Neutral Citation Number: [2019] EWCA Civ 83

Case No: A4/2017/2561

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
THE HONOURABLE MR JUSTICE TEARE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/02/2019

Before:

THE RIGHT HONOURABLE LORD JUSTICE LONGMORE
THE RIGHT HONOURABLE LORD JUSTICE PETER JACKSON
and
THE RIGHT HONOURABLE LADY JUSTICE ASPLIN

- -

Between:

MEDSTED ASSOCIATES LIMITED	**Appellant/ Claimant**
- and -	
CANACCORD GENUITY WEALTH (INTERNATIONAL) LIMITED	**Respondent /Defendant**

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Mr Henry Byam-Cook & Ms Belinda McRae (instructed by **Memery Crystal LLP**) for the **Appellant**
Mr Hodge Malek QC, Mr Matthew Slater & Mr Rupert Coe (instructed by **Devonshires LLP**) for the **Respondent**

Hearing date: 5th December 2018

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Approved Judgment

Lord Justice Longmore:

Introduction

1. This appeal is from a decision of Teare J, now reported at [2018] 1 WLR 314, made after a 5 day trial in which he decided 11 different liability issues mainly in favour of the claimant/appellant Medsted Associates Ltd ("Medsted") including the issue whether the respondent was in breach of a non-circumvention term in its agreement with Medsted. The judge, however, awarded only nominal damages. Medsted submits that this was wrong and that it is entitled to substantial damages to be assessed or (perhaps) a sum by way of quantum meruit, debt or restitution.

Factual Background

2. Medsted is a company registered in the British Virgin Islands which conducts business as an introducing broker. Relevant individuals connected to the claimant include Mr Valasakis, a beneficial owner to the extent of 65% and Mr Dedetsinas (referred to by the judge as "Marios"), a beneficial owner to the extent of 35%.

3. The respondent, before it changed its name, was called Collins Stewart (CI) Ltd and is a company incorporated in Guernsey which conducts business as an investment institution. I shall refer to it as Collins Stewart. Relevant individuals connected to the claimant include Mr Jouan, a stockbroker based in Jersey, Mr Glover, a stockbroker and, from 1st January 2010, the defendant's head of stockbroking in Jersey and Mr Lovett, chief executive officer of Collins Stewart's offshore business.

Outline of business conducted by the Medsted and Collins Stewart

4. The main financial products to which the present appeal relates were contracts for difference, or "CFDs". CFDs are a form of derivative written by a major financial institution, known as a "first-tier provider". The underlying asset of a CFD is equity stock and the CFDs allow investors to speculate on share price movements without buying or selling the shares. There were also trades in other financial products.

5. Individuals wishing to invest in CFDs cannot deal directly with the first-tier providers, but must deal with a regulated financial institution, or "second-tier provider", which itself will have an account with the first-tier provider. A second-tier provider, such as Collins Stewart, may engage an introducing broker, such as the claimant, to find potential investors; alternatively it may be the investor who engages the introducing broker.

6. Trades are conducted on a leveraged basis, so that each investor is required to put up a margin of a given percentage of the value of each CFD. The second-tier provider charges each investor (i) a commission on opening and on closing the CFD, and (ii) a daily financing charge, or "funding rebate", for keeping the CFD position open. The figures will be agreed between the investor and the second-tier provider. A proportion of the commission and financing charge may then be paid to the introducing broker pursuant to a contract between the second-tier provider and the broker.

7. There are thus at least three different contractual relationships in play. There is first the contract between the second-tier provider (Collins Stewart) and the first-tier provider.

Secondly there is a contract between the second-tier provider and the investor and thirdly there is a contract between the second-tier provider and the introducing broker. There was no evidence in this case of any written contract between the investor and the introducing broker.

8. The claim arose from events in 2010 when Collins Stewart did business directly with one or more of the investors which Medsted had introduced, thus depriving Medsted of the commission and rebate to which they would otherwise have been entitled.

Relevant events

9. On some date before July 2008, Mr Valasakis of Medsted introduced four individual investors to MAN, an investment institution. The investors wished to trade CFDs and in the event did so via MAN.

10. On 22nd July 2008, Mr Valasakis met Mr Lovett and Mr Jouan of Collins Stewart and Mr Xenophontos, a MAN account executive, with a view to persuading Collins Stewart to replace MAN in respect of the four investors. At that meeting:

    i) Mr Valasakis raised the subject of an introducing broker agreement and a non-circumvention agreement ("NCA"). On 24th July 2018, Mr Valasakis sent to Mr Lovett a draft agreement and a draft NCA; and

    ii) Mr Lovett asked to know the terms on which Medsted and MAN were operating. On 25th July 2018, Mr Xenophontos informed Collins Stewart that the clients paid (i) a commission of 0.7%, of which 0.25% was paid to Medsted; and (ii) a financing charge of 6.2%, of which 4.5% was paid to Medsted.

11. These four investors were subsequently transferred from MAN to Collins Stewart. In late 2008 Mr Valasakis of Medsted and Mr Jouan of Collins Stewart discussed the possibility of further investors being introduced and it was this further business which gave rise to the present claim.

12. The first such new investor introduced by Medsted was Mr Alexis Komninos, who provided margin to Collins Stewart on about 11th or 12th May 2009. Shortly afterwards Mr Valasakis sent Mr Jouan two documents, a draft "Introducing Agreement" and a note headed "Commission Proposal to Collins Stewart". The judge held that the parties agreed the terms of the former document by their conduct over the subsequent months so that it was to be treated as setting out the terms of their contract.

13. Those terms recorded at the outset that Medsted would introduce clients to Collins Stewart and that "Collins Stewart will execute separate agreements with these clients". It also recorded that "Medsted acknowledges that it is not an employee of Collins Stewart and has no power or authority to enter into agreements on Collins Stewart's behalf".

14. The contract also provided that "Collins Stewart will pay Medsted a commission and funding rebate in relation to CFDs or any other product placed with Collins Stewart by customers introduced by Medsted to Collins Stewart. Such payments will be made monthly in arrears". As the judge explained in his judgment (para 28) it can be calculated from the contract that Collins Stewart agreed to pay Medsted commission at

a rate of 0.25% and pay it rebate in respect of financing at a rate of 4.5%. To the extent no rate was agreed in respect of a particular product, it was an implied term that Collins Stewart was to pay a reasonable rate of remuneration (para 80).

15. It was common ground that by March 2010 Medsted had introduced 16 investors and that those investors subsequently traded in various financial products via Collins Stewart. Those introductions were made under the terms of the contract between Medsted and Collins Stewart as found by the judge, and so Collins Stewart was obliged to pay commission and rebate to Medsted in respect of that trading. However, while Collins Stewart paid commission and rebate on some of that trading, it did not pay it on all such trading. Rather, as the judge put it, "in 2010 Collins Stewart did business directly with one or more of the clients on terms which cut out Medsted from any right to claim its share of commission or funding rebate".

16. In particular, on 3rd March 2010 Mr Jouan spoke with Mr Komninos prior to Mr Jouan's planned trip to Athens. They discussed the possibility of obtaining further business from Mr Ioannis Panagiotopoulos, who was another investor introduced to Collins Stewart by Medsted. They made a plan to hold meetings behind Medsted's back about such business, Mr Komninos saying that any business should "stay between you and me". It may be that Mr Komninos had already found out how much Medsted were charging but the judge (paras 45 and 46) makes no explicit finding to that effect.

17. The next month Mr Jouan had further discussions with Mr Komninos in which they agreed that Mr Komninos and Mr Panagiotopoulos would open new accounts with Collins Stewart which would be hidden from Medsted. Mr Komninos would be treated as the introducing broker on those accounts and Collins Stewart would itself receive new and higher rates on those accounts. The judge does find (para 48) that on this occasion Mr Komninos told Mr Jouan that he had sought to persuade Medsted to reduce its charges but that it had refused.

18. Mr Komninos and Mr Jouan then put this scheme into action from the end of April 2010, with Collins Stewart opening the new accounts without telling Medsted. Part of this scheme involved opening accounts in the name of corporate entities which were beneficially owned by Mr Komninos and Mr Panagiotopoulos, with the express purpose that the different names would assist in hiding the trading from Medsted.

19. At the same time, Collins Stewart kept Mr Komninos' and Mr Panagiotopoulos' original accounts open and both clients continued to do some trading through those accounts (and Collins Stewart paid commission and rebate to Medsted on that disclosed trading). However, the essence of Medsted's complaint is that Collins Stewart concealed the fact of the larger volumes of trading which was carried out through the hidden accounts.

20. It was common ground that Collins Stewart had to disclose on a regular basis all trading information of the introduced clients so that Medsted could calculate the commission and rebate due to it. The judge found that Collins Stewart was in breach of that obligation and of the concomitant obligation that it would not circumvent Medsted by dealing directly with clients introduced by it. He also found that Medsted suffered loss when trades were done behind its back because it was disabled from exercising its right to commission and rebate on those trades. Those losses were caused by Collins

Stewart's willingness, in breach of contract, to find a means of continuing to do business with Mr Komninos and Mr Panagiotopoulos but excluding Medsted.

Medsted's appeal

21. Medsted says that the above findings would have entitled it to an order for the assessment of substantial damages. However, the judge went on to hold in three paragraphs towards the end of his judgment that Medsted was in fact only entitled to an award of nominal damages. His basis for doing so was that Medsted owed fiduciary duties to the introduced investors, which it breached by failing to tell them how much of the commission and funding charges agreed to be paid by the clients to Collins Stewart was payable by Collins Stewart to Medsted (i.e. the precise split of commission and funding rebate as between Collins Stewart and Medsted). This led the judge to describe the commission paid to Medsted as "secret commissions". It was on the basis of this supposed breach of fiduciary duty as between Medsted and the clients that he concluded that he should deny Medsted any substantive recovery from Collins Stewart on public policy grounds. In particular, the judge considered that the court ought not to assist Medsted in profiting from its own breach of fiduciary duty by allowing it to recover substantial damages for Collins Stewart's breach of contract. He expressed himself as follows:-

> "134. On the one hand, given that secret commissions are "objectionable as they inevitably tend to undermine trust in the commercial world" (see FHR European Ventures LLP v Mankarious [2015] AC 250, para 42, per Lord Neuberger PSC), it can be said that the court should not assist Medsted to recover its secret commission. On the other hand, Collins Stewart agreed to pay commission to Medsted, knowing (see Mr Jouan's telephone call with Mr Valasakis on 13th May 2009 and the e-mails sent by Mr Valasakis and Marios on 5th February 2010) that the split was to be kept secret from the clients. In those circumstances it may be said that Collins Stewart cannot take the benefit of the objectionable secret commission of which it was aware.
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> 135. The competing policy arguments were identified by counsel but the court was given little guidance as to how the conflict should be resolved. There is authority for the proposition that the remedy of damages can be denied on the grounds of policy, namely that damages cannot be claimed where the root of the damage was the claimant's own wrong: see Weld-Blundell v Stephens [1920] AC 956, 976 (although the decision in that case can also be explained on the basis of causation, see the discussion in McGregor on Damages, 19th Ed (2014), para 8-207). In my judgment the court should not assist Medsted to profit from its own breach of fiduciary duty to its clients. Were it to grant Medsted judgment for substantial damages to be assessed it would be doing so. For this reason the court cannot give such judgment. Medsted is only entitled to nominal damages for Collins Stewart's breach of contract."

22. There are six grounds of appeal:-

1) The decision of Teare J to refuse relief, other than an award of nominal damages, on the ground of public policy was unjust because of a serious procedural irregularity and/or the judge's failure to give Medsted a proper opportunity to address him on the point.

2) Medsted did not owe fiduciary duties to the clients that it introduced to the respondent.

3) Medsted did not breach any fiduciary duties owed to the clients.

4) The judge misapplied the principles of public policy (including the ex turpi causa principle) in reaching his decision.

5) The judge wrongly disallowed Medsted's claims in respect of secret trading by the respondent with the introduced clients that did not involve any breach of fiduciary duty on the part of Medsted towards the introduced clients.

6) The judge was wrong to conclude that the appellant had no claim in debt to its share of the commission and funding rebates requested (or at a reasonable rate in respect of other trading) in respect of the secret trading because such commission and rebates were never received by the respondent.

Procedural irregularity

23. This is based on the assertion that, although breach of fiduciary duty was pleaded and argued in relation to the sixth issue which the judge was asked to decide (namely whether there was any implied term of the contract between Medsted and Collins Stewart that Medsted would not mislead the investors about the division of the commission charges), an issue on which Medsted won, the alleged consequences of any breach of such duty, if it existed, were not spelled out until para 328 (8)(c) of Collins Stewart's closing submissions, so that Medsted never had any proper opportunity of dealing with it.

24. I would reject this submission since (1) Medsted could have asked for time to deal with it if it had really thought such time was necessary and (2) the public policy aspect of the damages claim raises a point of law which can be adequately dealt with by an appellate court. Mr Byam-Cook for Medsted tentatively submitted that any relationship between Medsted and the investors would not be governed by English law but there was (and is now) no evidence that the content of any such law is any different from English law.

25. I would therefore reject the first ground of appeal and turn to the real battleground between the parties.

Fiduciary duty as between Medsted and the investors

26. The judge considered that he had to decide whether Medsted was under any fiduciary duty to the investors in order to decide whether there was any implied term in the contract with Collins Stewart that Medsted would not mislead the investors. His conclusion was (para 95) that Medsted was under a fiduciary duty to the investors and

(para 97) that it was in breach of the duty by failing to inform the investors how the commission and funding rebate was split between itself and Collins Stewart. It was this finding of breach of fiduciary duty that formed the first stepping-stone to the conclusion that Medsted cannot recover damage for breach of the NCA on the grounds of public policy. It was therefore, the first prong of Mr Byam-Cook's substantive attack on the judgment.

27. He submitted first that there was no contract between Medsted and the investors at all, secondly that, if there was a contract, it was not a contract of agency and thirdly that, whether there was a contract or not, the relationship was not a fiduciary one. The judge only dealt expressly with the third way of putting this case. He held that (para 89) the facts and circumstances of the case had to be examined to see whether the investors reposed trust and confidence in Medsted, that the investors were "vulnerable to any disloyalty by Medsted" (para 94) and that the relationship was therefore a fiduciary one.

28. Mr Byam-Cook wished to submit that there was no contract (let alone a contract of agency) because he wished to rely on the statement in Bowstead and Reynolds on Agency 21st ed. (2018) para 1-020, note 54 that, in the absence of contract, it would be difficult to say there was a fiduciary relationship. It may be the case that an agent who merely effects an introduction and then drops out of the picture would not be subject to any fiduciary duty but even he, if he is paid a commission, will probably have a contract with his "client".

29. I have, so far, avoided the use of the word "client" and have used the more neutral term "investor" so as not to prejudge the contractual question. But there is no doubt in the present case that Medsted regarded Mr Komninos and the other investors as its "clients". It may be that once the introduction to Collins Stewart was effected and the investors made their own contracts with Collins Stewart, those investors can be regarded as clients of Collins Stewart also, but as between Medsted and Collins Stewart the investors were Medsted's clients who were introduced to Collins Stewart. There was thus a legal relationship between them and whether it was a contractual relationship or a relationship giving rise to a duty of care does not, in my view, matter a great deal. The question, for present purposes, is whether that relationship is a fiduciary one.

30. The judge's primary findings of fact were (para 90) that the clients were wealthy Greek citizens and that it was likely that they were experienced investors who lacked liquidity and could not deal with a first-tier provider of CFDs. He continued:-

> "…and so the role of the broker, such as Medsted, was to introduce them to a regulated financial institution, such as Collins Stewart, who could deal with a first-tier provider of CFDs. There was no other evidence of the relationship between the clients and Medsted. The clients were not paying a commission to Medsted and so must have assumed that Medsted was receiving payment from the financial institution."

He said later (para 93):-

> "There is no evidence of any advice or recommendation which Medsted gave to the clients. But it is to be inferred that Medsted

> at least impliedly represented to them that the terms offered by Collins Stewart were competitive."

31. Mr Byam-Cook challenged this last finding and said that in the absence of an agency contract there could not be any such implied representation. He referred us to para 91 of UBS AG v Kommunale Wasserwerke Leipzig GmbH [2017] 2 Lloyds Rep 621 in which Lord Briggs of Westbourne and Hamblen LJ recorded a submission of Lord Falconer that "a relationship could never be identified as one of agency if none of the main characteristics, namely authority to affect the principal's relationship with third parties, fiduciary duty or control by the principal was present". They said:-

> "We would not be mindful to go quite that far, but the absence of any of these main characteristics must nonetheless be a significant pointer away from the characterisation of a particular relationship as one of agency, even though there may be rare exceptions."

If one reads this passage literally it appears to go further than Lord Falconer's submission. That submission was that if "none" of the three characteristics one to be found, there would be no agency whereas the majority of the court said that in the absence of "any" the three characteristics there was unlikely to be agency.

32. Be that as it may, the context of this (I think) ultimately obiter observation was that Value Partners (who was already a fiduciary agent of KWL) had agreed to abuse those fiduciary duties for the purpose of bringing KWL as a captive to UBS as a counterparty to the transaction in issue and that UBS would assist Value Partners in doing so for their mutually corrupt benefit. It was submitted that Value Partners became an agent for UBS in the scope of whose authority a relevant bribe to KWL'S employee was paid. That is a very different context from that of this (more straightforward) case in which the issue is whether Medsted was acting on behalf of its introduced clients at all. It may well be that Medsted did not have authority to bind the clients (who made their own arrangements with Collins Stewart) and was not controlled by its principals in any relevant case, because they were, as Mr Valasakis said in his oral evidence, free to do what they wished. But in this case those factors cannot, to my mind, be determinative especially if the judge was right to say (as I think he was) that Medsted

> "at least impliedly represented to them that the terms offered by Collins Stewart were competitive."

To that extent at least the clients/investors reposed trust and confidence in Medsted; to my mind that gives rise to a duty which can be legitimately categorised as "fiduciary".

33. That is not, however, the end of the matter because one still has to ask what the scope of that "fiduciary" duty is.

Scope of the duty

34. One of the main ingredients of an agent's fiduciary duty is that he must not receive (or agree to receive) a secret commission from a third party. The judge decided that this is what happened in the present case but, in the light of his finding in para 90 that the clients must have assumed that Medsted was receiving payment from Collins Stewart,

his conclusion that the commission, which Medsted was receiving, was "secret" is an overstatement of the position. The clients knew that Medsted was being paid commission by Collins Stewart; what they did not know was the amount of that commission. The question to my mind is therefore whether it was within the scope of Medsted's duty to its clients to inform them how the commission was to be divided between itself and Collins Stewart.

35. This question was addressed by this court in Hurstanger Ltd v Wilson [2007] 1 WLR 2351, one of the authorities relied on by the judge for the imposition of what I may perhaps call a full fiduciary duty. In that case the agent introduced a borrower to a lender and took his commission from the lender; the loan agreement was expressed to be for £8,000 including a broker's fee of £1,000; the lender subsequently paid the broker a further commission of £240. The agreement was subject to the provisions of the Consumer Credit Act 1974 which was contravened in respect of an additional fee of £295 plus interest on termination in respect of the lender's administrative costs because the provision did not express the amount of that payment in the right way. When the borrower defaulted he claimed to rescind the loan agreement in its entirety because of the breach of the Act and (on the first day of the trial (see para 8)), because the lender had paid the additional sum of £240 by way of a secret commission to the broker who was acting for him (the borrower). The recorder had refused rescission and allowed the lender to enforce the agreement save for the provision about administrative costs. Mr and Mrs Wilson, before making the loan agreement, had signed a pre-contractual document which stated, "In certain circumstances this company does pay commission to brokers". The recorder held that, in the light of this statement, the payment of £240 was not a secret payment. This court, however, held the payment of £240 was the payment of a secret commission and, while upholding the order for possession, ordered the lender to pay back to the borrowers the amount of that secret commission plus interest.

36. Tuckey LJ (with whom Jacob and Waller LJJ agreed) said that the broker was the agent of the borrower, that their relationship was a fiduciary one and that the broker had put himself into a position where he had a conflict of interest so that he could only act if the borrower had consented with full knowledge of the material circumstances and the extent of his (the broker's) interest. He cited (para 36) the then current edition of Bowstead and Reynolds (now para 6-086 of the 21st ed.) in the following terms:-

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

37. He then said:-

> "Here I think the requirement is more special. Borrowers like the defendants coming to the non-status lending market are likely to be vulnerable and unsophisticated. A statement of the amount which their broker is to receive from the lender is, I

> think, necessary to bring home to such borrowers the potential conflict of interest.
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> 37. There is nothing about any of this which should come as a surprise to any lender or broker working in the non-status lending market…"

He continued:-

> "38. Obviously if there has been no disclosure the agent will have received a secret commission. This is a blatant breach of his fiduciary duty but additionally the payment or receipt of a secret commission is considered to be a form of bribe and is treated in the authorities as a special category of fraud in which it is unnecessary to prove motive, inducement or loss up to the amount of the bribe. The principal has alternative remedies against both the briber and the agent for money had and received where he can recover the amount of the bribe or for damages for fraud where he can recover the amount of any actual loss sustained by entering into the transaction in respect of which the bribe was given: Mahesan s/o Thambiah v Malaysia Government Officers' Housing Co-operative Society Ltd [1979] AC 374, 383. Furthermore the transaction is voidable at the election of the principal who can rescind it provided counter-restitution can be made: Panama and South Pacific Telegraph Co v India Rubber, Gutta Percha and Telegraph Works Co (1875) LR 10 Ch App 515, 527, 532-533.
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> 39. But "the real evil is not the payment of money, but the secrecy attending it": Chitty LJ in the leading case of Shipway v Broadwood [1899] 1 QB 369, 373. Is there a half-way house between the situation where there has been sufficient disclosure to negate secrecy, but nevertheless the principal's informed consent has not been obtained? Logically I can see no objection to this. Where there has only been partial or inadequate disclosure but it is sufficient to negate secrecy, it would be unfair to visit the agent and any third party involved with a finding of fraud and the other consequences to which I have referred, or, conversely, to acquit them altogether for their involvement in what would still be breach of fiduciary duty unless informed consent had been obtained. There is no authority which sheds any light on this question."

38. Tuckey LJ then concluded as follows:-

> "…the only disclosure made to the defendants was by means of the claimant's document which the defendants signed. The broker's letter said nothing about any disclosure which he had made; nor did Mr Fellows suggest that anything else had been disclosed by anyone. By signing the document the defendants must be taken to have understood what it said but no more. Quite

> apart from this, the passage from Bowstead & Reynolds on Agency which I have cited in para 35 says that it is for the agent to establish that sufficient disclosure has been made. Here the claimant knew that the broker was the defendants' agent and so it had to show that it paid commission to him in circumstances where its borrowers had given their informed consent to such a payment. That was obviously the purpose of the document the defendants were asked to sign. The question is whether it achieved that purpose.
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> 43. Did it negate secrecy? I think it did. If you tell someone that something may happen, and it does, I do not think that the person you told can claim that what happened was a secret. The secret was out when he was told it might happen. This was the recorder's view and I agree with him.
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> 44. Was the defendants' informed consent obtained? I do not think it was. The passage which I have quoted was muddled although, read carefully, for the reasons given by Mr Seymour, it may not in fact have been ambiguous. But it could and should have been clearer and informed the defendants that a commission was to be paid and its amount and done so in terms which made it clear that the defendants were being asked to consent to this. I also think this statement should have been accompanied by the warning recommended by the Office of Fair Trading to the effect that its payment to the broker might mean that he had not been in a position to give unbiased advice.
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> 45. So for these reasons I do not accept either party's submissions about the disclosure. This is a half-way house case. The claimant did not pay the broker a secret commission but procured the broker's breach of fiduciary duty by failing to obtain the defendants' informed consent to the broker acting in the way he did.
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> 46. This conclusion means that the defendants are not entitled to deploy the full armoury of remedies which would have been available if this had been a true secret commission case."

39. In the not dissimilar case of McWilliam v Norton Finance (UK) Ltd [2015] 1 All ER Comm 1026 (on which the judge also relied to hold that the relationship of Medsted and Collins Stewart was a fiduciary one), there was again no doubt that the defendant had been engaged as the claimant borrower's broker to arrange a loan. The borrower paid the broker a fee and commission based on a proportion of premium for payment protection insurance but, unknown to the borrower, the broker also received additional commissions from the lender in respect of both the loan and the insurance transactions. The recorder had held that the commissions had been paid to someone other than the broker and dismissed the claim. This court held that that defence could not be advanced and that the documentation did not adequately alert the borrower to the possibility that the broker might receive the additional commissions because he was not told how much

they would be. The broker was therefore held liable to account to the borrower for the commissions it had received.

40. Tomlinson LJ (with whom Mitting J and Sir Robin Jacob agreed) held that the broker was acting in a capacity which involved trust and confidence and in concluding that the broker was so acting, said:-

> "41. In that regard one critical factor is the nature of the borrowers. This was not "non-status" lending as defined by the Office of Fair Trading in its Guidelines for lenders and brokers, OFT 192 revised November 1997. Non-Status borrowers are there defined as those with impaired or low credit ratings who would find it difficult generally to obtain finance from traditional sources on normal terms and conditions. The Claimants did not fall into that category. They were not however financial sophisticates. They were people of relatively modest means with a history of credit problems. They were vulnerable, in that they had debt which was for them substantial in respect of which they needed assistance in finding a loan to ease the burden of servicing that debt and to put them a position where they could carry out an improvement to their home."

41. The broker who had gone into liquidation was not represented but the court considered a skeleton argument relying on the well-established practice of insurance brokers receiving their commission from insurers or reinsurers and not by arrangement with their own principals. This court held that the authorities recognising that practice turned on customary usage or practice which did not apply to payment protection insurance sold to consumers but it did not cast any doubt on Tuckey LJ's distinction between secret commissions and commissions of which the existence but not the amount was known. No doubt the unsophisticated nature of the borrower would have been relevant (as it was in Hurstanger) if such a point had been raised.

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 Komninos, for example, had already dealt through MAN).

43. In one respect, moreover, the amount of the commission paid in the present case is less "secretive" than it was in Hurstanger because the clients knew that all the commission was payable by Collins Stewart; there was no question, as there was in Hurstanger, that any extra commission was being paid over and above what had been agreed.

44. I would, therefore, hold on the present facts that, even though no trade usage was relied on, there was no duty on Medsted to disclose to its clients the actual amount of the commission it was due to (and did) receive from Collins Stewart. It may well be that, as the judge held, it did impliedly represent that the terms offered by Collins Stewart were competitive and that, if the terms were in fact uncompetitive, the clients would have had some remedy. But the judge made no finding that the rates were in fact uncompetitive and, in a case where the complaint is made not by the clients but by the third party in order to avoid paying the commission that is otherwise due, the judge was hardly in a position to do so. Mr Hodge Malek QC for Collins Stewart asserted to us that the rates were in fact unreasonable being much more than double what Collins Stewart themselves retained; but this court is in no better position than the judge to assess that proposition.

45. Mr Malek also relied on the well-known statement of a fiduciary's duty by Millett LJ in Bristol and West Building Society v Mothew [1998] Ch 1 at page 18:-

> "A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary. As Dr Finn pointed out in his classic work Fiduciary Obligations (1977) p 2, he is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary."

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. As Lord Wilberforce said in New Zealand Netherlands Society 'Oranje' Inc v Kuys [1973] 1 WLR 1126, 1130 A:-

> "the precise scope of [the duty] must be moulded according to the nature of the relationship."

See also Hospital Products Ltd v United States Surgical Corporation (1984) 156 CLR 41, 102 per Mason J:-

> "… it is now acknowledged generally the scope of the fiduciary duty must be moulded according to the nature of the relationship."

46. I would therefore hold that, on the facts which the judge found, Medsted was not under a duty to the clients to disclose the exact amount of the commission it was receiving or, to put the matter another way, to the extent that Medsted was the fiduciary of its clients it was not a breach of that duty for it not to disclose the amounts of commission it was receiving.

47. There is therefore no basis on which Collins Stewart can say that public policy requires no damages to be awarded. The judge's decision not to award any damages was premised (para 134) on his conclusions that the relevant payments were "secret commissions" but, as Tuckey LJ observed, commissions which are known can hardly be described as "secret". I would in these circumstances uphold grounds (3) and (5) of this appeal and order damages to be assessed.

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48. It is therefore unnecessary to consider the question whether, if Medsted had been in breach of duty, it would nevertheless be entitled to recover damages. If the commissions had been truly secret and Medsted truly in breach of its fiduciary duty, one can see the argument. But, with respect to the judge, there is no consideration of the question in the light of the Supreme Court's decision in Patel v Mirza [2017] AC 467 and in particular of the third requirement for non-recovery (para 120 per Lord Toulson JSC) that it be a proportionate response to the illegality.

49. If it had been relevant, I would myself have given more weight than the judge appears to have done to his finding that Collins Stewart agreed to pay Medsted's commissions knowing that the split was to be kept secret from the clients (paras 24, 45 and 134). If therefore there was a breach of fiduciary duty, it was a breach to which Collins Stewart was a willing party and I cannot see that there is any disproportion in allowing Medsted to recover even if the position might be that any sums so recovered might in fact be held on trust for the clients.

50. Nor does it seem to me that total disallowance of damages for breach of the NCA is proportionate. On any view Medsted must have been entitled to charge some reasonable commission and Collins Stewart should at least be obliged to pay that.

51. As it is, however, it is unnecessary to reach any final conclusion on these difficult questions and I would prefer not to do so, since their resolution is not essential to the disposal of this appeal. I would therefore make no order in respect of ground (4) of the appeal. I would agree with the judge that Medsted's claim is a claim for damages and not a claim in debt and would reject ground (6).

Conclusion

52. As I have indicated the appeal will be allowed on grounds (3) and (5) and an order for damages to be assessed should be made.

Lord Justice Peter Jackson:

53. I agree.

Lady Justice Asplin:

54. I also agree.