



Neutral Citation Number: [2020] EWHC 1710 (Comm)

Case No: CL-2019-000561

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**COMMERCIAL COURT (QBD)**

Royal Courts of Justice, Rolls Building  
Fetter Lane, London, EC4A 1NL

Date: 01 July 2020

**Before :**

**THE HONOURABLE MRS JUSTICE MOULDER**

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**Between :**

**CH Offshore Limited**

**Claimant**

**- and -**

**(1) Internaves Consorcio Naviero SA**

**Defendants**

**(2) Maritima Altair Petromar SA**

**(3) Lamat Offshore Marine Inc.**

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**Nigel Jacobs QC and Claudia Wilmot-Smith (instructed by Brookes & Co.)**

**for the Claimant/Arbitration Respondent**

**Christopher Hancock QC and Matthew McGhee (instructed by Waterson Hicks Solicitors)**

**for the Defendants/Arbitration Claimants**

Hearing date: 16 June 2020  
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**Approved Judgment**

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

**“Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties’ representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10:30am on 01 July 2020.”**

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THE HONOURABLE MRS JUSTICE MOULDER

**Mrs Justice Moulder :**

**Introduction**

1. This is the reserved judgment on the appeal (the “Appeal”) by CH Offshore Ltd (“CHO”) under Section 69 of the Arbitration Act 1996 (the “Act”) brought by an arbitration claim form dated 9 September 2019 against an arbitration award in favour of the defendants dated 14 August 2019 (the “Award”).
2. Leave to appeal was granted by Bryan J on 15 November 2019 in relation to 3 questions of law identified in the Particulars of Arbitration Claim. An application was made in the course of the hearing of the Appeal to amend the second question of law. It was not opposed by the defendants and permission is accordingly granted. This judgment proceeds to consider the questions of law as amended and set out below.
3. The hearing of the appeal was held remotely in light of the current pandemic but the court had the benefit of written and oral submissions by leading counsel to CHO and the defendants respectively.

**Background**

4. The background to this matter, so far as relevant to this Appeal, is taken from the Award and is as follows:
5. CHO was the owner of two Tug Supply vessels “AMETHYST” and “TURQUOISE” which were chartered to PDV Marina SA (“PDV Marina”) the chartering arm of Petroleos de Venezuela SA, the state-owned Venezuelan oil and gas company, pursuant to charterparties dated 22 January 2008. References in this judgment to “PDVSA” are to PDV Marina or its parent as the context may require.
6. The claimants in the arbitration (and the defendants in this Appeal) were Internaves Consorcio Naviero SA (“Internaves”), Maritima Altair Petromar SA, a Panamanian company, (“Maritima”) and Lamat Offshore Marine Inc. (“Lamat”). References in this judgment to the “Brokers” are to Internaves, Maritima and Lamat both individually and together, as the context may require.
7. The sole owner of Internaves is Ms Daphne Grek (“DG”) and the sole owner of Maritima is Mr Christobel Schlaubitz (“CS”). Lamat is jointly owned by DG and CS.
8. In late November 2007 PDVSA invited tenders to enter into charterparties for two vessels from a number of entities which it considered might be interested and which included Maritima Altair-Petromar CA, a Venezuelan company controlled by CS. When CS, on behalf of Maritima, received the invitation to tender from PDVSA, he passed it on to DG on behalf of Internaves and DG in turn passed the invitation to tender on to Mr Malvisi of Seascope/Braemar (“Seascope”), shipbrokers.
9. In response to the invitation to tender passed on to it by Seascope, CHO provided Seascope with an initial bid for “AMETHYST” at a daily rate of US\$46,000 with 1.00% commission payable to Seascope, the daily rate to include tax and the social contribution. Seascope informed CHO that Seascope would require 2.5% commission “for division”, the assumption being that Seascope

would have to pay commission to another broker as well as receiving its own commission.

10. In its response to Seascope, CHO amended its proposed bid, stipulating a daily rate of US\$47,000 including commission of 2.5%, with an increased mobilisation fee of US\$2,100,000 and a demobilisation fee of US\$2,600,000 to “accommodate” the increased commission.
11. On 12 December 2007 Mr Malvisi received an email from DG telling him that “the tender was not quite conclusive” but that he had been asked (it appeared by CS/Maritima) whether the Vessel was still available and whether CHO would accept a daily rate of US\$43,310. Internaves/DG advised Seascope further that “we are doing this outside of the tender procedure, via our local office”.
12. According to Mr Malvisi, he notified CHO that there had been some tentative interest from PDVSA at a fixing level of US\$42,850 and CHO indicated that it could accept this rate, inclusive of 2.5% commission, Venezuelan income tax and social contributions but that it would require payment of both the mobilization and demobilization charges on mobilization.
13. Mr Malvisi passed CHO’s offer on to DG on 14 December 2007 and she responded shortly thereafter with a counter, accepting the rate of US\$42,850 per day inclusive of 2.5% commission to Seascope for division, agreeing the tax and social contribution requirements and payment of the mobilization fee up-front, but proposing that the demobilization fee be paid only on completion of the charter.
14. Negotiations continued. On 15 December 2007 all bids pursuant to the tender expired as none of the bids complied fully with the requirements of the tender.
15. However CS enquired whether PDVSA was still interested in the bid from CHO which had expired. Having obtained confirmation from CHO that it was interested in renewing its proposal to PDVSA, Seascope provided a proposal to Internaves who passed it on to Maritima and it was then submitted to PDVSA. The terms of this revised proposal were very similar to the offer made by CHO pursuant to the tender but the hire rate was increased from US\$47,000 to US\$47,600.
16. Mr Malvisi’s evidence was that on 18 December 2007 he was informed by DG that the actual charterer would be “PDV Marina S.A.”. He passed this information on to CHO. CHO’s reaction was said to have been that it would not lift the availability subject until PDVSA provided written confirmation of their acceptance of the charter party terms. At about the same time, PDVSA informed Maritima that its offer (i.e. the offer which Maritima had made on behalf of CHO) had been accepted subject to details.
17. Following the confirmation given by PDVSA/ PDV Marina that they wanted to conclude the “AMETHYST” charter at the agreed rate of hire, negotiations began on the full terms of the charter, the position at that stage being that the charter was still ‘subject to availability’. These negotiations continued throughout the remainder of December 2007.

18. At the beginning of January 2008, Maritima learned that PDVSA was looking to charter a second vessel and CHO offered the second vessel to Internaves, through Seascope and Internaves passed the offer onto PDVSA. Negotiations for the charter of the two vessels then proceeded in tandem.
19. The agreements for commission between CHO and Internaves and CHO and Maritima respectively (the “Brokerage Commission Agreements”) and the consultancy agreements between CHO and Lamat (the “Consultancy Agreements”, together with the Brokerage Commission Agreements the “Agreements”) were signed on 24 January 2008. CHO signed the charter parties for the vessels on 23 January 2008 and PDVSA signed them on 1 February 2008.
20. Each of the Brokerage Commission Agreements and the Consultancy Agreements provided for English law and disputes to be referred arbitration in London.
21. In mid-January 2008 it emerged that another company within the PDVSA organisation had entered into an agreement for two different vessels with another company, Astilleros de Venezuela C.A. (“Astivenca”) and the vessels were therefore not needed. An assignment was therefore entered into with Astivenca in March 2008 (although the hire rate payable was subsequently reduced) and PDVSA acted as guarantor.
22. Instalments of hire were not made and in November 2012 CHO demanded redelivery of both vessels which took place in January 2013.
23. CHO commenced proceedings against PDV Marina, Astivenca and PDVSA in the courts in London which were settled by an agreement dated 16 April 2015 (the “Settlement Agreement”) and a lump sum payment of US\$60 million was made by PDV Marina to CHO in June 2015.
24. Disputes arose under the Agreements in relation to unpaid commission and by agreement of the parties six arbitrations under those agreements were consolidated.
25. An oral hearing took place in April 2019 before three arbitrators.
26. According to the Award at paragraphs 10 and 11:

“10 CHO’s primary case in these arbitrations was that the terms of the settlement agreement (“the Settlement Agreement”) ‘captured’ or precluded the claims brought in these arbitrations. However, a secondary case was that the commission and consultancy agreements were unenforceable. In essence, CHO alleged that the rate of hire paid by PDV Marina under the charter parties was “inflated” by “secret commissions” which were “siphoned off” by Internaves, Maritima and Lamat in breach of the obligations which these three parties owed to the parties to the charter parties.

“11 A key issue in the arbitration was whether Maritima and Internaves were to be treated as CHO’s agents (either because they were CHO’s brokers or because they were joint

intermediary brokers). If they were, then CHO argued that the commission and consultancy agreements were unenforceable because they had been procured in breach of the duty which Internaves and Maritima owed to CHO... If Internaves and Maritima were intermediary brokers, then it was argued on behalf of CHO that their failure to disclose to CHO and PDVSA the fact that they had an interest in keeping the “spread” between the rate of hire paid by PDVSA and the rate of hire received by CHO as wide as possible (to enable them to claim the maximum amount of commission) was a breach of the duty owed to both parties to the charter parties. As a matter of public policy, the commission and consultancy agreements would therefore, so it was argued, be unenforceable.”

27. By a majority (Michael Baker-Harber dissenting) the claims of the defendants for commission/damages under the Brokerage Commission Agreements and the Consultancy Agreements respectively succeeded and the counterclaim of CHO was dismissed.

Appeal under Section 69

28. Section 69 of the Act provides:

(1) Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings. ...

(2) An appeal shall not be brought under this section except—

(a) with the agreement of all the other parties to the proceedings, or

(b) with the leave of the court.

(3)...

(7) On an appeal under this section the court may by order—

(a) confirm the award,

(b) vary the award,

(c) remit the award to the tribunal, in whole or in part, for reconsideration in the light of the court's determination, or

(d) set aside the award in whole or in part.

The court shall not exercise its power to set aside an award, in whole or in part, unless it is satisfied That it would be inappropriate to remit the matters in question to the tribunal for reconsideration.

29. The court was reminded on behalf of the defendants of the distinction between findings of fact by the tribunal and an error of law which is amenable to review under section 69 referring the court to *Merkin* (chapter 21) and Mustill J in *The Chrysalis* [1983] 1 W.L.R. 1469:

“...(1) The arbitrator ascertains the facts. This process includes the making of findings on any facts which are in dispute. (2) The arbitrator ascertains the law. This process comprises not only the identification of all material rules of statute and common law, but also the identification and interpretation of the relevant parts of the contract, and the identification of those facts which must be taken into account when the decision is reached. (3) In the light of the facts and the law so ascertained, the arbitrator reaches his decision.

In some cases, stage (3) will be purely mechanical. Once the law is correctly ascertained, the decision follows inevitably from the application of it to the facts found. In other instances, however, stage (3) involves an element of judgment on the part of the arbitrator. There is no uniquely “right” answer to be derived from marrying the facts and the law, merely a choice of answers, none of which can be described as wrong.

Stage (2) of the process is the proper subject matter of an appeal under the Act of 1979. In some cases an error of law can be demonstrated by studying the way in which the arbitrator has stated the law in his reasons. It is, however, also possible to infer an error of law in those cases where a correct application of the law to the facts found would lead inevitably to one answer, whereas the arbitrator has arrived at another; and this can be so even if the arbitrator has stated the law in his reasons in a manner which appears to be correct, for the court is then driven to assume that he did not properly understand the principles which he had stated.”

#### Grounds of Appeal

30. The grounds of appeal for which permission was given (as amended) are the following three questions of law:
- i) Question 1: what duties are owed by an intermediary broker to its principals? In particular whether an intermediary broker (in the position of Maritima/Internaves) owed a duty (a) to disclose the full facts of the transaction to their principals; and (b) to disclose to CHO the fact “that the hire that it was getting was significantly less than the hire PDVSA had agreed to pay”;
  - ii) Question 2: whether, as a matter of English law, an agreement pursuant to which a broker and/or consultant received secret commission and/or other payments was unenforceable on the grounds of public policy or illegality;

- iii) Question 3: whether a proportion of the sum paid under the Settlement Agreement to compromise CHO's claims (as owners) against PDV Marina (as charterers) retained the character of "Charter Hire" so as to "capture" the Claimants' right to commission and consultancy fees.

Factual findings of the Tribunal

31. In relation to Questions 1 and 2, it is in my view essential to identify those findings of fact by the Tribunal which underpin the issues of law which are the subject of the Appeal under those two headings.

32. In relation to the nature of the role played by Internaves and Maritima, the Tribunal found:

"115. The foundation of this case was that the Claimants were either brokers or agents for PDV Marina/PDVSA or joint brokers for both parties. On the basis of the facts set out above (this being essentially a factual question which turned on the role they had played in the negotiations) we could not accept that either Internaves or Maritima had acted as brokers or agents for PDV Marina/PDVSA. CHO had its own broker, Seascope, so its case in relation to fiduciary duty as a matter of English law depended on satisfying us that Internaves and Maritima had to be treated under English law as a joint intermediary broker." [emphasis added]

33. It is also important to be clear what behaviour of the defendants is in issue and what is "secret" in this transaction as the nature of the alleged non disclosure and the "secret payments" is relevant to the identification of the relevant legal principles.

34. The claimant placed reliance on the following sentence in the Award (paragraph 139) that:

"The only thing that was secret about this negotiation from CHO's perspective was that the hire that it was getting was very significantly less than the hire PDVSA had agreed to pay."

35. However it is important that this sentence is not taken out of context. It is part of the Tribunal's concluding "observations on the evidence generally" and as is clear from the immediately preceding sentence in paragraph 139:

"CHO was apparently content to agree the commissions and the bottom line hire figure. There was nothing secret about that."

36. It was accepted for CHO that what was not kept secret from CHO was the amount to be paid by PDVSA to CHO under the charterparties (which was set out in the charterparties) or the amount of the commissions and other payments to be paid by CHO to the defendants (which were to be paid by CHO out of the monies received under the charterparties and were as specified in the Agreements). Although the Award is not wholly clear when it refers (paragraph 88) to neither party being aware that sums due under the Agreements were "effectively financed" by the difference



between the hire paid and the hire received, it was accepted for CHO that there was no suggestion that the defendants had received additional amounts over and above the commission payable under the Agreements.

37. The claimant's case is based on the fact (paragraph 26 of the Award) that CHO did not know it was being asked to accept a lower daily rate than the Brokers "were able to agree" with PDVSA and to pay "the difference" between the two rates to Internaves/ Maritima. In other words CHO was not told what PDVSA was prepared to pay without regard to commission but as can be inferred from the Award (as for example in paragraph 112) what in substance this means is that CHO's case is that the Brokers were under a duty to disclose to each of the parties to a negotiation what the other's "bargaining position" was.
38. As far as PDVSA is concerned, the claimant's case is based on the fact that PDVSA knew that the defendants were receiving commission but did not know the rate of that commission and that this led to the Agreements being unenforceable.
39. For completeness I do not accept the submission that the observations of the dissenting member of the Tribunal are to be accepted as factual findings of the Tribunal or that they have any bearing on the issues of law for this court.

Question 1: What duties are owed by an intermediary broker to its principals? In particular whether an intermediary broker (in the position of Maritima / Internaves) owed a duty (a) to disclose the full facts of the transaction to their principals; and (b) to disclose to CHO the fact "that the hire that it was getting was significantly less than the hire PDVSA had agreed to pay"?

#### Reasoning of Tribunal

40. It was submitted for CHO that the reasoning of the Tribunal on the duties owed by the intermediary to CHO under English law was non-existent.
41. The only section of the Award where it is expressly dealt with is in paragraph 140 as follows:

"140 For us to have concluded that CHO was entitled to avoid these agreements (that they had signed freely and were content to abide by until they learned the full facts of Internaves' and Maritima's involvement) we –the majority –concluded it would have been necessary for us to find and hold that Internaves and Maritima had a duty to tell CHO (and not PDVSA) the full facts of the transaction. It was common ground that Internaves and Maritima could not be regarded as CHO's own brokers, so that seemed to us to mean that for CHO's defence to these claims to succeed we would have had to have concluded that as intermediary brokers they were under an obligation to reveal and communicate all details of the transaction to both parties. In circumstances where neither CHO nor PDVSA appeared to have been interested (at the time) in the precise amount of the commissions which would be paid to the various brokers

involved (and they were aware that this was not just the normal situation with a single broker acting for each of the parties) that was not a proposition that we could accept” [emphasis added]

42. As noted above paragraph 140 was in a section of the Award described as observations on the evidence. This I infer was because the case as presented to the Tribunal rested largely on the proposition that the breach of duty owed to PDVSA resulted in the Agreements being unenforceable. I note at paragraph 11 the issue was formulated as follows

“11 A key issue in the arbitration was whether Maritima and Internaves were to be treated as CHO’s agents (either because they were CHO’s brokers or because they were joint intermediary brokers). If they were, then CHO argued that the commission and consultancy agreements were unenforceable because they had been procured in breach of the duty which Internaves and Maritima owed to CHO...If Internaves and Maritima were intermediary brokers, then it was argued on behalf of CHO that their failure to disclose to CHO and PDVSA the fact that they had an interest in keeping the “spread” between the rate of hire paid by PDVSA and the rate of hire received by CHO as wide as possible (to enable them to claim the maximum amount of commission) was a breach of the duty owed to both parties to the charterparties. As a matter of public policy, the commission and consultancy agreements would therefore, so it was argued, be unenforceable.”

43. The Tribunal dealt with the argument that a duty was owed to PDVSA, finding that it was a matter of Venezuelan law and preferring the evidence of Professor Gomez that there was no fiduciary duty owed to PDVSA and no breach (paragraphs 109 and 110).
44. It also held that there was no illegality which would render the agreements unenforceable. Implicit in that reasoning was a rejection of any duty owed to CHO.

#### CHO’s submissions

45. It is the claimant’s case (paragraph 5 of the Particulars of claim) that the Tribunal ought to have found that, as intermediary brokers, the defendants owed CHO a duty:
- i) to act loyally to CHO; and/or
  - ii) to act in the best interest of CHO;
  - iii) to avoid conflicts of interests;
  - iv) not to profit from their position;
  - v) to disclose their own interest in the transaction, in circumstances where this interest was in conflict with CHO’s.

46. CHO's primary case was that an agent owes to his principal a fiduciary duty of loyalty and as such had a duty to act in good faith, not to make a profit out of his trust, not to place himself in a position of conflict and not to act for his own benefit without the informed consent of his principal: *Bristol and West Building Society v Mothew* [1998] Ch. 1 at [18].
47. It was accepted for CHO that Internaves and Maritima were "intermediary brokers" but it was submitted for CHO that even an intermediary acts as an agent for both parties to the charterparty. It was submitted that the role of Maritima changed in the course of the transaction and that in the initial negotiations its role was more "proactive" than merely acting as a "postbox" and that it therefore owed "fiduciary duties" to both parties during the early stages.
48. In the alternative it was submitted for CHO that even if the agency role is limited to that of a "postbox" with limited duties, an agent can still be liable for breach of duty as when he conceals from his principal the existence of further offers: *Bowstead & Reynolds on Agency 21st Ed.* at 6-037; *Ruedi Staechelin v ACLBDD Holdings Limited* [2019] EWCA Civ 817 at [77]-[82].

#### Defendants' submissions

49. It was submitted for the defendants that:
  - i) the Brokers were intermediary brokers and there is an important distinction between an intermediary and an agent;
  - ii) an intermediary broker's duty is to receive messages from one principal which are intended for the other principal, and to accurately transmit those messages to their intended recipient: *The Mercedes Envoy* [1995] 2 Lloyd's Rep 559.

#### Discussion

50. It seems to me that the question of law as formulated assumes that:
  - i) the relationship between the intermediary and its principals is governed by English law;
  - ii) the relationship is one of agency which attracts fiduciary duties; and
  - iii) there is a single set of duties which are the same for all "intermediary brokers".

#### Applicable governing law

51. Counsel for the defendants in this Appeal disputed that the relationship between the Brokers and CHO before the Agreements were entered into was governed by English law. However this issue was not raised at the permission stage and I propose to assume for the purposes of this Appeal that the relationship between the Brokers and CHO is governed by English law.
52. I do not understand the claimant to contend on this appeal that the relationship between the Brokers and PDVSA was governed by English law (although under Question 2 the claimant submits that the court should have regard to English law

public policy irrespective of the position under the applicable foreign law). As noted above the Tribunal found that the relationship was governed by Venezuelan law and I see no basis to depart from that finding.

Did the relationship attract fiduciary duties? Is there a principal/agent relationship?

53. The Tribunal found as a fact (paragraph 115 of the Award) that, based on the role that they had played in the negotiations, neither Internaves nor Maritima were brokers or agents for PDVSA and CHO had its own broker, Seascope. Contrary to the submissions of counsel for CHO, it seems to me that there is a clear finding of fact (paragraph 84) by the Tribunal that based on their role in the negotiations they were “mere intermediaries”.

54. The Tribunal stated that:

“115. The foundation of this case was that the Claimants were either brokers or agents for PDV Marina/PDVSA or joint brokers for both parties. On the basis of the facts set out above (this being essentially a factual question which turned on the role they had played in the negotiations) we could not accept that either Internaves or Maritima had acted as brokers or agents for PDV Marina/PDVSA. CHO had its own broker, Seascope, so its case in relation to fiduciary duty as a matter of English law depended on satisfying us that Internaves and Maritima had to be treated under English law as a joint intermediary broker.”

“84 ... the evidence did not support a conclusion that the Claimants were at any time acting as more than mere intermediaries who could not be regarded as the agent of either party to the charterparties.”

Reasoning of the Tribunal

55. Having concluded that the Brokers were not the agent of either party, the Tribunal’s analysis then proceeded to consider whether the relationship attracted fiduciary duties and the nature of any duties as follows:

“117 It was accepted on behalf of Internaves/Maritima that if they were indeed agents for PDVSA or CHO, then they were under a fiduciary duty not to act for their own benefit (or for the benefit of third parties) without the principal’s informed consent and to act generally in the principal’s best interests. However, any such duties did not, so it was argued, extend to keeping the principal informed about matters which were not its concern (such as, in this case, the amount of hire which CHO would accept). We were referred in this context to the statement in Snell’s Equity at para 7.011 that “Fiduciary duties are fundamentally proscriptive in nature, rather than prescriptive: fiduciary doctrine “tells the

fiduciary what he must not do. It does not tell him what he ought to do”.

118 The treatment of this topic in Snell goes on to state (at para 7.008) that: –

“The scope of fiduciary duties is “moulded according to the nature of the relationship and the facts of the case”. However, application of fiduciary doctrine is not an unprincipled exercise in judicial discretion. Rather it requires a meticulous examination of the facts of each case in order to determine what non-fiduciary duties are owed, so as to be able to determine the effect that fiduciary principles will have in the case.”

Relevant law and commentary

56. In *Bristol and West Building Society v Mothew* [1998] Ch. 1 at 18 Millett LJ stated:

“A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter or circumstances which give rise to a relationship of trust and confidence.”

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

57. An agent in the strict sense of the word holds a power to affect the legal relations of his principal: *Bowstead* at 6.035. An agent which does not have power to bind his principal would be such as a canvassing agent and is described by *Bowstead* as an “incomplete agency” which *Bowstead* states “depending on the facts can still import an undertaking to act in the interests of the other”. However:

“...The agreement of the parties or the background of the case may however establish that the relationship is not one of agency or that a fiduciary relationship either did not exist or had been modified from the normal standards”

58. *Bowstead* at 6.037 states:

“Turning first to the question of how the incidence of the duties should be explained, it will be noted that the formulations in Article 1 and in the present Article treat the relationship of principal and agent as by definition a fiduciary one, and therefore in effect say that every agent is a fiduciary and hence owes fiduciary duties. This can be criticised on the basis that not every person who can be described by the word “agent” is subject to fiduciary duties; and that a person who certainly is so

to be described may owe such duties in some respects and not in others. Hence it is said that there may be a “non-fiduciary agent”, and that in some functions an acknowledged agent may not act as fiduciary at all. Rather than talk of a “non-fiduciary agent” it seems better to say that where an agent does not act in a fiduciary capacity (e.g. because he simply carries out specific instructions), this is a reflection of the scope of his duties and the boundaries of the equitable rules.”

Another view is that the approach should rather be to identify the general circumstances in which a fiduciary duty may arise of itself and note these as situations in which agents may sometimes, but do not always, find themselves. Thus in *Phipps v Boardman* Lord Upjohn said:

“The facts and circumstances must be carefully examined to see whether in fact a purported agent and even a confidential agent is in a fiduciary relationship to his principal. It does not necessarily follow that he is in such a position (see *In Re Coomber*).”

And in the case referred to, *Re Coomber*, Fletcher Moulton LJ said, in a much quoted passage:

“It is said that the son was the manager of the stores and therefore was in a fiduciary relationship to his mother. This illustrates in a most striking form the danger of trusting to verbal formulae. Fiduciary relations are of many different types; they extend from the relation of myself to an errand boy who is bound to bring me back my change up to the most intimate and confidential relations which can possibly exist between one party and another where the one is wholly in the hands of the other because of his infinite trust in him. All these are cases of fiduciary relations, and the Courts have again and again, in cases where there has been a fiduciary relation, interfered and set aside acts which, between persons in a wholly independent position, would have been perfectly valid. Thereupon in some minds there arises the idea that if there is any fiduciary relation whatever any of these types of interference is warranted by it. They conclude that every kind of fiduciary relation justifies every kind of interference. Of course that is absurd. The nature of the fiduciary relation must be such that it justifies the interference. There is no class of case in which one ought more carefully to bear in mind the facts of the case, when one reads the judgment of the Court on those facts, than cases which relate to fiduciary and confidential relations and the action of the Court with regard to them. In my opinion there was absolutely nothing in the fiduciary relations of the mother and the son with regard to this house which in any way affected this transaction.”

It is certainly true that fiduciary relationships arise in situations other than those of agency. Nevertheless, it is submitted that the fact that an agent in the strictest sense of the word has a power to alter his principal's legal position makes it appropriate and salutary to regard the fiduciary duty as a typical feature of the paradigm agency relationship. To do so will not mislead so long as two things are borne in mind.

The first is that the word "agent" can be used in varying senses, and not all persons to whom the word is applied are agents in the full (or sometimes, any) legal sense. A canvassing, or introducing agent, for instance, may do no more than bring two parties together and thus may in many situations do little involving the incidence of fiduciary responsibilities at all; though equally he can, as has been stated above, in some circumstances become liable for breach of such duties, as when he conceals from his principal the existence of further offers. Further, even canvassing agents usually have authority to make and receive communications on behalf of their principals, and can be expected to act loyally in exercising those powers.

The second matter which should be borne in mind is that the extent of an agent's equitable duties (a phrase that embraces more than the strictly fiduciary duties to avoid conflicts of interest and not to profit) and also common law duties may vary from situation to situation...In many situations the duty may be, by virtue of the circumstances, limited; or restricted or even excluded by contract..." [emphasis added]

### Discussion

59. In *Medsted Associates Ltd v Canaccord Genuity Wealth (International) Ltd* [2019] EWCA Civ 83 Longmore LJ cited with approval at [45] *New Zealand Netherlands Society "Oranje" Inc v Kuys* [1973] 1 W.L.R. 1126 at 1130:

"The precise scope of [the obligation] must be moulded according to the nature of the relationship."

60. The Tribunal expressed the view that this was not just the normal situation with a single broker acting for each of the parties (paragraph 140 of the Award) and that:

"the broking arrangements with which we were concerned in this dispute were far from normal (in fact, without parallel, in our experience)" (paragraph 139 of the Award).

61. Further there is a clear finding by the Tribunal (paragraph 84) that the defendants:

"were not acting as more than mere intermediaries who could not be regarded as the agent of either party to the charterparties."

62. In my view an intermediary in the position of the Brokers were not agents in what *Bowstead* refers to as the “full legal sense” in that they did not have power to bind either party. Further I doubt that they can be regarded as an agent at all. They were not acting for CHO which had its own broker, Seascope, which was being paid a commission for so acting and the Tribunal found as a fact that the Brokers were not acting for PDVSA.

63. Even if, as suggested by *Bowstead* (quoted above) the better approach is to say that the intermediary broker has some fiduciary duties, the scope of those duties are in my view limited to reflect the limited role which the Brokers carried out. As stated in *Re Coomber* (quoted above):

“Thereupon in some minds there arises the idea that if there is any fiduciary relation whatever any of these types of interference is warranted by it. They conclude that every kind of fiduciary relation justifies every kind of interference. Of course that is absurd. The nature of the fiduciary relation must be such that it justifies the interference” [emphasis added]

64. It is clear from the award that the negotiations between the two parties took place with Seascope, Internaves and Maritima passing communications along the line. As the Tribunal noted at paragraph 122:

“...[PDV Marina] were interested only in securing the services of the Vessels for their project at what they considered to be an acceptable price to them. They had left it to the brokers and intermediaries who had become involved in the contractual negotiations to bring these to a conclusion on such terms as they (PDV Marina) considered to be of importance (the hire rate clearly being a term of vital importance but not the only term which was important to PDV Marina) and then to sort out the position regarding commissions with CHO...”

65. Further so far as CHO was concerned the Tribunal observed at paragraph 139:

“...both [CHO and PDVSA] were intent on ensuring that the “deal” should be closed as soon as possible. Neither would therefore have wanted to put the conclusion of the deal at risk by asking further questions when they had reached a situation in which they had achieved a “bottom line” figure that was acceptable to each of them... CHO was apparently content to agree the commissions and the bottom line hire figure”

66. The Tribunal observed at paragraph 140 that:

“...neither CHO nor PDVSA appeared to have been interested (at the time) in the precise amount of the commissions which would be paid to the various brokers involved (and they were aware that this was not just the normal situation with a single broker acting for each of the parties)...”



67. These findings and observations of the Tribunal as to the relationship demonstrate why the commercial relationship between CHO and the Brokers does not justify “interference” by the imposition of the full scope of fiduciary duties. Accordingly in my view the nature of the intermediary relationship in the circumstances is such that it cannot be said that either CHO or PDVSA was entitled to the “single minded loyalty” of the Brokers and the obligations of a fiduciary summarised by Millett LJ in *Bristol Building Society* do not apply to the Brokers as intermediaries.

68. In my view the most relevant authority to the duties on an intermediary in the position of Maritima/Internaves is *The Mercedes Envoy* [1995] 2 Lloyd’s Rep 559. At 560, Mance J stated that:

“it seems to me that Howard Houlder were pure intermediaries, that is to say, their only role and authority on behalf of either party was to transmit the communications of the one to the other.”

The duties on such an intermediary it may therefore be inferred are to communicate messages honestly.

69. The duty to act honestly did not mean that the Brokers could not act as intermediaries to bring the two parties together. It was submitted for CHO that there was a breach of duty because the intermediaries were pulling the parties apart by seeking to increase the differential between the amount paid and the net amount received. However if the only duty is to transmit communications honestly then no such duty is breached by the underlying commercial motivation on the part of the Brokers to maximise their commissions and there is no finding by the Tribunal of dishonesty on the part of the Brokers.

70. CHO relied on the case of *Hilton v Barker* [2005] 1 WLR 457 (HL) in support of its submission that a broker is not relieved of his duties of disclosure by reason of having two principals as this is simply the consequence of the position in which he has voluntarily placed himself.

71. However in my view that case does not provide any guidance on whether a fiduciary duty exists in the present circumstances. In *Hilton* a solicitor acted for both parties to a property sale transaction which was in breach of his professional obligations as a solicitor. It is clear that (as stated at [29] of the judgment) that:

“The relationship between a solicitor and his client is one in which the client reposes trust and confidence in the solicitor. It is a fiduciary relationship.”

72. A duty to disclose would only arise if there was a fiduciary relationship which imposed such a duty. The position of a solicitor and his client is not comparable to the present circumstances of an intermediary.

73. As stated by Longmore LJ in *Medsted*, having quoted the dictum of Millett J from *Bristol and West Building Society*:

“But this statement of principle does not absolve the court from deciding the scope of the fiduciary's obligations. If, in fact, the agent has, in the light of the facts of the case, no obligation to disclose the actual amount of commission he is paid when his principal knows he is being paid by the third party to the transaction, it does not advance the matter to say that, because he is a fiduciary, he must disclose the actual amount he is being paid. It is the scope of the agent's obligation that is important, not the fact that he may correctly be called a fiduciary.”  
[emphasis added]

74. In my view an intermediary in the position of Internaves and Maritima does not have a duty not to put himself in a position of conflict because he is not an agent and has therefore no principal. However even if such an intermediary is subject to some fiduciary duties, the role does not justify the imposition of a fiduciary duty not to put himself in a position of conflict by “acting for two principals” as to impose such a fiduciary duty would result in the commercial absurdity that he would be unable to act and perform the role inherent in that of an intermediary as someone who stands between two parties to facilitate the relationship.

Did an intermediary broker (in the position of Maritima / Internaves) owe a duty to disclose the full facts of the transaction to their principals?

75. Dealing first with PDVSA, the only thing PDVSA did not know was the amount of the commissions being paid by CHO to the defendants.
76. The relationship between the Brokers and PDVSA was held by the Tribunal to governed by Venezuelan law (paragraph 107). The Tribunal preferred the evidence of Professor Gomez to that of Mr Anzola and the Tribunal found that so far as PDVSA was concerned:
- i) neither Internaves nor Maritima were agents for PDVSA;
  - ii) the relationship of broker and principal did not give rise to a fiduciary relationship;
  - iii) there was no duty on an intermediary broker (in the position of Maritima/Internaves) to disclose to PDVSA the amount of the commissions it would receive from CHO.

77. The relevant passages are as follows:

“108 Professor Gomez, the expert on Venezuelan law instructed on behalf of the Claimants, started by explaining that in his view neither Internaves nor Maritima would be regarded under Venezuelan law as agents or brokers for any wholly-owned subsidiary of PDVSA, including PDV Marina...

109 Furthermore, as a matter of principle Professor Gomez expressed the opinion that Venezuelan law does not view the

relationship between a broker or agent and its principal as one that gives rise to fiduciary relationship.

110 He then considered whether under Venezuelan law, it was a breach of a fiduciary duty for Maritima, Internaves or Lamat to receive payments from CHO of the difference between the charter hire paid by PDV Marina and the net sum received by CHO. He concluded that it was not for the following reasons:...

111. As a matter of Venezuelan law Professor Gomez explained that a person is not required to give information to its counterparty unless such a duty arises under the particular contract, by statute, or, if nondisclosure results in fraud or fundamental error. Since PDV Marina had not requested a cost breakdown of the hire or information on possible commission payments, his view was that neither Maritima nor Internaves had a duty – legal or contractual – to inform PDV Marina of the payments it was going to receive from CHO. Lamat had no reason to inform PDV Marina since it was not involved, directly or indirectly, in the negotiations with PDV Marina...

112 Mr. Anzola, on the other hand, started from the position that under Venezuelan law Internaves and Maritima would both be viewed as having acted as brokers for PDVSA/ PDV Marina-essentially it seemed for the reason given above, namely that Maritima had used the words “as brokers only” in communicating with PDV Marina. Given our conclusion that the evidence did not support a conclusion –whether under Venezuelan or under English law –that either Maritima or Internaves was the broker or agent of PDV Marina or PDVSA for our purposes, Mr.Anzola’s evidence was undermined fundamentally” [emphasis added]

78. Given that the relationship was governed by Venezuelan law and the findings of foreign law are findings of fact, there can be no error of law in the conclusions of the Tribunal on the duties of disclosure on an intermediary towards PDVSA.
79. Turning then to CHO, as referred to above and based on the findings of the Tribunal, the only fact about the terms of the hire and the commissions which CHO did not know was the commercial position of PDVSA which underlay the terms which were negotiated and agreed in the charterparties. Thus any alleged duty on an intermediary in the position of Maritima and/or Internaves to disclose the “full facts” (the first part of Question 1) is in substance the same as second part of Question 1 on this Appeal namely whether an intermediary broker owed a duty to disclose to CHO the fact "that the hire that it was getting was significantly less than the hire PDVSA had agreed to pay".
80. I accept that an agent is under a fiduciary duty to obtain the best possible deal for his principal and where there is a conflict of interest to obtain informed consent:

*Hurstanger v. Wilson* [2007] 1 WLR 2351 at [33] and [34]. In *Hurstanger* the defendants used a broker to apply for a loan. The relationship was stated to be one of agency. In these circumstances it is clear that an obligation to obtain informed consent arose:

“33. Certain things are clear. The defendants retained the broker to act as their agent for a substantial fee. The contract of retainer contained the usual implied terms, but the relationship created was obviously a fiduciary one. As a fiduciary the agent was required to act loyally for the defendants and not put himself into a position where he had a conflict of interest. Yet he agreed that he would be paid a commission by the other party to the transaction which his clients had retained him to procure. By doing so he obviously put himself into a position where he had a conflict of interest. The defendants were entitled to expect him to get them the best possible deal, but the broker's interest in obtaining a further commission for himself from the lender gave him an incentive to look for the lender who would give him the biggest commission.”

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

81. However the circumstances of that case are clearly distinguishable in that in this case the Brokers are not the agent of either or both CHO and PDVSA and for the reasons stated above, in relation to an intermediary in the position of Maritima/Internaves there is no fiduciary duty not to put himself in a position where he has a conflict of interest and no duty to obtain informed consent.
82. The decision in *Keppel v Wheeler* was considered by the Court of Appeal in *Staechelín*. The facts were summarised by the Court of Appeal as follows:

“73. In *Keppel v Wheeler* [1927] 1 KB 577 estate agents were retained to obtain a purchase for a block of flats. They obtained an offer, subject to contract, from a prospective purchaser, which their client accepted. But before contracts had been exchanged, the agents received a higher offer. The agents did not communicate that offer to their principal. They accepted that while they remained agents, they were under a duty to disclose the existence of the higher offer. But they argued that once they had introduced a willing purchaser, their agency came to an end. This court disagreed; and held that the agency

continued until exchange of contracts. It therefore followed that the agents were in breach of duty in failing to disclose the higher offer to their principal. However, despite that breach of duty, the court unanimously held that the agents were entitled to recover their commission.”

83. I do not accept the submission for CHO that it was “entitled to know” what the other side has agreed to pay as “pure hire”. CHO knew how much PDVSA had agreed to pay and how much commission it, CHO, was paying. It did not know what other commercial deal could or might have been achieved but there is no duty on an intermediary in the position of Internaves and Maritima which would require them to disclose such details.
84. The underlying commercial position of a party, in this case the amount which PDVSA was prepared to pay disregarding commissions, is not in the nature of an offer made which was concealed and which the intermediary had a duty to pass on. Whilst the duty on an intermediary is to pass on communications honestly including offers, the authorities do not support any wider duty to disclose details of the commercial position of a party such as PDVSA. Further there is no reason for the court to interfere and impose such a duty when it would have the commercial effect that the intermediary would no longer have a role in the transaction since the parties would deal directly with each other.
85. I also do not accept the submission for CHO that there is any duty on an intermediary in the position of Internaves and Maritima to disclose its “interest” in a transaction where such interest is defined as its interest in widening the spread between what is paid and received. Insofar as the duties of the intermediary are governed by English law, this alleged “interest” is in substance merely the rationale for the intermediary being involved, namely to earn commission, and does not seem to me to affect the scope of the duty of disclosure as a matter of English law in relation to the commissions where the party (in this case CHO) is aware both of the amount being paid by PDVSA and the net amount retained by it after payment of the commissions and other amounts.

### Conclusion on Question 1

86. Accordingly for the reasons set out above, in my view there is no error of law in the conclusion of the Tribunal that intermediary brokers in the position of Maritima / Internaves were not under any duty to disclose the underlying commercial position of PDVSA to CHO and on the findings of fact of the Tribunal as to what was disclosed and known to the parties, no error of law in the scope of the duty on the intermediary.

### 2. As a matter of English law, is an agreement pursuant to which a broker and/or consultant received secret commission and/or other payments unenforceable on the grounds of public policy or illegality?

87. The relevant findings of the Tribunal were as follows:

“127 Of the three possible English law doctrines which could conceivably have been relevant to this issue which were identified by Counsel for the Claimants, what was

described in shorthand terms as the “Patel v Mirza question” was the only one which seemed to us to provide CHO with any real assistance. In that case the claimant attempted to make a claim for repayment of a sum lent under an agreement to enter into a “spread bet” on shares using insider information. This was therefore a case in which the claimant was seeking to recover money which was paid over for an indisputably unlawful purpose. It was therefore an altogether different situation from that which confronted us in the present case.

128. Notwithstanding the ingenuity which was employed on behalf of CHO to persuade us that the conduct of the Claimants in negotiating what DG candidly described as “the deal of a lifetime” was so morally reprehensible that English law could not support the agreements that it led to, we agreed with Counsel for the Claimants that the illegality case as a matter of English law “did not even get off the ground”. The negotiations which led to the agreements were certainly in our view a classic case of commerce that was “red in tooth and claw” but to treat them as illegal under English law seemed to us to be a legal mischaracterisation.” [emphasis added]

### Submissions

88. It was submitted for CHO that:

- i) the Brokers “manipulated the hire rates in order to increase their spread” and that it is this “dishonest and corrupt conduct” which enabled them to obtain their secret commission and which should result in their claims being rejected: *FHR European Ventures LLP v. Mankarious* [2015] AC 250 at [42]:

“secret commissions...inevitably...undermine trust in the commercial world”:

- ii) even though PDVSA did know that commission was payable they would have assumed that it was at the “usual” level (around 2.5%) and the commission therefore should be regarded as “secret”;
- iii) accordingly the Agreements should be unenforceable as a matter of English law since the category of ‘quasi-criminal acts’ includes “fully secret commissions” and “cases of dishonesty or corruption”: *Les Laboratoires Servier v. Apotex Inc.* [2015] AC 430 at [25]:

“The ex turpi causa principle is concerned with claims founded on acts which are contrary to the public law of the state and engage the public interest. The paradigm case is, as I have said, a criminal act. In addition, it is concerned with a limited category of acts which, while not necessarily criminal, can conveniently be described as “quasi-criminal” because they engage the public interest in the same way. Leaving aside the

rather special case of contracts prohibited by law, which can give rise to no enforceable rights, this additional category of non-criminal acts giving rise to the defence includes cases of dishonesty or corruption, which have always been regarded as engaging the public interest even in the context of purely civil disputes; some anomalous categories of misconduct, such as prostitution, which without itself being criminal are contrary to public policy and involve criminal liability on the part of secondary parties; and the infringement of statutory rules enacted for the protection of the public interest and attracting civil sanctions of a penal character, such as the competition law considered by Flaux J in *Safeway Stores Ltd v Twigger* [2010] Bus LR 974 .” [emphasis added]

- iv) even if the defendants were not dishonest, their conduct amounted to “sharp practice” which cannot be tolerated: *Imageview Management Ltd v Kelvin Jack* [2009] EWCA Civ 63 at [12].

89. For the defendants it was submitted that:

- i) as a matter of Venezuelan law, there was no breach of any duty to PDVSA and thus there was no criminal or “quasi criminal” act so as to engage the public interest within the principles as expressed by Lord Sumption in *Les Laboratoires Servier* at [25] and [28];
- ii) as a matter of English law, even if there was a duty, there was no breach of duty where partial disclosure has been made as to the fact of the commission but not its amount and a failure to enquire: *Medsted* at [42];
- iii) "half secret" commissions are not a form of fraud; the behaviour was not dishonest or corrupt and the Tribunal did not make any finding of dishonesty.

### Discussion

90. It was common ground that a secret commission is a form of fraud which falls into the category of “quasi criminal” acts. The claimant’s case that the commission was “secret” depends on the fact that PDVSA did not know the precise amounts of commission.

91. In *Medsted* Longmore LJ said at [42]:

“42. It follows from all this, in my judgment, that even if the relationship of *Medsted* and its clients was a fiduciary one, the scope of the fiduciary duty is limited where the principal knows that his agent is being remunerated by the opposite party. As *Bowstead and Reynolds* say, if the principal knows this, he cannot object on the ground that he did not know the precise particulars of the amount paid. He can, of course, always ask and if he does not like the answer, he can take his business elsewhere. *Bowstead* does add that where no trade usage is involved (and no usage was alleged in the present case), the

principal's knowledge may require to be "more specific". In *Hurstanger* the court held that it did need to be more special "because borrowers (such as the Wilsons) coming to the non-status market were likely to be vulnerable and unsophisticated". The contrary is the case here since, as the judge found (para 90) the clients were wealthy Greek citizens and it is likely that they were experienced investors (Mr Komminos, for example, had already dealt through MAN)." [emphasis added]

92. It was submitted for CHO that the key difference from *Medsted* is that in *Medsted* no argument could be broached that the rate of the commission were unreasonable. Counsel for CHO also relied on the evidence of the defendants recorded at paragraph 91 (set out above) as being "inconsistent" with the commission being usual or "half secret".
93. The submission for CHO that PDVSA would have assumed that the rate was the "usual rate" of 2.5% was advanced before the Tribunal (as recorded at paragraph 121) but there is no finding of fact in the Award that PDVSA would have assumed that it was at the "usual" level. The only finding in this regard is that the details of the commissions ie the "precise amount" were not known because PDVSA chose not to enquire (paragraph 122 read in conjunction with paragraph 140). I therefore do not accept that the issue of whether the commission was "usual" has any bearing in the circumstances of whether the commission was "secret" to PDVSA.
94. To the extent that the broking arrangements were "far from normal" (paragraph 139) and thus (assuming the relationship with PDVSA was governed by English law and imposed a fiduciary duty on the intermediary) it might be said this case fell into the category referred to in *Medsted* (and quoted above) where more specific disclosure was required. However I note the finding of fact of the Tribunal at paragraph 93:

"93. We agreed with the Claimants that what the documents made clear was that CHO were interested only in the 'bottom line' figure, so that if the effect of taxes of one sort or another was that they would receive less than the 'headline hire rate', then the commissions would have to be adjusted accordingly. So far as PDVSA were concerned, the suggestion that they might not have been aware of the appropriate market rate was not borne out by the evidence before us..." [emphasis added]

Thus PDVSA was not a vulnerable consumer (as was the case in *Hurstanger*) but was found by the Tribunal (in effect) to be a commercial entity aware of the market rates and which was not interested in the precise amount of the commissions (whether usual or reasonable) even though it was aware that this was not the normal situation with a single broker acting for each of the parties (paragraph 140).

95. Thus in my view even if the relationship of the Brokers and PDVSA was a fiduciary one, the general principle as set out in *Medsted* would apply and the scope of the fiduciary duty is limited where the principal knows that his agent is being remunerated by the opposite party. It is not therefore open to PDVSA (let alone CHO) to object on the ground that it did not know the precise particulars of the amount paid.



96. In the alternative it was submitted for CHO that even if the commissions were not secret, the law should be stringent as to the “reprehensible conduct” of the defendants which “undermines the integrity of commercial transactions”.

97. As to whether the conduct of the defendants was dishonest or corrupt in the sense contemplated by Lord Sumption in *Les Laboratoires Servier*, it was the evidence (recorded at paragraph 91) that

“DG candidly admitted that “we had seen the opportunity to make the difference between the net rate that CHO indicated and whatever rate PDVSA could come back to us with. It was a once in a lifetime opportunity and we took it”. CS also did not disguise the fact that his objective was to persuade CHO to reduce their rate to US\$ 43,410 from the figure of US\$47,00 that it had put in its tender bid so that he and DG could “keep the difference”...” [emphasis added]

The Tribunal characterised this behaviour as “a classic case of commerce that was “red in tooth and claw””.

98. In my view however there is no finding of dishonesty or corruption (fraud) in the Award. CHO sought to place reliance on the fact that having received confirmation from CHO that it was still interested in the proposed charter, in the revised proposal sent to PDVSA the hire was increased from US\$47,000 to US\$47,600 and it was submitted that this increase was of itself evidence of reprehensible conduct. In my view there is no finding by the Tribunal that this was done deliberately in order to increase their commission. The Tribunal recorded (at paragraph 31) that the explanation provided by the defendants was that this was a “clerical error” and whilst noting the contrary argument on this point advanced by CHO, the Tribunal made no finding that it was an “attempt to earn a secret profit”. I do not accept that any reliance can be placed on any view expressed by the dissenting arbitrator to support CHO’s case as it does not amount to a finding by the Tribunal.

99. In any event as noted above, the full amount of US\$47,600 was disclosed to CHO as this represented the amount paid and received under the charterparty and the net amount received by CHO reflected the larger figure. There was no deceit or concealment in this regard.

100. There is also no evidence that the conduct of the defendants undermined the integrity of commercial transactions within the meaning of the passage in *FHR European Ventures*. The relevant passage stated:

"42. Wider policy considerations also support the respondents' case that bribes and secret commissions received by an agent should be treated as the property of his principal, rather than merely giving rise to a claim for equitable compensation. As Lord Templeman said giving the decision of the Privy Council in *Attorney General for Hong Kong v Reid* [1994] 1 AC 324 , 330H, "bribery is an evil practice which threatens the foundations of any civilised society". Secret commissions are also objectionable as they inevitably tend to undermine trust in

the commercial world. That has always been true, but concern about bribery and corruption generally has never been greater than it is now: see for instance, internationally, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1999 and the United Nations Convention against Corruption 2003, and, nationally, the Bribery Acts 2010 and 2012 . Accordingly, one would expect the law to be particularly stringent in relation to a claim against an agent who has received a bribe or secret commission."

101. These were not secret commissions. PDVSA was aware that commissions were payable by CHO but did not enquire as to the amount. The observations of the Tribunal were that:

"both [CHO and PDVSA] were intent on ensuring that the "deal" should be closed as soon as possible. Neither would therefore have wanted to put the conclusion of the deal at risk by asking further questions when they had reached a situation in which they had achieved a "bottom line" figure that was acceptable to each of them." [emphasis added]

102. In my view the "opportunism" of the defendants in seeking to maximise their commercial return does not elevate it to a "quasi-criminal act" which engage the public interest, within the scope of the principle in *Les Laboratoires Servier*. As is clear from the judgment of Lord Sumption the principle does not extend beyond quasi criminal acts:

"28. Apart from these decisions, the researches of counsel have uncovered no cases in the long and much-litigated history of the illegality defence, in which it has been applied to acts which are neither criminal nor quasi-criminal but merely tortious or in breach of contract. In my opinion the question what constitutes "turpitude" for the purpose of the defence depends on the legal character of the acts relied on. It means criminal acts, and what I have called quasi-criminal acts. This is because only acts in these categories engage the public interest which is the foundation of the illegality defence. Torts (other than those of which dishonesty is an essential element), breaches of contract, statutory and other civil wrongs, offend against interests which are essentially private, not public. There is no reason in such a case for the law to withhold its ordinary remedies. The public interest is sufficiently served by the availability of a system of corrective justice to regulate their consequences as between the parties affected." [emphasis added]

103. It was submitted for CHO that CHO were also "victims" in that they received less hire than they might otherwise have been paid: *Imageview* at [45]. As discussed above, there was no commission or payment which was secret from CHO. The only information which was secret was the underlying commercial position of PDVSA.

This is not secret remuneration such as to engage the principle in *Les Laboratoires Servier*.

Conclusion on Question 2

104. For these reasons as a matter of English law, there was in my view no error of law in the conclusion of the Tribunal that an agreement pursuant to which a broker and/or consultant received commission and/or other payments was not unenforceable on the grounds of public policy or illegality in circumstances where the fact of the payments was known to the parties and it was open to the party who was aware of the market rates but unaware of the amount payable to the Brokers, to enquire as to the amount of the payments but chose not to do so.

Did a proportion of the sum paid under the Settlement Agreement to compromise CHO's claims (as owners) against PDV Marina (as charterers) retain the character of "Charter Hire" so as to "capture" the Claimants' right to commission and consultancy fees?

105. The Brokerage Commission Agreements provided:

“2. Notwithstanding anything else stated in this Agreement, the Owners will only pay the commission stated in the above Clause (1) to the Broker ONLY IF the stated Charter Hire are received by the Owners from the Charterer. In the event that any Charter Hire received by the Owner is reduced from the amount stated in Clause (1) above for whatsoever reason, the commission payable to the Broker shall be reduced proportionately...

4. This agreement shall be valid and effective as and when the Contracts become valid and effective under the provisions thereof and shall become null and void on expiration or termination of the Contracts...”

106. The Consultancy Agreements had substantially similar provisions.

107. In the Settlement Agreement, Recital B provided:

“(B) Party A has claims for outstanding hire further to two Charterparties Between Party A and Party B dated 22 January 2008 for the ships Amethyst and Turquoise, which Charterparties were assigned by Party B to the Second Defendant by way of a Protocol of Assignment dated 6 March 2008 (the Dispute).....” [emphasis added]

108. Paragraph 5 provided:

“This agreement is in full and final settlement of the Dispute, and, upon confirmation by party A pursuant to para. [3.5] above, each party hereby releases and forever discharges, all and/or any actions, claims, rights, demands and set-offs,

whether in this jurisdiction or any other, whether or not presently known to the parties or to the law, and whether in law or equity, that it, its Related Parties or any of them ever had, may have or hereafter can, shall or may have against the other party or any of its Related Parties arising out of or connected with:

- (a) the Dispute;
- (b) the underlying facts relating to the Dispute;
- (c) the Proceedings;
- (d) any agreement between or act by the parties or their Related Parties or any of them; and
- (e) any other matter arising out of or connected with the relationship between the parties.”

109. The Tribunal’s reasoning included the following passages:

“70. We turn then to CHO’s argument that the sum paid under the Settlement Agreement could not be treated as the equivalent of “Charter Hire” even if unpaid hire represented most of the sum claimed –and therefore settled under the Settlement Agreement. CHO argued that, if we were to conclude that the sum paid under the Settlement Agreement was properly regarded as Charter Hire, then it would be necessary to construct a mechanism so as to separate that part of the US \$60 million payment which attracted brokerage commission from that which did not. They emphasised that no evidence to enable us to do so had been adduced.

71. We were referred in this context to a number of authorities including *Howard Holder v Manx Isles Steamship* [1923] 1 KB 1110, *Shackleton Aviation v Maitland Drewery Aviation Limited* [1964] 1 LLR 293, *White v Turnbull* [1898] 3 Com Cas 183, and a decision of the New York Supreme Court Appellate Division, *Tankers International Navigation Corporation v National Shipping & Trading Corp*[1986]. CHO extracted from these decisions the following propositions in the context of the present dispute: (i) That, in the absence of clear words, a broker will be unable to claim commission where the underlying contract pursuant to which commission was payable has been superseded by another –albeit related –contract; (ii) That it was necessary to show that any right to commission attached to the “wholly distinct bargain” (in this case the Settlement Agreement); and (iii) That CHO was perfectly entitled to conclude the Settlement Agreement even though

one of its (intended) effects might have been to deprive the Claimants of their commission. The Settlement Agreement was a genuine attempt to compromise the underlying claims, then sums paid under it had to be treated as being paid under a wholly separate agreement. The fact that in a particular case this might lead to the loss of an entitlement to substantial commission was, so it was argued, not a reason to ignore these principles.

72. We do not propose to add to the length of these reasons by considering these authorities in detail. We agreed with the Claimants that the short point was that none of the cases to which we were referred actually concerned the situation which confronted us in the present case where:

(i) There was a written agreement between the owner and the broker for the payment of commission; and

(ii) A sum had actually been paid to the owner.

73. Counsel for the Claimants identified the following salient features of the present case which distinguished it from the authorities under consideration. These were as follows:

(i) The Settlement Agreement provided for the settlement of the 'Dispute'. That was defined as "claims for outstanding hire" –rather than 'claims for outstanding hire and other amounts';

(ii) On receiving the amount paid under the Settlement Agreement, CHO's Board of Directors had expressly confirmed that the sum received as "\$60m of outstanding charter hire";

(iii) The inescapable fact was that CHO had paid commission (to Seascope) on the sum paid under the Settlement Agreement pursuant to a commission agreement in materially identical terms to those relied on by the Claimants in this arbitration and had done so without any hesitation.

All of these points seem to us to reinforce the conclusion that the Settlement Agreement was not intended to extinguish any accrued entitlement the claimants might have to commission on Charter Hire." [emphasis added]

110. The same arguments were essentially relied upon by CHO in this appeal: that the entitlement to commission had been superseded by a "wholly separate bargain" and the payments under the Settlement Agreement could not be separated.

111. It was submitted for the defendants that there was no dispute of law as to the construction of the Agreements but only a dispute as to the application of the law to the facts.
112. To the extent that CHO advances certain propositions relating to the Settlement Agreement as matters of law it seems to me that the issue is a mixed question of fact and law.
113. I do not regard the fact that the clauses dealing with the payment of commission in other contracts namely the industry standard forms (Barecon and Baltime) referred to by CHO are more extensive cast light on the construction of the term “Charter Hire” in these Agreements. The fact that the wording of the Agreements could have expressly stated whether it extended to cover the present situation does not provide an answer to the correct interpretation of the language used in the Agreements which, it is well established on the authorities, is a question of ascertaining the objective meaning of the language which the parties have chosen to express their agreement. On the authorities this is not a literalist exercise but requires consideration of the contract as a whole and, where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which is more consistent with business common sense.
114. It seems to me that the literal meaning of the term “Charter Hire” in the Agreements encompasses not only payments of hire made in accordance with the terms of the charterparty but also payments of hire which are made late or as a result of legal proceedings. It seems to me to be irrelevant whether the legal proceedings are only to recover unpaid hire or also include claims for other amounts. The entitlement to commission under the Agreements is triggered if charter hire is received by the Owner, whether or not other amounts are also recovered.
115. In my view viewed objectively the term “Charter Hire” also extends to payments which are made to settle the claim for charter hire and there is no basis for imposing a narrow construction of the term either on the language used or the context of the Agreements. Commercial common sense would support a wider interpretation of the term as this which would otherwise result in commission being lost even though the hire had been paid.
116. As in the case of the legal proceedings it seems to me equally irrelevant that the Settlement Agreement releases not only the claim for hire but other claims (for demobilization fees, damages for late delivery, interest and legal costs- as referred to in paragraph 61 of the Award). Provided there is a receipt of an amount which falls within the term “Charter Hire”, the payment of other amounts in respect of other claims is irrelevant to whether the obligation to pay commission is triggered under the Agreements.
117. In my view the question of whether (a proportion of) the payments under the Settlement Agreement fall within the scope of the Agreements and trigger the obligation under clause 2 as receipt by the Owners of the “stated Charter Hire” is not affected by any difficulties which may exist in relation to the identification of the correct proportion of the payment received under the Settlement Agreement provided that at least part of the sum paid under the Settlement Agreement are to discharge the claim for hire and as such fall within the term “Charter Hire”. As noted by the

Tribunal (at paragraphs 73 and 75) it is difficult to see that the amount of commission cannot be calculated since following the payment under the Settlement Agreement CHO had been able to calculate the commission due to Seascope and had paid commission to Seascope on the sum paid under the Settlement Agreement.

118. CHO referred the court to paragraphs 36.9 and 36.10 of *Wilford "Time Charters" 7th Edition, 2014*:

“36.9 It is clear from the express terms of Clauses 27 and 28 of the New York Produce form that commission is payable only on hire which is both earned and paid under the charter or under any continuation or extension of it. If hire is not paid for the full period of the charter, whether, for example, because of off-hire or because of early termination, the broker does not earn his commission.

36.10 In such circumstances, the question may arise whether any term is to be implied into the agreement between owners and their broker, to the effect that the owners will do nothing to deprive the broker of the commission which he would otherwise earn. The answer is not entirely clear. The House of Lords decided in *French v Leeston Shipping (1922) 10 Ll. L. Rep 448* that no undertaking is to be implied that the owners will not agree to terminate the charter.”

119. In my view these passages do not assist as the court is here concerned with hire which has already accrued (as found by the Tribunal at paragraph 69) not hire which could have been earned had the charter continued and no implied term of the type dealt with in *French* is relied upon.

120. CHO also relied on the New York authority of *Tankers Int'l Navigation Corp. v National Shipping & Trading Corp.* referred to in *Wilford* at 36A.7:

“36A.7 In *Tankers Int'l*, above, the broker claimed commissions on funds paid by the charterer to the owner to settle the latter's claim for unpaid hire. While the court stated that a factual question was raised as to whether the obligation to pay commissions survived the charterer's default, the court observed that as a matter of law, the payment of settlement funds was not the equivalent of the payment of hire as earned under the charter. According to the court: Even had the shipowners recovered the full amount of hire sought by their claims, it is well settled that a broker is not entitled to recover commissions merely because his principal has secured a benefit equivalent to what he would have received had the contract been performed. [499 N.Y.S. 2d at 701]”

121. However it seems to me that this New York case is not binding authority on this court and as accepted by *Wilford*, the question is one of the construction of the relevant agreement:

“36A.5 The broker’s entitlement to commissions is entirely dependent upon the language of the contract authorizing the commissions. Unless the charter provides otherwise, the broker may recover commissions only to the extent that hire is actually paid under the charter.” [emphasis added]

“36A.6 In [*Lougheed & Co. Ltd. v Suzuki*], the charter provided that a commission was due “on the monthly payment of hire.” The charterer paid no hire because of the owner’s failure to make a timely delivery of the vessel. The court dismissed the broker’s claim for commissions and stated that the brokerage clause “indicated a clear intention to pay commissions only on the monthly payment of hire when received.” ...”

122. The case of *Lougheed* (another New York case) referred to can be distinguished from the present case as in that case no hire had been received, a distinction relied upon by the Tribunal at paragraph 72.
123. CHO also relied on two further authorities *Howard Houlder v. Manx Isles Steamship* [1923] 1 KB 110 at 113-4 and *Shackleton Aviation v. Maitland Drewery Aviation Ltd.* [1964] 1 Ll.R. 293 at 298-9 for the proposition that where the settlement agreement constitutes a “wholly distinct bargain”, any right to commission under the previous contract will not survive.
124. The authority of *Howard Houlder* does not in my view assist CHO: it addressed a situation where a broker is to receive commission on transaction A but the principal enters into transaction B, in which case no commission was held to be due. That is not in my view analogous to the Settlement Agreement. The principle is still, as stated in that case, that the claimant has to show that the conditions of his written bargain have been fulfilled. *Shackleton* was also a case where the principal entered into a different agreement and no commission was therefore due.

### Conclusion on Question 3

125. In my view for these reasons there was no error of law in the conclusion of the Tribunal that a proportion of the sum paid under the Settlement Agreement to compromise CHO's claims (as owners) against PDV Marina (as charterers) retained the character of "Charter Hire" so as to trigger the Claimants' right to commission and consultancy fees under the Agreements.

Appeal dismissed.