



Neutral Citation Number: [2019] EWCA Civ 88

Case No: A3/2018/0816

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

His Honour Judge Keyser QC
[2018] EWHC 29 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/02/2019

Before:

LORD JUSTICE LONGMORE
LORD JUSTICE PETER JACKSON

and

LADY JUSTICE ASPLIN

Between:

PRINCE ARTHUR IKPECHUKWU EZE

Appellant

- and -

CONWAY and ANOTHER

Respondent

Mr Edmund King QC (instructed by **Watson Farley & Williams Llp**) for the **Appellant**
Mr Matthew Collings QC and **Mr G L Darbyshire** (instructed by **Kennedys Law Llp**) for
the **Respondent**

Hearing dates: 11th- 12th December 2018

Approved Judgment

Lady Justice Asplin:

1. This is an appeal from the order of His Honour Judge Keyser QC, sitting as a Deputy High Court Judge in the Business and Property Courts (Chancery Division), dated 19 March 2018 and sealed on 21 March 2018. The appeal is concerned with whether the law in relation to bribes and secret commissions is engaged in the circumstances of this case and the nature of the relationship which must exist between the proposed recipient of a secret payment and a contracting party before the effect of the promise to make the payment renders a contract between that contracting party and the promisor in relation to the secret payment void or unenforceable. The Judge gave judgment for the Respondents, Richard and Deborah Conway, (“Mr and Mrs Conway”) in the sum of £1,041,389, having found that the contract for the purchase of 86 Uphill Road, London NW7 4QE (the “Property”) was enforceable despite the promise of payment of a fee by them to a Mr Richard Obahor (“Mr Obahor”) which was not revealed to the Appellant, Prince Arthur Ikpechukwu Eze (“Prince Eze”) who was the purchaser. The citation for his judgment is [2018] EWHC 29 (Ch).

Background

2. I take the essential facts from the judgment, which contains a detailed consideration of all of the relevant circumstances. As this matter turns, in part, upon the precise nature of the relationship between Mr Obahor and Prince Eze, it is necessary to set out the facts in some detail.
3. Turning to the facts themselves, on 7 August 2015 Mr and Mrs Conway and Prince Eze exchanged contracts for the sale of the Property to Prince Eze for £5million. Prince Eze subsequently decided not to proceed with the purchase and failed to comply with two notices to complete. The Conways commenced these proceedings for damages for breach of contract and claimed losses, including the difference between the price agreed with Prince Eze and the price achieved on the subsequent sale of the Property to another purchaser, and bridging finance costs which they incurred to enable them to proceed with their purchase of another property, whilst giving credit for the deposit of £500,000 paid by Prince Eze on exchange of contracts. Once he became aware of the material facts, Prince Eze defended the claim on the principal basis that the contract was concluded following the Conways’ promise to pay a bribe or secret commission to his agent, Mr Obahor, which Prince Eze contended rendered the contract void or at least voidable and unenforceable by them.
4. The Conways had placed the Property on the market in 2010 at an asking price of £7 million, which was reduced to £5,495,000 in 2012. They felt, nevertheless, that the prospects of achieving a sale price of £5million were not good. This was borne out by the expert evidence. Their expert’s evidence was that it was worth £4.5-4.75 million in the period April – August 2015 and the expert on behalf of Prince Eze considered that it was worth £4.2 million.
5. Mr Obahor is a UK based Nigerian property developer, property manager and “acquisition agent”. The Judge found that his work as an acquisition agent involved finding UK properties for British and foreign investors and that sometimes he looked for a property for a specific client, whilst on other occasions he found a property and then looked for a client who might be interested in purchasing it. The latter was the order of events in this case. The Judge found that in either case, Mr Obahor’s role

typically involved not only finding the property but also co-ordinating the activities of all those involved in the transaction in order to ensure that they were doing what needed to be done at the right time. See judgment at [8].

6. Mr Obahor viewed the Property on 6 April 2015 and told the Conways that he was acting on behalf of a Nigerian person whose identity was confidential, although in fact he had no client interested in purchasing the Property and was proceeding speculatively in the hope of finding a client in the future. Negotiations were commenced directly between Mr Obahor and Mr Conway and within a few days a price of £5 million had been agreed, subject to contract. Mr Obahor considered the purchase price as representing an “ok deal”. He informed the Conways that his client would wish to complete the purchase by the end of May 2015. The agreement was recorded in a memorandum of sale dated 15 April 2015 which named Roudo Limited, a Nigerian company in which Mr Obahor had an interest, as the purchaser. The Conways instructed solicitors and asked for proof of funds to be sent to that firm. It was received the next day, 16 April 2015.
7. Having raised the topic of a “finder’s” or “introduction fee” on the first visit to the property, Mr Obahor raised the issue a second time when he re-visited the property on 18 April 2015 and Mr Conway indicated that, if necessary, he would be prepared to pay £75,000, being 1.5% of the purchase price.
8. On 27 April 2015, Mr Obahor contacted Prince Eze for the first time and mentioned the property. They had had no previous dealings and did not know each other. Mr Obahor stated that he had negotiated the price down from £5.5 million to £5 million and expressed the opinion that it was a “good deal”. He also mentioned that he wanted a 3% fee, being £150,000. Prince Eze agreed the fee, made it clear that he wanted to proceed with the transaction and told Mr Obahor to get in touch with his independent private wealth adviser, a Mr Richard Howarth, to progress matters. It was accepted that no one told Prince Eze that the Conways were paying Mr Obahor a 1.5% fee at that time, or at any time until after these proceedings were commenced.
9. Prince Eze contacted Mr Howarth, informed him about the transaction and told him to monitor what was going on and to “tell him the truth”. As the Judge recorded at [29] of the judgment, in cross examination Prince Eze had stated:

"So then he call me. He tell me about the property. I said, 'Go ahead, but contact Howard [scil. Richard Howarth], a British man.' When I found out it's a Nigerian I say, 'Get in touch with the British man so I can know the truth what's going on.' Then I phoned Howard and said, 'This man is going to call. Please monitor what's going on, tell me the truth regards ..."

“I just ask him, 'Go ahead'—and it is less than two minutes—'Go ahead, contact Richard.' [Q. And that was really it?] Yes, because I know Richard, I don't know Obahor very well. So get in touch with Richard. Richard will advise me, tell me truth."

Mr Howarth was also required to “oversee the mechanics of the transaction”, arrange the necessary finance, provide any necessary “know your client” information and identify the corporate vehicle to be used in the purchase. When Mr Obahor contacted

him that day, 27 April 2015, Mr Howarth informed him that the Prince would purchase the property through Azarvale Ltd (“Azarvale”) a company registered in the British Virgin Islands which was owned by Prince Eze and administered by Confiance Ltd, a financial services company based in Guernsey (“Confiance”). Mr Howarth contacted a Mr Chick of Confiance and introduced Mr Obahor who sent further details of the proposed purchase. On 29 April 2015, Mr Chick confirmed the name of Azarvale’s solicitors, BPE Solicitors, and on 30 April he sent an email to Mr Howarth asking him to provide due diligence documentation concerning Azarvale. That email was forwarded on to Prince Eze without reference to Mr Obahor.

10. In the following days and weeks, Mr Obahor communicated with the Conways and those dealing with the matter on behalf of Prince Eze “with a view to progressing matters” including moving towards exchange of contracts. On 6 May 2015 he emailed Mr Howarth to see how things were progressing and in response to a query about whether he could speak to Prince Eze to move things along, Mr Obahor replied that “Prince has clearly indicated he wants all requirements/funding instructions to come from you.”
11. On a third visit to the Property on 21 May 2015, Mr Obahor told the Conways that his client would not pay him a finder’s fee and that they would have to pay him the 1.5% (£75,000) fee which he had previously mentioned. He also threatened to introduce his client to another property and abort the transaction if they did not make the payment. The Conways agreed to pay the fee if Mr Obahor really could not persuade his client to do so. It was untrue that Prince Eze would not pay a fee and in addition, the Judge found that Mr Obahor would not have “scuppered” the deal.
12. In late May, in order to provide the Conways with false comfort in relation to the continuing delay, Mr Obahor sent them false information about the source of Azarvale’s funds which he said he had provided to them in breach of confidence. He even patched the Conways into a confidential telephone conversation with Mr Howarth without the latter’s knowledge. In late May, Mr Chick of Confiance told Mr Obahor that the solicitors were satisfied with the due diligence procedure but asked him to arrange a survey of the Property. Mr Obahor did instruct surveyors but required them to carry out a valuation instead. A valuation report valuing the property at £5million was produced. The Judge found nothing amiss about Mr Obahor’s decision to instruct the particular surveyors and stated that he had no reason to suppose that they carried out the valuation with other than “full integrity”, albeit that the expert evidence called into question its accuracy. The Judge rejected Mr Obahor’s evidence that he had instructed them to carry out a valuation instead of a survey because he did not want to jeopardise the transaction or his commission as a “further example of his attempt to explain his motivation in ways he thinks most helpful to Prince Eze”. See the judgment at [46].
13. Mr Obahor attended the property again on 1 June 2015 and brought with him a draft agreement for the payment of his “introduction fee”. Mr Conway re-typed the draft agreement making a slight modification and it was signed by both Mr and Mrs Conway and by Mr Obahor "for and on behalf of Fresco Property Services Ltd" (“Fresco”). It was addressed to the Conways’ solicitors and headed “Agreement of Fees for the Sale of 86 Uphill Road, London NW7 4QE”. Where relevant, it was in the following terms:

“We, Mr Richard Conway and Mrs Deborah Conway of 86 Uphill Road, Mill Hill, London NW7 4QE, hereby instruct you to pay the sum of

£75,000, inclusive of all sales and other taxes, to Fresco Property Services UK Ltd upon completion of the sale of the property known as 86 Uphill Road, Mill Hill, London NW7 4QE for the sum of £5,000,000 (five million pounds) providing the client was introduced by Fresco Property Services.

Once this authority is given, both sides agree that the agreement cannot be revoked.”
(the “Promise”)

It is not in dispute that, although the payment was to be made to Fresco, the Conways were aware that Mr Obahor would benefit from it. The agreement was not forwarded to the Conways’ solicitors. Further, having rejected Mr Obahor’s evidence that he and the Conways agreed that the agreement be kept secret from Prince Eze, the Judge found that although the Conways failed to ensure that the agreement was brought to the attention of Prince Eze, neither did they try to keep it secret: see [49] of the judgment.

14. At this time Confidence was having difficulty obtaining information from Prince Eze about the source of the funds for the purchase by Azarvale and Mr Obahor asked Mr Howarth to try to get the Prince to move more quickly. Mr Howarth’s response by email of 1 June 2015 was:

“My advice, for what it is worth, is to concentrate on your end of the transaction and leave Prince to his side. If he is serious then you will get the funding, but in his time, which no amount of pushing and shoving will alter. He will understand the urgency—it is your job to buy him as much time as you can.”

15. The Judge found that in early June 2015 Mr Obahor was misleading everyone in order to keep the transaction alive and “although Mr Obahor was acting as a go-between and was the point of contact with the Conways, he was not in a position either to dictate to Azarvale with respect to the transaction or, though he certainly did communicate with BPE Solicitors, to give them instructions on Azarvale’s behalf.” See [51] of the judgment.
16. On 21 June 2015, Mr Obahor telephoned Prince Eze and told him that the involvement of the corporate vehicle was jeopardising the purchase and that it would be better if he purchased in his own name. The Judge found that in addition “doubtless Mr Obahor said to Prince Eze something to the effect that the purchase represented a good deal”. See [52] of the judgment. Prince Eze decided to proceed to purchase in his own name. On 22 June 2015, BPE Solicitors emailed Mr Obahor to confirm that upon receipt of funds from a UK bank account in Prince Eze’s name, they would have everything necessary to proceed. The writer went on to state that she would need authority from the Prince to take instructions from Mr Obahor.
17. On 24 June, as the Judge records at [57] of the judgment:

“ . . . Mr Obahor sent an email to Mr Howarth, attaching four documents for Prince Eze’s signature: the TR1 transfer form; the contract of sale; a letter authorising Mr Obahor to act (Mr Obahor commented in the email: “As the acquisition agent Prince needs to authorize me so that I can

process manage the transaction"); and BPE Solicitors' terms and conditions of business. The email read in part:

"I tried arranging an appointment with Prince yesterday to get him to sign the relevant docs but I haven't had any joy, I am assuming this is because he wants you to be the one to present the docs to him for signing. I assume so because he had previously requested/insisted that everything comes through you."

Exactly when Prince Eze had requested or insisted that everything come through Mr Howarth is uncertain, but he clearly had done so, at least vis-à-vis Mr Obahor. This is consistent with the tenor of the evidence of Mr Howarth and Prince Eze that Mr Howarth as a longstanding and trusted adviser was to have some form of general oversight of the entire transaction, albeit that he was not being looked to for advice on its merits. However, Mr Howarth confirmed in evidence that Prince Eze had never told him that everything was to go through him."

18. Thereafter, on 25 June 2015, Prince Eze met Mr Obahor in London and, at his request, signed his part of the contract for the purchase of the Property and the transfer form TR1. The completion date was left blank. He also signed a letter dated 23 June and addressed to BPE Solicitors, authorising Mr Obahor of Fresco to act on his behalf in the purchase of the Property. The authorisation, where relevant, was in the following form:

"Re: Purchase of 86 Uphill Road, Millhill London NW7 4QE

I Prince Arthur Ikpechukwu Eze . . . write to confirm that I have authorised Mr Richard Obahor of Fresco . . . to act on my behalf for the purchase of my the (sic) above property.

Mr Richard Obahor will be in regular contact with you throughout the whole purchase process, kindly avail him of what is necessary to facilitate the process as and when required."

The Judge notes at [63] of the judgment that Mr Howarth's evidence was that it was very unusual to confer on an acquisition agent authority of this kind to give instructions to solicitors and that it was the normal role of such an agent to source the property for the client and co-ordinate the various parties to the transaction to make sure everything went according to plan.

19. Prince Eze also signed an agreement headed "Property Acquisition Terms of Engagement", and dated 23 June, between Fresco ("the Provider") and Prince Eze ("the Buyer") under which Prince Eze agreed to pay Fresco the fee of £150,000, being 3% of the purchase price the Property on completion of the transaction. Under the heading "About our Services" it was explained that Fresco could advise and make a recommendation having assessed the client's needs or could merely narrow down the selection of properties and offer no advice or recommendation. Prince Eze acknowledged that no assessment of his particular needs had been made and without a prior relationship of any sort he had been presented with a property that he might be

interested in albeit that he was encouraged by it having been presented as a good deal. Under the heading “Your specific purchase” the agreement provided as follows:

- “A. Fresco Property Services UK Ltd and 'The Buyer' have entered into a primary agreement that 'the provider' (sic) will source for a property for the buyer (sic) for residential or investment purposes.
- B. Fresco Property Services UK Ltd has succeeded in securing for your purchase 86 Uphill Road, Millhill London NW7 4QE
- C. 'The Buyer' agrees to pay A.Fresco (sic) Property Services UK Ltd the fee of £150,000 (One Hundred and Fifty Thousand Pounds) being 3% of the purchase price for this service facility. The Buyer agrees to pay the fee on the day of the completion via the solicitors.
- D. This Agreement shall be governed by and construed in accordance with the laws of England and Wales”

In fact, Prince Eze paid Mr Obahor £150,000 on 29 June 2015 without waiting for exchange or completion of the contract to purchase the Property.

20. After Prince Eze had signed the documentation, Mr Howarth began to facilitate the movement of Prince Eze’s funds with HSBC to BPE Solicitors’ client account and the Prince provided a letter of authority to enable Mr Howarth to deal with HSBC on his behalf.
21. Meanwhile, on 27 June, Mr Conway purported to terminate the proposed sale in favour of another interested party. Mr Obahor called his bluff but by early afternoon, Mr Obahor gave confirmation that his “clients” would be in a position to exchange contracts on the following Wednesday, 1 July, and that, if in the meantime the other interested party incurred surveyors' costs, they would be reimbursed. Mr Conway also demanded the inclusion in the contract of a special condition requiring Prince Eze to pay £50,000 for each month or part month in the event of late completion. Mr Obahor stated that he saw no problem with this but, in fact, it does not seem that such a provision was ever raised with the parties' solicitors, and it was not included in the contract upon exchange.
22. In August 2015 there were extensive discussions between Mr Obahor and the Conways about the completion date, amongst other things. In addition, there was a dispute about whether the Conways should be able to use Prince Eze’s deposit as a deposit on their purchase of another property. Contracts were finally exchanged on 7 August 2015, Mr Obahor having given BPE Solicitors instructions to do so immediately prior to exchange, and having also confirmed that there was no difficulty in allowing the Conways to use the deposit in the way they proposed (despite contrary advice from BPE Solicitors). The Judge stated that the tenor of Mr Obahor’s evidence in this regard was that “he had taken the view that the transaction was going to proceed anyway and that the question concerning the deposit was not an important issue and could be disregarded”. See [78] of the judgment. Completion was fixed for 30 November 2015. The Judge found that Mr Obahor instructed the solicitors as to the completion date “in accordance with his own express instructions from Prince Eze”. See [77] of the judgment.

23. However, on 24 August 2015, Prince Eze spoke to Mr Howarth on the telephone and expressed unhappiness about Mr Obahor having proceeded to exchange contracts. The Judge records as follows at [82] of the judgment:

“An email sent by Mr Howarth to Prince Eze the following morning shows the nature of the conversation:

"Following our telephone conversation last night I am enclosing a copy of the agreement you entered into with Richard Obahor along with a copy of the letter given to the solicitors authorising him to act on your behalf.

I will speak to Nicky Corner this morning and report back with her summary of the position and recommendations for the way forward.

If you no longer wish [scil. wish] Richard Obahor to be involved then it would be sensible to send BPE Solicitors a letter along the lines of the attached.

I will report back as soon as I have further news."

An attachment to the email was a draft letter from Prince Eze to BPE Solicitors rescinding Mr Obahor's authority, instructing them to act only on his (Prince Eze's) instructions, but permitting them to discuss all matters relating to the transaction with Mr Howarth. Prince Eze signed the letter. It is uncertain whether he sent it to the solicitors, but his evidence was that he had done so.”

The Judge found, nevertheless, that Prince Eze did give Mr Obahor instructions to exchange contracts with a completion date at the end of November and that for some reason, the Prince's attitude towards the transaction cooled. See [85] of the judgment.

24. As I have already mentioned, having heard that the Prince did not wish to proceed, the Conways served a notice to complete dated 9 October 2015 followed by another on 30 November 2015. They began these proceedings on 4 March 2016 and on 16 May exchanged contracts for the sale of the Property to a third party for £4.2million with a delayed completion date. By a letter dated 15 December 2016 Prince Eze's solicitors gave notice that they had recently learned of the agreement to pay Mr Obahor the £75,000 fee and, amongst other things, would rely on it in defence to the claim. Thereafter, in November 2017, the Conways' Reply was amended to state that Mr Obahor was not Prince Eze's agent (as had been previously alleged) and that Fresco's agency was limited to introducing the Property and providing acquisition services once the Prince had decided to go ahead with the purchase.

Judge's conclusions

25. The Judge set out the issues with which he was concerned at [95] of the judgment, the first three of which were:

“1) What was the nature of the relationship between the defendant and Mr Obahor/Fresco? More particularly, was that relationship such as to engage the law relating to bribes or secret commissions? (“Issue 1”)

- 2) Did the Disputed Payment Agreement [the Promise] amount to the promise of payment of a bribe or secret commission to Mr Obahor/Fresco? (“Issue 2”)
- 3) If it did amount to the promise of a bribe or secret commission, what are the consequences?” (“Issue 3”)
26. Having set out the law on bribes and secret commissions in some detail at [96] – [106], the Judge held that the relationship between Mr Obahor and Prince Eze was not such as to engage the law on bribes: see [110] of the judgment. He held that the “starting point [was] that initially Mr Obahor was nobody's agent” (see [111] of the judgment). As his reasoning is central to this appeal, I will set it out in full:

“112. When Mr Obahor first contacted Prince Eze, on 27 April 2015, he told him of the opportunity to purchase the Property, told him it was a good deal, and told him of his requirement for a commission of 3% of the purchase price. Prince Eze said that he would proceed with the purchase and told Mr Obahor to contact Mr Howarth in order to progress matters. None of that involves either agency or any other kind of relationship that could fall within the scope of the rules on bribes or secret commissions. Mr Obahor was, so to speak, presenting a pre-packaged deal for which, if it were taken up, he required a percentage commission. So far from being an agent, he was in substance a salesman acting on his own behalf and for his own commercial interest. Nothing in the initial conversation entitled Prince Eze to assume that Mr Obahor would not get paid by the vendors. There was no inherent reason why he should not be paid by either side or, indeed, by both. There is nothing untoward or particularly unusual in an introducing agent receiving commission from both parties to a transaction; cf. *Bowstead* at para 1-020, above. In the present case, Mr Obahor had not even acted as agent for Prince Eze in sourcing the Property. Further, by 27 April the Conways had already agreed in principle to pay a fee to Mr Obahor. As a matter of fact there was nothing objectively wrong in them so agreeing. Prince Eze did not know that the Conways were to pay Mr Obahor, but nor did they know that Prince Eze was to pay him. That is the context in which subsequent events are properly to be considered.

113. Mr Obahor was told to contact Mr Howarth in order to progress matters. He was not thereby made an agent in any significant sense of the word. Despite his efforts to persuade me of the contrary, Prince Eze was looking to Mr Howarth to oversee matters and give him any necessary advice. That does not, of course, mean that he expected Mr Howarth to give advice as to the property market or the merits of the Property. It means, rather, that, trusting Mr Howarth from long association, Prince Eze was relying on him to ensure that the transaction proceeded properly—to “tell [him] the truth”, as he put it. As Mr Obahor had acknowledged on 6 May (with particular reference to finance) and again on 24 June (with more general reference), Prince Eze wanted everything to go through Mr Howarth. As Prince Eze acknowledged, he did not have any real knowledge of Mr Obahor. Contrary to his present claims to the

contrary, he did not regard Mr Obahor as a trusted adviser; rather he was someone who could provide a ministerial service in progressing matters.

114. What followed until late June 2015 was at most an attenuated form of agency. Mr Obahor was not being instructed to do anything beyond facilitate the progress of a transaction that was desired by both vendor and purchaser and was intended to be to their mutual advantage. He had authority to receive and communicate information but he had no ability to affect Prince Eze's legal position vis-à-vis the Conways. The directors of Azarvale, acting through Mr Chick, had the legal control of the transaction and Mr Howarth was in charge of the financial side. Mr Obahor's function was to chivvy them and Prince Eze to do their bit when required and to encourage the Conways in the face of prolonged delays. In instructing surveyors, he was performing a ministerial function on the instructions of Mr Chick for Azarvale. I reject the suggestion that the fact that he either did or could perform that function in a manner that was capable of affecting the outcome of the process constituted him a fiduciary within the terms of Christopher Clarke J's dictum properly understood. Whether the information provided by the surveyors was satisfactory for the purposes of the purchase was a matter for the directors of Azarvale and, subsequently, for Prince Eze. The context, already mentioned, remains important: Mr Obahor had introduced the transaction as a salesman, not as an agent; he had his own commercial interest in the transaction proceeding, and there was nothing untoward in either or both parties paying for the introduction. The only promise of payment by the Conways was of commission for the introduction, upon completion. They did not, for example, promise to pay a fee for the use of a particular surveyor. In my judgment, matters stood essentially as they had done at the outset on 27 April.

115. The final stage came with the signing of the documents on 25 June. It is at this stage that Prince Eze gave to Mr Obahor an authority that was, as Mr Howarth observed, very unusual for an acquisition agent. However, the following matters need to be borne firmly in mind. First, the agreement to pay Mr Obahor was made in principle before there was any relationship at all between him and Prince Eze and was formalised at a time when Mr Obahor was not Prince Eze's agent in any relevant sense. Second, the basic context, as mentioned above, remained unchanged. Third, Prince Eze had signed the purchase contract. The only provision remaining to be completed was the completion date. Fourth, the authority given to Mr Obahor was for the purpose of dealing with the solicitors to bring the purchase to fruition. Having regard to the terms of the letter of authority and to the fact that Prince Eze had signed the contract, Mr Obahor's authority could not properly be construed as extending to anything other than progressing the purchase in accordance with the agreed terms of the contract. Mr Obahor certainly did have authority to instruct the solicitors to exchange contracts; that, however, was simply authority to instruct them to make the contract that Prince Eze had signed. There is nothing to indicate that he had authority to change the terms of the agreement. Fifth, the only contractual term that remained outstanding

was the completion date. This concerned not the substance of the agreement but the time when the agreement would be completed. Even if the promise of payment made at a time when no relevant agency existed could in principle engage the law on bribes, it is fanciful to think that in the circumstances as they obtained the question concerning the completion date created a position of potential conflict of interest and duty. Moreover, the facts show that on this matter Mr Obahor acted on instructions from Mr Howarth and Prince Eze himself. The true position, in my judgment, is that Mr Obahor's authority was, as Mr Collings submits, ministerial for the purpose of facilitating the progress of the contract that Prince Eze had signed and wanted brought to fruition. Insofar as this involved him in making decisions on what he rightly regarded as minor points, there was no real as distinct from fanciful conflict between his interest and his duty.”

27. The Judge went on to state that if he had reached a different conclusion on the nature of the relationship of Mr Obahor and Prince Eze and whether it was capable of engaging the law of bribery and secret commissions, he would have held that the Promise was an agreement to pay a bribe or secret commission (see [116] of the judgment) (Issue 2) and that Prince Eze had a common law right to rescind the agreement to purchase the Property and even if he had taken a different view, would have concluded that rescission should be granted in equity. See the judgment at [156] and [157]. (Issue 3)

Grounds of Appeal and Respondent's Notice

28. The grounds of appeal are: that the Judge was wrong to find that the relationship between Mr Obahor and Prince Eze was such that Mr Obahor was incapable of being bribed and that the payment of £75,000 by the Conways did not have the effect of rendering the agreement to purchase the Property, void or voidable, for the reasons set out at [115] of the judgment; that the Judge wrongly attributed significance to the fact that Mr Obahor had not identified the Prince as principal when he negotiated the initial terms with the Conways (see judgment at [111]), wrongly thought that on the facts, Mr Obahor's authority was ministerial and that that was relevant (see judgment at [115]), wrongly thought that it was relevant whether there was a real or fanciful conflict between Mr Obahor's duty and his interest and wrongly concluded on the facts as found that there was no real prospect of such conflict, erroneously misapplied the dictum in *Novoship (UK) Limited v Mikhaylyuk*, wrongly thought that there was “nothing untoward” with the Conways agreeing to make a secret payment and wrongly thought that Prince Eze should have envisaged that Mr Obahor could properly be paid by the Conways without his knowledge; and that the Judge was wrong to state that the effect of the secret payment was to render the contract voidable rather than void.
29. If Prince Eze's appeal is successful, the Conways seek to uphold the judgment in their favour on the grounds that the Judge was wrong in his *obiter dicta* in relation to Issue 2 and Issue 3. In summary, it is said that the Judge was wrong not to distinguish between a bribe and a secret commission, and not to conclude that the agreement to purchase the Property was unaffected by the secret commission whether in law or equity and that to impeach the contract between the principals was disproportionate and wrong in the circumstances.

Issue 1 – Is the Law of Bribery and Secret Commissions Engaged?

30. Mr King QC, on behalf of Prince Eze, submits that: (i) the Judge was wrong to decide that the promise of a secret payment to a person acting in a purely “ministerial” role in relation to a transaction does not engage the law of bribery and secret commissions; (ii) that on the facts of this case as he found them, the Judge was wrong to find that Mr Obahor’s role was purely “ministerial”. He says that if he succeeds in relation to either of these matters, his appeal must be allowed. Mr Collings QC on behalf of the Conways formulates the questions slightly differently. He says that in order to engage the law of bribes and secret commissions, Prince Eze must show that there was a fiduciary relationship between him and Mr Obahor, that the Promise related to that fiduciary relationship and that there was a realistic prospect that that relationship would be impugned by the promise. He submits that the Judge’s findings in relation to Mr Obahor’s role are findings of fact and should not be disturbed.

Nature of the Appeal and Role of the court

31. It seems to me that Mr King’s challenge to the Judge’s finding that Mr Obahor’s role was merely “ministerial” goes to the Judge’s consideration of all of the evidence before him and his evaluation of that evidence in the light of the law, and that his second challenge goes directly to the Judge’s factual findings. The Judge reached his evaluative judgment having considered in detail the written evidence before him, and having heard all of the protagonists cross-examined. In this regard, it is important to note that the Judge had serious reservations about the veracity of Mr Obahor and Prince Eze in particular, in relation to their relationship and the centrality of the role played by Mr Obahor in the transaction with which this appeal is concerned and that he took these matters into consideration when making his findings. He described Mr Obahor as “quite happy to lie whenever he deems it to be in his own interest to do so” but that “he does not lie for the sake of it;” and that “this means, strangely, that much of his evidence is truthful, accurate and reliable.” The Judge went on to state that there were two central areas in which Mr Obahor’s evidence “has to be viewed with particular caution” the first (which is relevant to the appeal) being “the supposed centrality of his role in the abortive purchase”. The Judge also noted that Prince Eze tried to make too much of points which he felt supported his case including the trust he reposed in Mr Obahor. The Judge also went on to mention three matters concerning the relationship between Mr Obahor and Prince Eze which caused him concern. They were: that when assessing the reliability of witnesses, the £150,000 fee paid by Prince Eze to Mr Obahor, to which I shall refer below, had not been returned; the unconvincing evidence about their contact since 2015; and his conclusion that they had not told the whole truth and that they were “concealing something”. See the judgment at [9] and [12].
32. Before turning to the issues, therefore, it is important to bear in mind the role of the court on an appeal of this kind. As Sales LJ explained in *Smech Properties Limited v Runnymede Borough Council, Crest Nicholson Operations Limited, CGNU Life Assurance Limited* [2016] EWCA Civ 42 at 27, (a case concerned with the exercise of judicial discretion) in such circumstances:

“...the task for this court in looking to see whether the judge was ‘wrong’ so that the appeal should be allowed is to ask whether the judge had legitimate and proper grounds for reaching the decision [s]he did, rather than simply for this court to approach the matter completely afresh and make up its own mind without regard to what the judge decided.”

Sales LJ went on, where relevant, as follows:

“29... Where an appeal is to proceed, like this one, by way of a review of the judgment below rather than a re-hearing, it will often be appropriate for this court to give weight to the assessment of the facts made by the judge below, even where that assessment has been made on the basis of written evidence which is also available to this court. The weight to be given to the judge’s own assessment will vary depending on the circumstances of each particular case, the nature of the finding or factual assessment which has been made and the nature and range of evidential materials bearing upon it. Often a judge will make a factual assessment by taking into account expressly or implicitly a range of written evidence and making an overall evaluation of what it shows. Even if this court might disagree if it approached the matter afresh for itself on a re-hearing, it does not follow that the judge lacked legitimate and proper grounds for making her own assessment and hence it does not follow that it can be said that her decision was ‘wrong’.”

33. Similar statements of principle can be found in the speech of Lord Hoffmann in *Biogen Inc v Medeva plc* [1997] 38 BMLR 149 (at page 165) and in the often-quoted judgment of Clarke LJ in *Assicurazioni Generali SpA v Arab Insurance Group* [2003] 1 WLR 577 at [16] where he said:

“Some conclusions of fact are, however, not conclusions of primary fact of the kind to which I have just referred. They involve an assessment of a number of different factors which have to be weighed against each other. This is sometimes called an evaluation of the facts and is often a matter of degree upon which different judges can legitimately differ. Such cases may be closely analogous to the exercise of a discretion and, in my opinion, appellate courts should approach them in a similar way.”

34. This passage was approved by Lord Mance in *Datec Electronic Holdings Ltd v United Parcels Service Ltd* [2007] 1 WLR 1325 at [46] as the correct test for the Court of Appeal to apply when faced with appeals against evaluative judgments. It is appropriate therefore, to give proper weight to the Judge’s assessment of the evidence in this case including, in particular, his conclusions having heard the cross examination of the protagonists and experienced the atmosphere of the courtroom, and having done so to determine whether he had legitimate and proper grounds for reaching the decision he did rather than approaching the matter entirely afresh.

Bribes and Secret Commission

35. The nature of a bribe and the circumstances in which the law on bribes and secret commissions applies was considered succinctly by Christopher Clarke J as he then was in *Novoship (UK) Limited v Mikhaylyuk* [2012] EWHC 3586 (Comm) at [104]-[110] which where relevant is as follows:

“*Bribery*

104. In *Industries and General Mortgage Co Ltd v Lewis* [1949] 2 All ER 573 Slade J defined a bribe as follows (at page 575):

'For the purposes of the civil law a bribe means the payment of a secret commission, which only means (i) that the person making the payment makes it to the agent of the other person with whom he is dealing; (ii) that he makes it to that person knowing that that person is acting as the agent of the other person with whom he is dealing; and (iii) that he fails to disclose to the other person with whom he is dealing that he has made that payment to the person whom he knows to be the other person's agent.'

105. A bribe was defined even more succinctly by Leggatt J, as he then was, in *Anangel Atlas Compania Naviera SA v Ishikawajima-Harima Heavy Industries* [1990] 1 Lloyd's Rep 167 at 171, as:

'A commission or other inducement which is given by a third party to an agent as such, and which is secret from his principal.'

106. The essential character of a bribe is, thus, that it is a secret payment or inducement that gives rise to a realistic prospect of a conflict between the agent's personal interest and that of his principal. The bribe may have been offered by the payer or sought by the agent. There is no need to establish dishonesty or corrupt motives. This is irrebuttably presumed - *Re A Debtor* [1927] 2 Ch 367 at 376 (*per* Scrutton LJ – "*the court ought to presume fraud in such circumstances*"). A bribe encompasses not just a payment of money but the conferring of any advantage or benefit, and may be an actual benefit or merely the promise of a benefit held out by the payer or an expectation of one. The motive for the payment or inducement (be it a gift, payment for services or otherwise) is irrelevant. In *Fiona Trust v Privalov* [2010] EWHC (Comm) at para 73 Andrew Smith J contemplated that moonlighting for a person engaged in transactions with the principal might well give rise to a conflict between the agent's interest and duty and that the reward for his services might count as a bribe.

107. The payments (or other benefits) do not have to be made directly to the fiduciary. Bribes may be paid to third parties close to the agent, such as family members or discretionary trusts, or simply to those whom the agent wishes to benefit. The test is whether the payment (or other benefit) puts the fiduciary in a real (as opposed to a fanciful) position of potential conflict between interest and duty.

108. The recipient of the bribe (or the person at whose order the bribe is paid) must be someone with a role in the decision-making process in relation to the transaction in question e.g. as agent, or otherwise someone who is in a position to influence or affect the decision taken by the principal. There is, however, no need to show that the payer intended the agent to be influenced by the payment or whether he was *in fact* influenced thereby. There is an irrebuttable presumption as to both, and that the principal has suffered damage in the amount of the bribe -

Hovenden & Sons v Milhof (1900) 83 LT 41 CA *per* Romer LJ at page 43; *Industries & General Mortgage Co Ltd v Lewis* (above) at *per* Slade J at pages 576 to 578; *Mahesan v Malaysian Housing Society* [1979] AC 374 PC at pages 380E and 383A-C; *Daraydan Holdings Ltd v Solland International Ltd* [2005] Ch 119, *per* Lawrence Collins J at para 53.

109. The payment need not be linked to a particular transaction - *Daraydan Holdings v Solland International* (above) at para 53; *Fiona Trust v Privalov* [2010] EWHC (Comm) at para 73 (*per* Andrew Smith J). It is sufficient if the agent is tainted by the bribery at the time of the transaction between the payer of the bribe and payee's principal. If that is so, the agent's conflict of interest means that the principal has been deprived by the other party to the transaction of the disinterested advice of his agent and is entitled to a further opportunity to consider whether it is in his interests to affirm it. It follows that subsequent transactions may be tainted by payments linked to an earlier transaction between the parties, or by a payment not linked to any particular transaction. "*If a secret payment is made to an agent, it taints future dealings between the principal and the person making it in which the agent acts for the principal or in which he is in a position to influence the principal's decisions, so long as the potential conflict of interest remains a real possibility*": see *Fiona Trust* at para 73.

110. The underlying rationale for the strict approach taken by the cases is that a principal is entitled to be confident that an agent will act wholly in his interests."

36. The promise of a payment even if it is not eventually paid, therefore, can amount to a bribe or a secret commission: *Shipway v Broadwood* [1899] 1QB 369 *per* Chitty LJ at 372 and 373 and the *Novoship* case at [106]. Furthermore, it is not in dispute that the payer or promisor takes a "hazardous course" if he does not tell the person with whom he intends to contract and whose agent is to be the recipient about the payment or promise rather than trusting to the payee to do so. Only actual disclosure will do: *Grant v Gold Exploration and Development Syndicate Ltd* [1899] 1 QB 233 *per* Collins LJ at 249.
37. Furthermore, an agent of one principal cannot become the agent of the other without the permission of the first with whom he originally established his agency and therefore he cannot receive a commission from the second principal without the full knowledge of the first: *Fullwood v Hurley* [1928] 1 KB 498 *per* Lord Hanworth MR and Scrutton LJ at 502 and *Hurstanger Ltd v Wilson & Anr* [2007] 1 WLR 2351 *per* Tuckey LJ at [34] and [38] – [39]. The latter paragraphs also contain a succinct exposition of the law, albeit *obiter*:

"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 v Malaya's Housing Society* [1979] AC374, 383). Furthermore, the transaction is voidable at the election of the principal who can rescind it provided counter-restitution can be made. (*Panama & South Pacific Telegraph Co. v India Rubber, Gutta Percha, and Telegraph Co.* [1875] 9 Ch App 515, 527, 532-3).

39. But "the real evil is not the payment of money, but the secrecy attending it" (Chitty L.J. in the leading case of *Shipway v Broadwood* [1899] 1 QB 369, 373). . ."

38. In order to engage these principles is it enough that the recipient of the payment or the promise is an "agent" of the contracting party of whatever kind or is the requirement more subtle? Mr King says that the principles are engaged where the recipient is someone who has a role in the transaction. He gave examples of the courier who receives a payment to take a longer and slower route so that an important document arrives after a crucial moment or a secretary who is promised a payment if he presents to the board of a company only some of the tenders received in relation to a project. He says that despite what otherwise might be the slender breadth of their duties, the law of bribery is engaged as a result of their conduct in the particular circumstance. It seems to me that that is possible but that it does not progress matters very far. Whether the law of bribery is engaged is dependent upon the nature and extent of the fiduciary duties owed by the recipient of the benefit or promise of a benefit, if any, the nature of the transaction in question and the relevant circumstances. The enquiry is inevitably extremely fact sensitive. This was acknowledged by Lord Upjohn in *Boardman v Phipps* [1967] 2 AC 46 at 127 which was quoted in the passage from *Bowstead and Reynolds on Agency* 21st ed at 6-037 to which we were referred. He stated:

"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*)."

39. It is clear from the authorities that in order for the law of bribery and secret commissions to be engaged there must be a relationship of trust and confidence between the recipient of the benefit or the promise of a benefit and his principal (used in the loosest of senses) which puts the recipient in a real position of potential conflict between his interest and his duty. Not all agents will be in such a position and the relationship may arise where there is no agency at all. It is not helpful, therefore, to consider what might be considered to be the paradigm of any particular type of agent, whether an "introducing agent" or otherwise. It all depends on the nature of the individual's duties and which of those duties is engaged in the precise circumstances under consideration. Although the relationship of principal and agent is a fiduciary one, not every person described as an "agent" is the subject of fiduciary duties and a person described as an agent may owe fiduciary duties in relation to some of his activities and not others. See *New Zealand Netherlands Society "Oranje" Inc v Kuys & Anr* [1973] 1 WLR 1126 (PC) per Lord Wilberforce at 1129H–1130 F.

40. For example, on some occasions, an agent may merely carry out specific instructions and as a result, in the particular circumstances, may not owe fiduciary duties: see *Bowstead and Reynolds on Agency* 21st ed at 6-037. Despite the use of the term “agent” in the older cases, merely to characterise a relationship as one of agency, is not necessarily enough to engage the law of bribes. In *Panama and South Pacific Telegraph Co v India Rubber* (1874-5) LR 10 Ch App 515, for example, agency and the necessary fiduciary duties with regard to the particular transaction were coterminous and therefore, it was unnecessary to use the term with any greater precision.
41. The classic description of a fiduciary is in a passage in the judgment of Millett LJ in *Bristol and West Building Society v Mothew* [1998] Ch 1 at 18A-C and E-F:-

“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), page 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.

...

The nature of the obligation determines the nature of the breach. The various obligations of a fiduciary merely reflect different aspects of his core duties of loyalty and fidelity. Breach of fiduciary obligation, therefore, connotes disloyalty or infidelity. . .”

42. In the context of bribes and secret commissions, where necessary, a broad view is taken of the necessary fiduciary relationship. In *Reading v The King* [1949] 2 K.B. 233, 236, Asquith LJ delivering the judgment of the Court of Appeal stated:

“In most of these cases [viz. cases in which the servant or agent has realised a secret profit, commission or bribe in the course of his employment] it has been assumed that the plaintiff, in order to succeed, must prove that a 'fiduciary relation' existed between himself and the defendant and that the defendant acted in breach of this relation. But the term 'fiduciary relation' in this connexion is used in a very loose, or at all events a very comprehensive, sense. A consideration of the authorities suggests that for the present purpose a 'fiduciary relation' exists (a) whenever the plaintiff entrusts to the defendant property ... and relies on the defendant to deal with such property for the benefit of the plaintiff or for purposes authorized by him, and not otherwise ... and (b) whenever the plaintiff entrusts to the defendant a job to be performed, for instance,

the negotiation of a contract on his behalf or for his benefit, and relies on the defendant to procure for the plaintiff the best terms available ...”

In the House of Lords, ([1951] AC 507) Lord Porter, with whose speech Viscount Jowitt LC concurred, agreed at 516 with Asquith LJ that “the words ‘fiduciary relationship’ in this setting are used in a wide and loose sense”. Lord Radcliffe expressed entire agreement with the Court of Appeal, and Lord Normand and Lord Porter also agreed with the Court of Appeal subject only to minor reservations that are not relevant for present purposes.

43. The real question, therefore, is whether the person receiving the benefit or the promise of a benefit was acting in a capacity which involved the repose of trust and confidence in relation to the specific duties performed rather than on some general basis and whether the payment to him in that capacity was such that a real position of potential conflict between his interest and his duty arose: see *McWilliam & Anr v Norton Finance (UK) Ltd* [2015] 1 All ER (Comm) 1026 per Tomlinson LJ at 1041d and *Novoship* per Christopher Clarke J at [106] and [107]. The requirement that the recipient of the payment or the promise of payment must be someone with a role in the decision-making process in relation to the transaction or someone who is in a position to influence or affect the decision taken by the principal, as referred to in *Novoship* at [108], seems to me to be no more than a means of satisfying the central criterion that the recipient owes fiduciary duties to the principal in relation to the transaction in question and a means of determining the extent of his obligations and fiduciary duties.
44. As I have already mentioned, in order to determine that central question, it is necessary to consider the factual circumstances including the nature of the relationship and the precise task which is being undertaken in some detail. That is what the Judge did in this case. Having set out the law and made findings of fact having heard the cross-examination of all of the protagonists and having weighed all the evidence carefully, he went on to consider whether the nature of the relationship between Prince Eze and Mr Obahor in relation to the transaction in question was such as to give rise to fiduciary duties and a real position of potential conflict between Mr Obahor’s interest and his duty. In summary, he concluded that Mr Obahor started out acting on his own behalf, offered a pre-packaged deal to Prince Eze as a salesman, became a facilitator/“gofer” or “chivvier” in order to progress matters and, finally, was given authority to instruct the Prince’s solicitors in order to exchange contracts but was given express instructions as to exchange and completion. In those circumstances, the Judge decided that the requisite fiduciary duties were not owed by Mr Obahor to the Prince and, accordingly, the law of bribes and secret commissions was not engaged.
45. It seems to me, therefore, that Mr King’s first proposition that the Judge was wrong to decide that the promise of a secret payment to a person acting in a purely “ministerial” role in relation to a transaction does not engage the law of bribery and secret commissions is neither entirely apposite nor fair. The Judge did not decide in the abstract that those who act in a “ministerial” role (a term he adopted from the submissions of Mr Collings) do not attract the provisions of the law of bribery and secret commissions. On the contrary, he considered all of the relevant facts of the relationship between Mr Obahor and Prince Eze in relation to the relevant transaction which was the purchase of the Property, in a very detailed way, made his findings,

applied the law and reached an evaluative judgment about the obligations and the duties attaching to the actual relationship in relation to the actual transaction.

46. The Judge’s use of the label arose in the midst of that detailed assessment of the relevant relationship. It must be understood in the way in which the Judge described it and in context. In particular, he found that: Mr Obahor was “in substance a salesman” having presented a “pre-packaged deal” (see judgment at [112]); Prince Eze “did not regard Mr Obahor as a trusted adviser” and was not an agent “in any significant sense of the word” (see judgment at [113]); “[W]hat followed until late June 2015, was at most an attenuated form of agency. Mr Obahor was not being instructed to do anything beyond facilitate the progress of a transaction . . . He had authority to receive and communicate information but he had no ability to affect Prince Eze’s legal position vis-à-vis the Conways” and his function was to “chivvy” (see the judgment at [114]); and in the final stage when the documentation was signed his authority “could not be construed as extending to anything other than progressing the purchase in accordance with the agreed terms of the contract”, he “acted on instructions from Mr Howarth and Prince Eze” and his authority was “for the purpose of facilitating the progress of the contract that Prince Eze had signed and wanted brought to fruition” (see judgment at [115]).
47. I can see no error in the way in which the Judge carried out his analysis of the facts and it seems to me that he had legitimate and proper grounds for reaching the decision he did. It follows that Mr King’s second proposition, that on the facts of this case as he found them, the Judge was wrong to find that Mr Obahor’s role was purely “ministerial” also fails.
48. In particular, I can see no error in the way in which the Judge carried out his analysis at [111] – [115] of the judgment. First, he was right to concentrate on the actual state of affairs between Mr Obahor and Prince Eze rather than what the Conways believed the circumstances to be. It was only the actual state of affairs between them which could give rise to the obligations and fiduciary duties sufficient to engage the law of bribery and secret commissions. Although it was necessary to analyse the facts including Mr Obahor’s interaction with the Conways with precision, their understanding or belief in relation to his role was irrelevant. The fact that Mr Obahor may have manipulated the Conways so that they believed, for example, that he could derail the transaction, is unfortunate, but it is neither here nor there. Even if he could have done so and would have done so, such influence would not necessarily have rendered him a fiduciary, (although it would be a factor to take into consideration).
49. The same is true of the fact that Mr Obahor presented himself as being on Prince Eze’s “side of the table”, that the Conways understood him to be so and that there may have been “improper collusion” between the Conways and Mr Obahor. These matters would only be relevant if, in fact, Mr Obahor’s relationship with the Prince was such that he was in a position of trust and had such authority that he could affect the transaction. The fact that Mr Obahor may have represented himself or misrepresented himself to the Conways cannot have an effect upon his true relationship with Prince Eze, which is the relevant issue.
50. Secondly, the Judge was entitled to find as he did that Mr Obahor was nobody’s agent at the outset (see judgment at [111]) that he sought a “finder’s fee” from the Conways (see judgment at [26]) and that when Prince Eze came on the scene on 27 April 2015, he was offered a pre-packaged deal. He was entitled to find on the facts that there was

no other relationship between them on 27 April than that of salesman and recipient of information and that Prince Eze's decision to proceed with the purchase and his instruction that Mr Obahor should contact Mr Howarth in order to progress matters did not involve "agency of any other kind of relationship that could fall within the scope of the rules on bribes or secret commissions." Contrary to Mr King's submissions, Prince Eze was not in a position to ratify the arrangements which had been made between Mr Obahor and the Conways prior to 27 April 2015, including the "in principle" agreement to pay a fee to Mr Obahor. Mr Obahor had not been acting on behalf of the Prince at the time, in any way: see *Bowstead and Reynolds on Agency* 21st edition at 2-062, 2-063 and 2-064.

51. What was the position thereafter? Mr Collings accepted that if the relationship between Mr Obahor and Prince Eze had matured into a fiduciary relationship, the Prince having reposed trust and confidence in his agent, it would have behoved Mr Obahor or the Conways to have disclosed the Promise at that stage. It seems to me that the Judge was entitled to come to the evaluative conclusions he did in relation to the relationship post 27 April 2015 and to conclude that the relationship did not mature in that way and that trust and confidence was not placed in Mr Obahor.
52. First, in relation to the Judge's analysis of the period post 27 April 2015, Mr King criticised the Judge's conclusion at [113] of the judgment that telling Mr Obahor to contact Mr Howarth in order to progress matters did not make Mr Obahor "an agent in any significant sense of the word". He submitted that the use of the phrase "significant sense" was an impermissible gloss and that Mr Obahor was Prince Eze's agent at that stage. It seems to me that this is no more than semantics. It is clear from the paragraph as a whole that the Judge was referring to a state of affairs which in his judgment did not give rise to the requisite fiduciary duties and it seems to me that he was entitled to find that requiring Mr Obahor to contact Mr Howarth in order to progress the deal was insufficient to cause him to become the Prince's agent.
53. Secondly, Mr King submitted that although the Judge found that the Prince did not regard Mr Obahor as a trusted adviser, that did not mean that he could not give advice. In this regard, he referred us to *Imageview Management Ltd v Jack* [2009] 2 All ER 666 at [45]. That was a case in which a football agent was held to be in breach of his fiduciary duty. At [45] Jacob LJ noted that "[I]t flies in the face of reality to say that once the terms of Mr Jack's [the Defendant's] contract had been negotiated in principle they could not be reopened." It seems to me that this is of no assistance to Prince Eze. Although it may well be true that an agreement may be re-negotiated, and that the relationship between Mr Obahor and Prince Eze may subsequently have blossomed into one in which advice was sought and given or, to put the matter another way, was given and received, that is not what the Judge found on the facts. The Judge was entitled to find that the Prince viewed Mr Obahor merely as someone who could provide ministerial services to progress matters and not as a trusted adviser.
54. Furthermore, in my judgment, the Judge was entitled to find as he did despite the fact that Mr Obahor had negotiated the price of the Property down to £5m but that figure was still in excess of its true value and that prior to exchange of contracts, Prince Eze had signed an agreement under which Mr Obahor had agreed to source a property. In the light of the fact that the purchase was put forward as a "pre-packaged deal" and that the Judge found that Mr Obahor did not advise or tailor his search to the Prince's specific needs, it seems to me that these factors are irrelevant in themselves. The

negotiation of the price would only take on any significance if Mr Obahor were in a fiduciary relationship with Prince Eze and had advised him about the purchase.

55. It also seems to me that having evaluated all the relevant facts and taken them in the round, the Judge was entitled to come to the conclusion that Mr Obahor was not a trusted adviser despite having informed Prince Eze that the purchase was “a good deal” and an “ok deal”. He had presented the purchase of the Property as a pre-packaged deal in a few short minutes and thereafter, the Prince required everything to be monitored and to go through Mr Howarth. The mechanics were to be undertaken by Mr Howarth and Mr Chick of Confiance and Mr Obahor’s role was as the Judge quite properly described it at [34] of the judgment. He communicated between the Conways and those on Prince Eze’s side “with a view to progressing matters”. That description is entirely consistent with Mr Obahor’s own estimation of matters set out in an email referred to at [37] of the judgment in which he stated that:

“Prince has clearly indicated he wants all requirements/funding instructions to come from you. So please do send him or call him with all the instructions as required . . . Kindly keep me updated.”

It is also consistent with his request that Mr Howarth contact the Prince about funding which is recorded at [40].

56. Thirdly, Mr King says that the Judge was wrong to conclude as he did at [114] of the judgment that what followed until late June 2015 was “at most an attenuated form of agency.” Mr King points out that by this stage, Mr Obahor had already begun to perform duties which were described by Mr Howarth as unusual for someone in Mr Obahor’s position. He had met the Prince in London, obtained his signature on the TR1 transfer form and contract of sale and had obtained written authorisation to act on the Prince’s behalf in the transaction in order that he might be able to instruct BPE Solicitors. It seems to me that this is to seek to parse the judgment. The Judge goes on to deal with the position once Mr Obahor was given authority to instruct BPE Solicitors at [115] of the judgment. His analysis at [114] is concerned with Mr Obahor’s role from 27 April 2015 until he was given authority in relation to the transaction. If paragraphs [114] and [115] are read together, it is clear that the phrase “until late June 2015” at the beginning of [114] is not intended to cover the events after authority was given.
57. Lastly, Mr King submits that the Judge’s analysis at [115] is flawed for two particular reasons. He says that the Judge failed to take proper account of the fact that Mr Obahor was given authority to exchange contracts and that he also agreed to allow the Conways to make use of the deposit in the way which they thought fit. In relation to the authority to act, I can see no error in the Judge’s conclusion that Mr Obahor was merely carrying through the express instructions given to him by Prince Eze and Mr Howarth and that, accordingly, in the circumstances, he was not in a position to affect the Prince’s legal relations with the Conways. As the Judge records at [57] Mr Obahor himself described himself as the “acquisition agent” and stated that the Prince needed to authorise him so that he could “process manage the transaction”. Furthermore, the Judge found that he received express instructions to exchange contracts and as to the completion date. The Judge was entitled to find as he did that Mr Obahor did not freely negotiate those matters as Mr King suggests.

58. The only question arises in relation to the use of the deposit. Mr Obahor's instruction to BPE Solicitors to allow the deposit to be used, contrary to their advice, appears to have been a decision which he reached on his own. Is this exercise of discretion sufficient to change or govern the nature of the relationship which he had with Prince Eze and as a result, was the Judge wrong to find that Mr Obahor did not owe the Prince fiduciary duties? As I have already mentioned, the Judge was entitled to look at the matter in the round and to take account of all of the circumstances and come to the value judgment he did. It seems to me that in the context of the whole, Mr Obahor's instructions in relation to the deposit are insufficient to render the Judge's evaluative conclusion wrong.
59. Accordingly, the Judge was entitled to come to the conclusions he did. I would dismiss the appeal for all of the reasons set out above. In the circumstances, therefore, it is not necessary to consider Issues 2 and 3 which are raised in the Respondent's Notice but which would only have been relevant if the law of bribery had been engaged.

Lord Justice Peter Jackson:

60. I have had the opportunity to read the draft judgments of Asplin and Longmore LJ and agree with both.

Lord Justice Longmore:

61. The present case has an initial similarity to Grant v Gold Exploration and Development Syndicate Ltd [1900] 1 QB 233 but also has an important difference. Mr Grant owned mineral rights in British Columbia and wished to dispose of them. On 26th September 1896 he agreed with Mr Govan who was the managing director of the defendant syndicate (but not known by Mr Grant to be so) to give Mr Govan a 6 month option on his mineral rights to enable him to form a company who would buy and exploit the rights. On successful flotation Mr Grant returned to England and Mr Grant also came later to discuss terms of a proposed sale. During the visit Mr Grant became aware that Mr Govan was a director of the defendant syndicate and then concluded an agreement whereby the syndicate bought Mr Grant's mineral rights for £25,000 in cash and 115,000 shares in the company still to be formed. The shares were allotted to Mr Grant but at Mr Grant's request 10% of those shares were put in the name of a nominee of Mr Govan who had also agreed with Mr Grant. The syndicate then paid part of the purchase price and in due course paid part of the balance and gave a promissory note for the rest.
62. When Mr Grant sued on the note the syndicate defended the claim and counterclaimed for the balance of what it called the secret commission retained by Mr Grant and as yet unpaid by Mr Govan. This court held that the law about secret commissions was engaged because, although the agreement with Mr Govan was initially made without any corrupt intent (page 240 per A L Smith LJ) it was in fact made with a director of the syndicate who owed duties of loyalty and was in a fiduciary relationship with the syndicate. When, therefore, the sale contract was made with the syndicate, the commission became an improper commission. A L Smith LJ emphasised that, by the time of the sale contract, Mr Grant knew that Mr Govan was a director of the syndicate (pages 240-1) and (243) that he also knew the syndicate had no knowledge of the commission to paid to Mr Govan. Collins LJ (page 246) said that Mr Grant from the beginning dealt with somebody whom he knew

“was to stand in a fiduciary relation to the purchaser”

and who, as such, was debarred from receiving a commission from the vendor without disclosing that fact to the purchaser. Vaughan Williams LJ (pages 252-3) regarded the case as initially a commission to be paid by Mr Grant for finding a purchaser of the property but considered it critical that Mr Grant knew the true position at the time of sale. The ultimate result was that the syndicate could recover so much of the commission as still remained in Mr Grant’s hands.

63. What emerges from this decision is that for the law about secret commissions to be engaged, the status of the alleged agent has to be a fiduciary one in relation to his principal. That is clearest from the judgment of Collins LJ who uses the actual phrase “fiduciary agent” but on any view a director (let alone the managing director) of a company has a fiduciary relationship with the company in the fullest sense of that word.
64. HHJ Keyser QC was therefore entirely correct to focus on that question. He considered it in great detail and took into account all the relevant indications pointing either way. It was a careful evaluation leading to his conclusion that Mr Obahor was not regarded as a trusted adviser by Prince Eze but was someone who provided a ministerial service in progressing matters or as the judge put it (para 115):-

“Mr Obahor’s authority was ministerial for the purpose of facilitating the progress of the contract that Prince Eze had signed.”

That is not a conclusion with which, in my judgment, this court should interfere.