did not occur. The Courts' contractual analysis of where the boundary of sufficient disclosure lies may invite the view that brokers can define what is sufficient via their retainer. This may be viewed sceptically as the threshold is ultimately one of a broad assessment of the sufficiency of disclosure which is influenced, but likely not set, by the terms of a retainer.

The distinction between half and fully secret commissions is relevant primarily due to the difference in remedies. Where a commission is half-secret, rescission is available as a matter of judicial discretion rather than as of right. Rescission here responds to a breach of fiduciary duty and as such fiduciary status must be demonstrated. Despite the reformulation of the test in *Wood* it is difficult to see what the

[4] This analysis was conducted by David Richards LJ when assessing Issue 2 as to whether the brokers were fiduciaries or not.

[5] *Hurstanger Ltd v Wilson* [2007] EWCA Civ 299

"additional" requirement to show fiduciary status adds in half-secret cases where the duty which must be established in *fully secret* cases is virtually on all fours with the minimum duty needed to render an agent a fiduciary.

Following the decision in *Wood* it is more difficult to see where half-secret cases will arise:

- Half-secret cases require a very similar, or potentially equivalent, duty of loyalty to be established as with fully secret cases.
- Disclosing the prospect of, and actual payment of, a commission will not negate fiduciary status and will likely not constitute informed consent unless further details, including quantum, are provided.
- Where said further details are provided, unless it is shown that the principal refused to agree to the commission then a defence of consent may be made out. This takes the case out of the field of impeachable bribes altogether. There is seemingly little room left for half-secret commissions to arise.

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12 April 2021