Neutral Citation Number: : **[2024] EWHC 374 (Ch)**

Case No: BL-2024-LDS-000003

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURT
BUSINESS LIST (Ch)
LEEDS DISTRICT REGISTRY

The Court House Oxford Row Leeds LS1 3BG

Before :

His Honour Judge Saffman sitting as a Judge of the High Court

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Between :

Expert Tooling and Automation Limited	**Claimant**
- and -	
Engie Power Limited	
	Defendant

- -

Mr Stephen Brown (instructed by BC Legal) for the Claimant
Mr David Lord KC and Mr Stuart Cutting (instructed by Walker Morris) for the Defendant

Hearing date: 6 & 7 February 2024
Date draft circulated to the Parties 15 February 2024
Date handed down: 26 March 2024

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

JUDGMENT

Introduction

1. The claimant, Expert Tooling and Automation Limited, now and at all times relevant to this claim, carried on business as a manufacturer of tools, related equipment and special purpose machinery. It did so from a variety of industrial sites both in the Midlands and in the North East. In this claim it is represented by Mr Stephen Brown of counsel.

2. Inevitably, the manufacturing process requires the consumption of significant amounts of energy. This case concerns 5 contracts that the claimant entered into with the defendant, a supplier of electricity, by which the defendant supplied electricity to the claimant's premises in the North East. The defendant is represented by Mr David Lord KC and Mr Stuart Cutting of counsel.

3. As it had done in relation to prior energy supply contracts, the claimant used the services of Utilitywise plc (UW) an energy broker in order to secure the 5 contracts with which I am concerned. UW entered into administration on 13 February 2019 and was dissolved on 19 May 2022. It is, of course, not a party to this claim.

4. UW held itself out to customers as an expert in the procurement of energy. Its website boasted that it would, "*negotiate with your energy supplier on your behalf*" and that it was, "*renowned for negotiating contracts at the most opportune points in the market*". It claimed to be, "*helping businesses save time, save effort and save money since 2006*" and to have, "*significant buying power, which we use to help our customers find better deals and save money*". UW expressly stated that, "*We are independent and on your side*".

5. Through the brokerage of UW the claimant committed itself to the 5 contracts, all of which provided for the claimant to pay for its electricity on the basis of an agreed price per kilowatt hour (kWh) of consumption. There was one unit price per kWh of consumption during the day and a lower unit price for consumption at night. It is not suggested that this charging structure per se was unusual. The relationship between UW and the defendant was governed by brokerage agreements and side letters to which I shall come.

6. It transpires that the unit price charged to the claimant pursuant to each contract included a sum that was paid by the defendant to UW by way of commission for introducing the claimant to the defendant. That commission varied in respect of each of the 5 contracts and, at least in connection with the first 3 in time of the 5 contracts, that commission was at the rate proposed by UW. This supplement to the base unit charge had the effect of increasing the aggregate unit charge per kWh by a significant percentage ranging from 31% in respect of the first of the 5 contracts to 9% in respect of the last.

7. Suffice it to say that it is agreed that, had the contracts run their course without the intervening insolvency of UW, UW would have received from the defendant by way of commission the sum of £130,449.70. In simple terms and ignoring any issue relating to the rate that, in reality, the claimant could have negotiated with the defendant if it had conducted negotiations direct rather than through an intermediary, the claimant asserts that it paid an excess charge of £130,449.70 for its electricity in the period covered by the contracts.

8. It is conceded by the claimant that it was aware that UW would be paid a commission for brokering the contracts. It is conceded by the defendant that the claimant was not told of the level of commission. The defendant asserts that the claimant was notified that the commission payable to UW would be funded by a supplement added to the unit cost that was equal to the commission payments. The claimant denies that this was its understanding.

9. By this claim the claimant looks to the defendant for the commission element of its electricity bills. It does so on the basis that it was an accessory to UW's breach of its obligations to the claimant. It seeks equitable compensation in that amount or, alternatively, payment for monies had and received.

10. In order for the claim to succeed the claimant must establish first, that UW did indeed breach the obligations that it owed to the claimant and secondly that, in law, the defendant was an accessory to those breaches.

11. It is conceded that UW was the claimant's agent. The claimant asserts that this is a case where the agency was a fiduciary one importing obligations of trust, confidence and single minded loyalty on the part of UW in its dealings with the claimant. The scope of which included the obligation not to put itself in a position where its interests conflicted with those of the claimant. It is contended by the claimant that the commission structure was such that a conflict of interest was inevitable because UW's duty to obtain the best deal for the claimant inevitably conflicted with its own interest in maximising its commission.

12. The defendant denies that, in the circumstances of this case, UW owed fiduciary duties in the strict sense. Even if it did however, it had the informed consent of the claimant to the commission structure. The claimant disputes that.

13. All this leads to a consideration of the duties on an agent who has disclosed to his principal the fact that he is earning a commission but has not disclosed what that commission is. This is the concept of the half secret commission to which I shall come in more detail later.

14. In any event, the defendant asserts that, even if it is established that UW breached its fiduciary obligations, the claimant has failed to establish that the criteria are met for fixing that liability on the defendant as an accessory to the breach.

15. The claim however is not founded exclusively on agency/fiduciary obligations. It is also asserted by the claimant that there were terms to be implied into the contract between it and UW that UW would act in good faith and in the claimant's best interests and the defendant induced a breach of that contract. The defendant denies that, in law it induced a breach.

16. There are 2 further issues with which I am concerned. The first is a limitation point. The first contract with which I am concerned was dated 8 February 2016. This claim was brought on 31 March 2022, some 6 years and 7 weeks later.

17. The defendant contends it is caught by s5 Limitation Act 1980 in respect of the claim for money had and received and/or by the exception to the provision in s36 of the 1980 Act by which claims for equitable relief are not subject to a limitation period.

18. The claimant does not accept that the claim is caught by either s5 or the s36 exception but even if it is, there was deliberate concealment of the cause of action and the claimant can therefore rely on s32 of the 1980 Act with the effect that the claim is in time.

19. This contract is by far the greatest in value. It provided for the defendant to supply electricity at a unit cost that included 5.6p per kWh by way of commission to UW for a period of 5 years from 1 April 2016 to 31 March 2021. The value to UW was just short of £101,000 in commission.

20. The 4 remaining contracts were each for 6 months. Each was entered within the 6 years of the bringing of proceedings. The second contract dated 17 May 2016 took effect from 1 April 2021 until 30 September 2021. The third

contract was dated 28 November 2016 to take effect for 6 months from the day after the second contract expired. Contracts 4 and 5 respectively dated 9 November 2017 and 30 November 2017 were designed to take effect for 6 months each to provide an uninterrupted electricity supply up to 31 March 2023. The commission to be earned by UW from these 4 contracts was respectively £11,863.57, £9,582.12, £4,631.74 and £3,466.30. The commission on the latter 2 contracts was much less than on the first 3 because they were governed by a cap that the defendant placed on commission payable to brokers of 3p/kWh ostensibly to put an end to the "*champagne*[1]" commission that brokers had enjoyed hitherto. I should add that it is interesting to note that contracts 2 to 5 were dated many years before their respective start dates.

21. The second issue relates to quantum. The claimant's assessment of the claim at £130,449.71 is based on the aggregate kWh of electricity consumed over the period covered by the 5 contracts multiplied by that element of the unit price in each contract that reflected UW's commission. In short, it is the amount of commission paid by the claimant.

22. In fact, by reason of the insolvency of UW and various adjustments in terms of accounting between UW and the defendant, the amount of commission actually paid to UW by the defendant was £108,511.29. The defendant argues that if the claim is made out and commission has to be repaid it cannot exceed the commission it actually paid. The dispute therefore is whether compensation is assessed on what the claimant paid to the defendant over and above the base unit cost per kWh or whether it is what the defendant actually paid to UW by way of commission.

23. Mr Brown and Mr Lord have agreed that there are 13 issues to be determined:
    a. Was UW acting as agent for the claimant?
    b. Did UW owe fiduciary duties to the claimant?
    c. If so, what was the nature, scope and extent of any fiduciary duties?
    d. What was the claimant's knowledge in respect of commissions/commission arrangements?
    e. What was the relationship between the claimant and UW?
    f. What was the nature and extent of disclosure provided by UW to the claimant?
    g. What was the nature and extent of disclosure provided by the defendant to the claimant?
    h. What was the nature and effect of the brokerage agreements between UW and the defendant?

1 A description given by the divisional finance director of the defendant in an email of 22 August 2017

i. Did the claimant need to provide informed consent in respect of the commission structure and, if so, was that consent provided?
j. Was UW in breach of any fiduciary duty?
k. Did the defendant procure any such breach by UW?
l. Is the claim in respect of contract 1 statute barred?
m. To the extent of the claimant succeeds, what is the quantum of damages?

24. Finally, in the context of an introduction, it is right to record that this matter was issued in the county court as BPC work. In the defendant's skeleton argument the point is made that "*whilst this case is not for a large amount of money, it is of significant importance due to a number of similar fact cases passing through the courts. The importance of these cases is significant as there have been no reported authorities in the area of secret commissions and energy supply contracts.*"

25. As I understand it, the defendant itself faces at least a further 16 claims and no doubt there are other claims made or proposed against other energy brokers and energy suppliers. I am aware of 3 that have so far been heard in the county court. I was referred to the judgment in 2 of those and a transcript of evidence in the third.

26. In all the circumstances it was thought appropriate to transfer this case to the High Court BPC Business List for hearing.

Evidence

27. The oral evidence in this case was provided by Mr Craig Forster who, at the relevant time, was the claimant's Assemblies and Facilities Manager. It was a fairly senior position albeit he was not a member of the senior management team. Nevertheless, it was, as I have said, a fairly senior position that Mr Forster had worked up to over his 23 years employment at the claimant.

28. It specifically involved, amongst many other duties, responsibility for the supply of energy to the Midland plants. Mr Forster confirmed that he knew the detail of the energy contracts for these plants but he was not an "expert" in energy supply or suppliers.

29. I also heard from Mr Philip Gazeley who is now retired but, at the relevant time, was the general manager of the claimant's facilities in the North East. That too was a fairly senior role which specifically included responsibility for the energy supply to the plants in the North East. He had negotiated the contract for the supply of electricity to the North East operation which ended when the contracts with which I am concerned went live.

30. On behalf of the defendant I heard from Mr Paul O'Connor, a sales director. No oral evidence was forthcoming from anybody employed by UW.

31. As for the claimant, Mr Forster said that at the relevant time it had a turnover of over £50m. It had 140 to 150 employees. It is a fairly large and successful company - even more so now. It now has between 250 and 300 employees and a turnover of between £70m and £80m.

32. At all material times there were 2 directors, Angelo Luciano and Susan Luciano. Mr Luciano headed the company at the relevant time.

33. The relationship between UW and the defendant was governed by brokerage agreements dated 25 June 2015 and 14 July 2016 and variation side letters. Rather than referring to UW as an agent it refers to it as a TPI (Third Party Intermediary). It is true to say that in public documents emanating from Ofgem and to which I shall refer shortly, entities such as UW are also described as TPIs.

34. I shall be corrected if I am wrong but the only significant relevant difference between the 2 brokerage agreements is that by the earlier one commission is payable to UW in arrears based on actual consumption whereas under the 2016 agreement UW received 80% of its estimated commission up front based on estimated consumption by the customer with the balance being paid when the contract had expired.[2]

35. The agreements imposed on UW obligations to:

- "*act in a fair, honest, transparent appropriate and professional manner towards customers" (clause 4.1.8 of the 2015 agreement)*
- *"refrain from using pressurised sales techniques and not to force or pressure a Potential Customer into disclosing information or agreeing a contract and*

will ensure that potential Customers have the opportunity to make an informed decision, free of any kind of pressure" (clause 4.1.10 of the 2015 agreement)

- *"at all times whether prior to providing any product or service or during the provision of the same be transparent with the Potential Customer in relation to all charges and commissions" (clause 4.1.11 of the 2015 agreement)*
- *"in its dealings and performance and this Agreement, and with Potential Customers, Customers and Engie, act in accordance with Good Industry*

2 See defendant's skeleton paragraph 33

Practice and the Behaviours[3] at all times" (clause 4.1.9 of the 2016 agreement)

- *"at all times, be transparent with the Potential Customers in relation to all charges and commissions payable pursuant to this Agreement" (clause 4.1.11 of the 2016 agreement)*

36. Both agreements also provided that:

" UW warrants that it has authority to act on the customer's behalf in relation (1) to procuring and providing to the defendant information relating to its (the customers) electricity and/or gas consumption and supply; (2) for the purpose of obtaining quotations and contracts to supply; and (3) in providing all further information and data that may be required by the defendant on an ongoing basis". (Clause 4.1.1 in both agreements).

37. Finally, both seek to prevent disclosure of details of the agreements to any third party. Clause 8.4 of the 2015 agreement provides:

"Both parties agree not to disclose the details of this agreement or any information disclosed under it to any third party, other than to fulfil their obligations under this Agreement or if required by law or an appropriate regulatory authority, without the written consent of the other party."

That clause is, to all intents and purposes, replicated at clause 12.3 of the 2016 agreement.

38. The side letters to which I briefly referred earlier were in connection with sales campaigns in 2015 and 2016. Each variation stated that *"the defendant and the TPI wish to strengthen the commercial relationship between them and as a result increase the number of potential customers the TPI introduces to the defendant".* The means of doing this was to agree to pay further "*campaign*[4]" commissions to UW up to £5m in 2015 and £6.5m in 2016 but these were subject to clawback if monthly sales targets were not met.

39. UW operated under terms and conditions (T&Cs) which it sought to impose upon the companies with whom it dealt. These could be found on its website. There is no suggestion that the T&Cs were ever sent to the claimant but Mr Lord asserts that the claimant was aware of their existence because they are constantly referred to in other correspondence passing between the claimant and UW and were clearly incorporated into the relationship between UW and the claimant.

3 Behaviours is defined in the agreement as meaning "at all times acting in a fair, honest and transparent appropriate and professional manner with Potential Customers, Customers and Engie and refraining from using pressurised sales techniques and practices"

4 Inadvertently described as "champagne" commissions in Mr Brown skeleton at paragraph 63.He clearly has in mind the description of commissions to which I refer in footnote 1 above.

40. The T&Cs do not specify in terms that UW will receive commission from an energy supplier where they broker a deal but clause 6.3 of the T&Cs seeks to limit UW's liability to the sum not exceeding "*the aggregate commissions received by (UW) from a utility provider in connection with the Services provided to the Customer*".

41. Mr Lord argues that this is a clear indicator that commission is payable and, to emphasise that, he draws attention to the first page of the T&Cs in which it is stated that "*The Customer's attention is particularly drawn to the provisions of clause 6."*

42. There are 2 other clauses in the T&Cs that it is appropriate to mention:

- Clause 4.1.6 obliges the customer to provide "*authority to enter into discussions and/or arrangements with such utility providers as (UW) may determine (as further detailed in the Letter of Authority ……."* The Letter of Authority is defined as "*the Customer's signed letter of authority appointing (UW) as its agent in connection with the Services*"

- Clause 8.5 of the T&Cs provides that "*No party shall have authority to act as agent for, or to bind, the other party in any way.*"

43. It is accepted that the classification of contracts is governed by their substance rather than their form. If a contract clearly creates an agency relationship then an agency relationship exists even if the contract purports to suggest otherwise. The situation is analogous to leases. If a property is occupied under a purported licence that has all the characteristics of a lease then it is a lease. In any event, clause 8.5 seems to be inconsistent with the definition of Letter of Authority referred to above.

44. The first 3 of the contracts between UW and the claimant with which I am concerned were signed on behalf of the claimant by an employee of UW pursuant to a letter of authority.

45. It is suggested by Mr Lord[5] and not challenged by Mr Brown that contracts 1, 2 and 3 were signed by UW's employee pursuant to a letter of authority signed by a Mr David Bland (conceded to be an employee of the claimant) on 1 November 2015.

46. Emails passing between UW and the claimant for the period prior to 7 September 2017 are not available although, bearing in mind that UW and the

5 Defendant's skeleton paragraph 14, 20 and 22

claimant were working together before that time, it is likely that there will have been some email

correspondence. The fact that UW and the claimant had worked together previously is demonstrated by the fact that Mr Bland had entered into contracts for energy supply to the Midlands premises through the agency of UW in as early as 2014. There is in the bundle a letter of authority signed by him dated 9 October 2014. In addition, it appears that Mr Forster had dealings with UW in respect of the renewal of energy contracts for the Midlands.

47. The point is that emails which have been disclosed emanating from UW relating to letters of authority state the following:

"*Please note that, if you have returned a signed LOA (letter of authority), you acknowledge and accept that you have read UW's terms and conditions and your instructions will be deemed agreement by you to be bound by UW's standard terms and conditions.*

The terms and conditions can be found here: " That is followed by the website address.

48. Mr Foster signed a letter of authority in respect of the 4th contract dated 11 September 2017. In his skeleton argument at paragraph 24 Mr Lord makes the point that that authority is indeed more comprehensive than the one signed by Mr Bland because it specifically says, in terms, that the claimant has retained UW "*to act as an energy consultancy service provider to (the claimant) in accordance with their terms and conditions appearing on their website."*

49. As it happens, as I understand it, letters of authority in respect of the 4th contract and the 5th contracts were academic since neither was signed by anybody at UW but rather by Mr Forster and Mr Tony Groves (another employee of the claimant) respectively.

50. Let me turn to the contracts and the quotations that preceded them. The first contract dated 8 February 2016 stated on its face that "*if you use a third party consultant or broker to negotiate your contract the prices quoted may include commission due to them"*. That wording is replicated on the succeeding 4 contracts. There is a question over whether the claimant received copies of contract 1 to 3 signed by the UW employee on their behalf. Clearly it received contracts 4 and 5 because they are signed by its employees.

51. On the specific issue of commissions and the question of what notice the claimant had of them I heard 2 recorded telephone calls between a Mr Dean Jackson, an employee of UW and Mr Forster on 21 January 2016 and between Mr Jackson and Mr Gazeley on 29 January 2016.

52. As regards the conversation between Mr Jackson and Mr Forster, it is clear that it was not the first time these 2 gentlemen had spoken to each other. Mr Jackson apologises for not getting in touch earlier despite a promise to do so.

53. In any event, in the course of the telephone conversation, Mr Jackson confirms that he has negotiated a deal for the supply of energy to the Midlands premises. He explains to Mr Forster what the charges will be, to which Mr Forster says "*right*".

54. Mr Jackson then runs through a script which culminates in him saying to Mr Forster "*and as I'm sure you are as (sic)*[6] *a consultancy, we do get paid a commission from the supplier and as part of your energy package, the price you have accepted inclusive or (sic)* [7] *your utility management plan consisting of the following, that is your dedicated account manager".*

Mr Forster's reply was "*yep*".

55. There was some discussion about what additional services UW would provide which, as I have indicated, apparently included an account manager, some software and a smart meter and then later Mr Jackson tells Mr Forster that if he has any issues he can contact his account manager or he can give Mr Jackson a call and he would be "*more than happy to help you with anything".*

56. It should be emphasised that this conversation related to the supply of energy to the claimant's Midlands operation. The contracts with which I am concerned relate to the supply of energy to the North East.

57. The conversation with Mr Gazeley 8 days later was however indeed about energy contracts for the North East. It does not appear to be in dispute that this call to Mr Gazeley came out of the blue. Mr Jackson appeared to believe that Mr Forster was going to tell Mr Gazeley to expect this call but apparently that did not happen.

58. That did not appear to put Mr Jackson off. He simply launched into his presentation to Mr Gazeley. He told him that the electricity supply to the North East operation was due to end on 31 March 2016. That came as something of a surprise to Mr Gazeley who, albeit he had negotiated the then current contract, had thought that it was for a longer period.

59. Mr Jackson told Mr Gazeley that he had negotiated a deal which would run until 31 March 2021 which coincided with the deals that he had negotiated for Mr Forster in respect of the Midlands operation. Mr Gazeley said that that would be "*better for us".*

6 I suspect that the word "aware" was intended before the word "as". [7] I suspect that the word "of" was intended rather than "or"

60. Mr Jackson told Mr Gazeley that UW would do an energy audit and would help complete applications for feed in tariffs (FITT) in relation to the solar panels on the factories for which Mr Gazeley was responsible. Mr Gazeley thought that would be "*handy*".

61. Mr Jackson then explained to Mr Gazeley what rates he had negotiated per kWh to which Mr Gazeley's reply was "*right*". Mr Gazeley was then told that the new contract would start on 1 April 2016 and run to 31 March 2021 and he did not express any misgivings about that. Mr Jackson then undertook some formalities in terms of formal corporate details which it appears Mr Gazeley willingly supplied.

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62. There is then some talk about direct debits and Mr Gazeley requests that the debit mandate is sent to him and then, towards the very end of the conversation, Mr Jackson says "*we also need to make you aware you should not enter into any more contracts for the same meter with any other supplier including your existing supplier unless we reject this in writing it is a legally binding contract, it is in your best interests that I explained this to you*".[7]

63. Then shortly afterwards Mr Jackson says "*as I'm sure you are aware as a consultancy we do get paid a commission from the supplier as well. Is that okay?* To which the answer given by Mr Gazeley is "*yes*".

64. Then Mr Jackson invited Mr Gazeley to contact him if he had any queries and he gave him his direct line number which Mr Gazeley apparently wrote down. Finally, Mr Jackson tells Mr Gazeley that he is going to lock in this contract with the supplier because if it is not "*locked in straight away we might lose these prices.*"

65. In his evidence Mr Forster does not deny having dealt with UW before the telephone call in January 2016. He describes their staff as a pushy but it seems that, despite the fact that he felt that he was confident enough to look after the claimant's energy supply in the Midlands and had the authority to do so, he welcomed their input because he was by no means a specialist in this area and had his hands full with his other responsibilities.

66. He never read UW's T&Cs. He cannot recall having seen the contract of 8 February 2016 but does not deny that he may have seen it as well as contracts 2 and 3. Clearly he saw contract 4 because he signed it.

7 This is how the transcript appears in the bundle. Having listened to the actual recording though there is in my view no reason to discount the possibility that the words after "existing supplier" are 2 new sentences. Whereby Mr Gazeley is informed that "Unless we reject this in writing it is a legally binding contract. It is in your best interest that I explain this to you".

67. He was shown a contract dated 16 September 2015 made with the defendant for the supply of electricity. Once again this contract appears to have been brokered through UW because it bears the same signature as the first 3 contracts with which I am concerned. He believes that he would have seen this and acknowledged that it specifically indicates that, where the contract is negotiated through an agent, the unit prices quoted may include their commission.

68. He does not deny signing the letter of authority of 11 September 2017 but rather assumes that he may have gone to his line manager for approval before doing so. He says that he was happy with the unit prices given to him by Mr Jackson during the course of their telephone conversation. He never asked if this was the best price that could be achieved, he was more focused on comparing it to the British Gas tariffs.

69. Importantly, he does not deny that he was aware that UW would be charging a commission. His point is that at no stage was he told that the commission paid by the

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suppliers would be added back onto the claimant's energy cost. He assumed that commission would be paid by the defendant simply as an overhead. Furthermore, his evidence is that he did not know how much the commission was. He was not told but he acknowledges that he never asked. He simply assumed that he was getting the best deal.

70. He recognised, when asked by Mr Lord, that he had no evidence upon which to base his assumption that commissions would be funded by the defendant rather than funded by the claimant through the unit cost. He acknowledged that nothing in the paperwork suggested that was the case and neither could it be inferred from anything Mr Jackson said to him. Indeed, he conceded to Mr Lord that his assumptions as to the funding of commissions was "*illogical*".

71. Mr Brown encouraged Mr Forster to think more carefully about what contracts he had actually seen. He questioned why Mr Forster in reality would have had sight of contracts relating to the North East when that patch was outside his jurisdiction. As regards contracts which did relate to the Midlands, he elicited from Mr Forster clear evidence that Mr Forster in reality had no actual recollection of seeing these contracts. As I have said, clearly he must have seen contract 4 because he signed it.

72. Mr Gazeley's evidence was that essentially it was not his understanding that he had approved any deal for the supply of electricity to the premises over which

he had jurisdiction. He acknowledged that he was responsible for securing energy supplies to the North East operation and, as I have said, had indeed negotiated the contract which was due to be succeeded by the contract of 8 February 2016.

73. He was, of course taken through his conversation with Mr Jackson which he contended was his one and only contact with UW. It was Friday afternoon, very close to close of business for the weekend. He found himself speaking out of the blue to a pushy salesman and all he wanted to do was get through the call.

74. His constant refrain was that he did not believe that he was entering into any agreement for the supply of energy from the defendant. He was just listening. He was expecting and, he said, was given to understand, that paperwork would be sent through to him and it was only at that stage, when he signed something, that he would enter into a contractual commitment on behalf of the claimant if satisfied that that is what should be done. He was simply not aware that in law a contract could be made verbally (with of course certain exceptions).

75. As far as he was concerned, he was happy with the prices that Mr Jackson quoted but only provisionally so. He wanted to compare and consider them in an email which he expected would follow on from that telephone conversation. He acknowledged that in the transcript he never asked for any email or indeed any follow on documents other than a direct debit mandate.

76. As for commissions, he assumed that the defendant was going to pay commissions in the same way that Mr Forster appears to have thought. He contended that Mr Jackson's explanation to him of the commission receivable by UW did not suggest anything else.

77. He did not believe he saw any documents relating to UW whether that be letters of authority, or T&Cs. He did not see any of the contracts for energy supply with which I am concerned.

78. Mr Paul O'Connor gave evidence for the defendant. This was not the first time he has given evidence in cases of this nature. I have referred earlier to 3 county court cases involving the obligations that UW owed to customers of the defendant. I believe Mr O'Connor has given evidence in them all.

79. He was taken to some Ofgem reports on the conduct of TPI's involved in the energy market. It was suggested by the claimant that it is well known that TPI's are guilty of exploitative practices.

80. Reference was made to an Ofgem "*Energy Supply Probe*" dated 6 October 2008 relating to SMEs. (Small and Medium Sized enterprises[8]*)* It revealed that:

- "*our research also suggests that there is insufficient trusted information about the range of contract options available, which makes it difficult for SME customers to find and select the one that works best for their business. SME customers are often unable to find useful price comparison data and often doubt whether advice from a TPI is unbiased, complete and relevant to their particular consumption profile."* (paragraph 10.19)

- *"Moreover, our qualitative research highlighted significant concerns about deals agreed over the phone or on the doorstep. Many are unaware that they have entered into a formal energy contract or are unaware of the terms of that contract. Our qualitative research found that only around half of those surveyed remembered seeing a contract from their energy supplier, and some were unaware whether they were subject to a contract. Others had not always read the contract documentation fully or were not aware of their key contract terms. A large number of these consumers agreed contracts over the telephone and did not see their full terms and conditions before, during or after the contract was agreed."* (paragraph 10.23*)*

81. Mr Brown suggested that this demonstrates that, despite the theoretical expectation that business people will scrutinise the terms of their contracts, in practice often they simply do not, particularly where a relationship of trust and confidence has been nurtured by the TPI specifically in order to encourage the customer not to look too closely at the small print. He also suggested that it corroborates the evidence of Mr Forster and Mr Gazeley that they did not see any terms and conditions.

82. Mr Brown also referred to an Ofgem report of 2011 entitled "*The Retail Market Review: Non-domestic Proposals*" in which it is recorded that:

"Our 2008 Probe raised concerns about business customer problems with some TPIs. This included being given misleading information when they signed up to a new contract, and sometimes very little information about who they represented and how they were being paid." (paragraph 4.1)

83. By 2013, Ofgem was actively considering a regulatory framework for TPIs. Ofgem stated that, "*When dealing with TPIs, consumers in both the domestic and non domestic retail energy markets may experience practices that are not fair and transparent*". Ofgem was also seeking regulatory powers in relation

8 The evidence is that the claimant was an SME

to TPI misconduct. Neither of these were in place when the contracts in issue were executed.

84. All this was put to Mr O'Connor to support Mr Brown's assertion that the retail market and the involvement of TPI's in it and their selling practices had something of the Wild West about it and that this fact was well known.

85. Mr O'Connor said that he did not really recognise Ofgem's description of the market, at least so far as the defendant's dealings with TPIs was concerned. He pointed out that the reports are old and that, in any event, the defendant only dealt with a limited number of TPI's (about 5% of that section of the market) and it has faith in the integrity of those TPIs with whom it works.

86. Having said that, he was taken to the transcript of the telephone call involving Mr Gazeley and accepted that that, while it made clear that UW would receive commission, it did not state how that would be funded.

87. As regards receipt of the contracts by the claimant, he acknowledged that new customers are expected to be sent a "Welcome Pack" which would include a copy of the contract but he had not been able to locate that in the case of the claimant.

88. In its defence the defendant pleads, at paragraph 18 that, "*the defendant believed that any commission received by UW had been or would be disclosed by them to the claimant*" and, at paragraph 19, that it "*always assumed that UW would have informed the claimant of the amount of any commission, particularly if any enquiries as to that amount had been made by the claimant."*

89. He was taken to his evidence in earlier cases and in particular *The Dark Blue Pig Ltd v Engie Power Ltd* heard in the County Court at Oxford in March 2023. In his judgment the learned deputy district judge records Mr O'Connor's evidence to be that "*in his extensive experience of the industry he would not have expected a broker like UW to tell the customer about the fact and amount of the commission, though he would expect a customer to be aware that there was commission."* It was accepted by Mr O'Connor that there is an obvious inconsistency between this and the pleaded defence.

90. Also, apparently when asked how this squares with the obligation of transparency that the defendant imposed upon UW through the brokerage agreement his response was that "*to be transparent did not mean disclose."*

91. Mr O'Connor's concession in that case that commission details were unlikely to be disclosed by the TPI to the customer was not an isolated concession. It

was repeated in his evidence as recently as November of last year in the county court case of *Weardale Entertainments Ltd v Engie Power Ltd.* In that case he was asked by the claimant's counsel "*why is it, Mr O'Connor, that in your extensive experience of the industry you would not have expected a broker like UW to tell its customer about the fact and amount of the commission?*" The answer given by Mr O'Connor was *"because that was how the market operated".*

92. Mr O'Connor was questioned about the level of commissions, the effect of which could add in excess of 30% to energy costs. He acknowledged that the defendant knew this was the effect of the commission structure. He did not deny that he appreciated that the commission model could give rise to a conflict of interest – as could the provisions in the side letters relating to clawback if sales targets were not met.

93. Some efforts were made by the defendant to ameliorate the size of the commissions by the introduction of a cap but in fact in this case that cap only applied in respect of contracts number 4 and 5. The email which I refer to in footnote 1 above of 22 August 2017 is of particular interest in connection with the commissions which prevailed before the cap. Mr Gary Proctor, the defendant's Divisional Finance Director not only called them "*champagne*" commissions but acknowledged that customers were exposed to "*extortionate*" rates of commission. Mr O'Connor did not seek to distance himself from that assessment.

94. Turning back to the brokerage agreements and the obligations that it imposed upon UW for transparency etc, he acknowledged that there were no provisions which would entitle the defendant to ensure that UW was complying with its obligations. There was a compliance officer at the defendant but he did not suggest that the compliance arrangements were particularly effective. The department seemed to consist of one person dealing with between 100 and 150 TPI's.

95. He did however point out that there was something of an expectation that UW would comply with its obligations. I was referred to emails from Mr Jackson to the defendant relating to the 2nd and 3rd contracts dated 17 May 2016 and 28 November 2016 respectively. In emails dated 4 May 2016 and 14 October 2016 locking the claimant into those contracts Mr Jackson assured the defendant that "*the customer is aware that there is a fee included."*

96. As to the unit prices paid by the claimant generally, he was taken to the Department of Energy and Climate Change's *Quarterly Energy Prices Review* of June 2016 which suggested that the average unit cost of electricity for SMEs was about 11p per kWh. For their supply in 2016 the claimant was

paying between 17.82p and 19.99p. Mr O'Connor pointed out that the Department's figures were merely averages. An average implied that there were some businesses whose unit cost was considerably higher as well as those whose unit cost would be much lower. Much would depend on the volume of electricity supplied to the business and when it was consumed.

97. He was questioned about the defendant's policy on the disclosure of the size of the commission payable. The claimant's solicitors clearly had problems in eliciting that information from the defendant. There is an email of 15 January 2020 from a Claire Monteiro of the defendant which says that it is "*company policy never to disclose commission uplifts*".

98. In an email from the defendant to the claimant solicitors of 19 September 2021 the defendants say that it is "*unable to disclose the value of the commission without their (UW's) written consent."* UW went into administration in 2019 and was no longer trading.

99. Mr O'Connor conceded that it is not a policy of the defendant not to disclose commissions but, in fact, whenever they were requested to do so they simply referred the customer to the TPI concerned.

100. Finally, reference was made to an Ofgem factsheet dated March 2015 entitled "*Third Party Intermediaries: what your small business needs to know"*. Under the heading "*paying for a TPI's services*" the factsheet explains that "*a TPI will charge for the services it provides you. This could be a direct charge paid by you to them (e.g. a flat fee, a charge per trade made on your behalf) or indirectly. For indirect payments, the TPI receives a payment from the supplier, which is added to your bill. Below is an illustrative example using simple figures to aid understanding:*

101. The factsheet then assumes a basic cost of energy at 10p/kWh, a commission of 1p/kWh and explains that the bill will show 11p/kWh so that if consumption is 50,000kWh the TPI will receive £500 from the supplier.

102. Mr O'Connor conceded that this factsheet was not on the defendant's website.

The Issues

103. I have set out in paragraph 23 above the list of issues to be determined. I shall deal with them in that order save that I propose to deal with limitation first.

Limitation

104. As I have said above, quite clearly this claim was brought after the expiration of 6 years from the contract date. If s5 or the s36 exception apply it is out of time unless saved by s32.

105. s5 *Limitation Act* 1980 states:

An action founded on simple contract shall not be brought after the expiration of six years from the date on which the cause of action accrued.

106. In so far as the claim is based on procurement of a breach of implied terms it is difficult to see how it cannot fall within the purview of this section unless accessory liability or liability for inducing a breach a breach is not a matter of contract but rather an economic tort. In that case however the claimant is in no better position as a result of s2 1980 Act which provides that*:*

An action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued.

107. In fairness to Mr Brown neither in his skeleton argument nor in his oral submissions did he appear to assert otherwise. The thrust of his contentions revolved around s36 and s32 1980 Act and the fact that this is a claim for equitable relief[9].

108. *s36 of the 1980 Act states:*

Equitable jurisdiction and remedies.

(1) The following time limits under this Act, that is to say—
(a) the time limit under section 2 for actions founded on tort;
[
(aa) the time limit under section 4A for actions for libel or slander, or for slander of title, slander of goods or other malicious falsehood;
]1
(b) the time limit under section 5 for actions founded on simple contract;
(c) the time limit under section 7 for actions to enforce awards where the submission is not by an instrument under seal;
(d) the time limit under section 8 for actions on a specialty;
(e) the time limit under section 9 for actions to recover a sum recoverable by virtue of any enactment; and
(f) the time limit under section 24 for actions to enforce a judgment; shall not apply to any claim for specific performance of a contract or for an injunction or for other equitable relief, except in so far as any such time limit may be applied by the court by analogy in like manner as the corresponding time limit under any enactment repealed by the Limitation Act 1939 was applied before 1st July 1940.
(2) Nothing in this *Act shall affect any equitable jurisdiction to refuse relief on the ground of acquiescence or otherwise*

9 I refer to paragraph 4.1 of the Reply dated 5 December 2022

109. It is right to say that, in connection with s36, in his skeleton argument at paragraph 137, Mr Brown merely puts the defendant to proof that the 6 year time limit (what I have referred to as the s36 exception) applies and that the claim is one "*for other equitable relief*" which benefits from the exceptions "*by analogy*" expressed in s36(1).

110. Mr Lord argued that this claim clearly falls into the "s36 exceptions". He cited *Wood v Commercial First Business Ltd (*2019) EWHC 2205 Ch. and in particular paragraphs 176 to 178 in support of that proposition.

111. In *Wood* the learned Deputy High Court Judge said:

> *"176. In Nelson v Rye (1996) 1 WLR 1378 Laddie J had held that breaches of fiduciary duty (other than those giving rise to a constructive trust) were outside the scope of the LA 1980 and were therefore not subject to a period of limitation. In Coulthard v Disco Mix Club Ltd [2000] 1 WLR 707 , however, Nelson was disapproved. The judge, Jules Sher QC, noted that in Nelson there had been no argument as to whether the time limits under the LA 1980 applied by analogy by virtue of section 36. The judge then proceeded to analyse the circumstances in which it is appropriate to apply a statutory limitation period to an action in equity by analogy. The starting point was the speech of Lord Westbury in Knox v Gye (1872) LR 5 HL 656 as follows:*
>
> *"...The general principle was laid down [in]...Lockey v Lockey (1719)... that where a court of equity assumes a concurrent jurisdiction with courts of law no account will be given after the legal limit of six years, if the statute be pleaded... For where the remedy in equity is correspondent to the remedy at law, and the latter is subject to a limit in point of time by the Statute of Limitation, a court of equity acts by analogy to the statute, and imposes on the remedy it affords the same limitation...Where the suit in equity corresponds with an action at law which is included in the words of the state, a court of equity adopts the enactment of the statute as its own rule or procedure..."*
>
> *177. On this basis, so the judge in Coulthard found, it could be seen that (1) where the court of equity was simply exercising concurrent jurisdiction giving the same relief as was available in a court of law, the statute of limitation would be applied; and (2) even if the relief afforded by the court of equity was wider than that available at law, the court of equity would apply the statute by analogy where there was "correspondence" between the remedies available at law or in equity. In Coulthard itself, the judge considered that deliberate and dishonest breaches of fiduciary duty are based on the same factual allegations as common law claims of damages for fraud and that given that the latter claim would be directly barred under the LA 1980, so should the former by analogy under section 36. A similar conclusion was reached by the Court of Appeal in Cia de Seguros Imperio v Heath (REBX) Ltd [2001] 1 WLR 112 where a claim for equitable compensation was found to be barred by analogy*

under section 36 given that the facts on which it was based were identical to those which could have been founded in tort and contact but were directly barred under other provisions of the LA 1980.

178. In short, therefore, to the extent that Mrs Wood's claim in respect of the first secret commission is properly classified as a claim for money had and received it is barred by section 5 of the LA 1980; and to the extent that that claim is in fact better characterised as a claim for equitable compensation, I find that it would nevertheless still be barred by analogy under section 36".

112. Mr Brown did not suggest that this assessment was not the law or that there was anything in this case which justified departing from its principles. It seems clear to me that this claim falls comprehensively within its purview. There is clearly a "*correspondence*" between remedies available at law or in equity in this case.

113. I detected Mr Brown to be more enthusiastic in his contention that in this case the time limit had been postponed by reason of deliberate concealment of facts relevant to the claimant's right of action. This was really the focus of his arguments in his skeleton argument and oral submissions.

s32 1980 Act states so far as is relevant:

(1) Subject to [subsections (3) [, (4A) and (4B)]2]1 below, where in the case of any action for which a period of limitation is prescribed by this Act, either—
(a)the action is based upon the fraud of the defendant; or
(b)any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or
(c)the action is for relief from the consequences of a mistake; the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it. References in this subsection to the defendant include references to the defendant's agent and to any person through whom the defendant claims and his agent.
(2) For the purposes of subsection (1) above, deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty.

114. Mr Brown prays in aid s32(1)(b). He argues that there was deliberate concealment of facts relevant to the claimant's right of action. In his skeleton argument he contends that the level of commission and the "*commission model"* were deliberately concealed. In his oral submissions he argued that the relevant facts that the claimant needed to know to bring a claim, but which were deliberately concealed, were that:

- The claimant was not getting the best deal in terms of the cost of electricity.

- UW was highly incentivised to place business with the defendant in light, not only of the very high commission (which, to all intents and purposes, it set at least in regard to contracts 1 to 3) but also because under the agreement that UW had with the defendant entitled UW to commission up front in anticipation of future earnings but these were liable to be clawed back if the up front payments exceeded the commission actually earned.

- That the claimant did not know the duration of its contracts with the defendant.

- That it did not know the amount of the commission or that in fact it was paying it by means of the supplement added to the basic charge for each unit of electricity supplied.

115. Mr Brown drew attention to paragraph 20.006 of Limitation Periods, 9th Edition by Professor Andrew McGee. It has to be said that this passage does not appear to offer assistance on what is a relevant fact but rather focuses on what is expected in the context of discoverability of that fact with reasonable diligence. It will be remembered that to avail oneself of the provisions of s32 a claimant does not just need to be the victim of deliberate concealment. Time will run for limitation purposes from the moment that that concealment could have been discovered by the claimant if he had acted with reasonable diligence.

116. Mr Brown argues by reference to paragraph 20.006 above referred to that the claimant was entitled to believe that UW was acting in its best interest. This is what UW told the claimant it would do and, as Tuckey LJ observed in *Collins v Brebner* (2000) Lloyd's Rep PN 587 CA "*the claimant could not be considered to have discovered a fact so long as the defendant was telling him the opposite of that fact and he had no compelling documentary evidence to suggest that the defendant was lying.*"

117. As regards the level of commission, Mr Brown points out that the evidence is clear that even when ultimately, its suspicions having been raised, the claimant sought information from the defendant about UW's level of commission, it was told that it could not have that information because doing so would put the defendant in breach of its contractual obligations to UW.

118. The fundamental point made by Mr Brown is that it was not until well within 6 years of the bringing of proceedings that the claimant had sufficient facts to appreciate that it had a cause of action against UW and the defendant and that reasonable diligence would not have brought these facts into the open any earlier.

119. I do not accept that. First, the evidence is that the claimant was told and did know that commission would be payable. The claimant does not deny that. All it had to do was ask what the commission was and how it was to be paid and there is no reason to believe it would not have been told. It may well be the case that UW and indeed the defendant were relieved that the claimant did not bother to ask what the commission was or exactly how it was to be paid but, in my judgment, that does not amount to intentional concealment of those facts.

120. I was referred to *Potter v Canada Square Operations Ltd (*2023) UKSC 41 in which the meaning of s32 was closely analysed. In that case Mrs Potter took out a loan and bought payment protection insurance (PPI) to ensure it would be repaid if she herself became unable to make the loan repayments.

121. She was not told that, out of the premium she paid for the PPI (and which was added to the loan), a commission would be paid to Canada Square for arranging the PPI policy. When, over 6 years after her credit arrangement had ended, she learnt of this fact she brought proceedings under the *Consumer Credit Act* 1974 to recover the sums paid under the policy on the basis that the failure to disclose the commission was unfair.

She was met with a limitation defence.

122. In that case she was successful in arguing that the limitation period had been postponed but Mr Lord cites the case in support of more general propositions as to concealment. He points out that the factual matrix in this case is very different to that in *Potter*. In that case Mrs Potter was unaware that commission was being paid. In this case the claimant was aware. Mr Lord refers me to paragraphs 96 to 109 but I do not propose to reproduce those here save that the conclusion reached by Lord Reed SCJ at paragraph 109 in relation to s32(1)(b) is instructive. He says:

> *"109 The elaborate and confusing analyses of s32(1)(b) put forward in Williams, The Priti Palm and the present case represent a wrong turning in the law. It should return to the clarity and simplicity of Lord Scott's authoritative explanation in Cave[10] (paragraph 60):*
>
> *"A claimant who proposes to invoke s32(1)(b) in order to defeat a Limitation Act defence must prove the facts necessary to bring the case within the paragraph. He can do so if he can show that some fact relevant to his right of action has been concealed from him either by a positive act of concealment or by a withholding of relevant information but, in either case, with the intention of concealing the fact or facts in question.*

10 Cave v Robinson Jarvis & Rolf (2002) UKHL 18

What is required is (1) a fact relevant to the claimant's right of action, (2) the concealment of that fact from her by the defendant either by a positive act of concealment or by a withholding of the relevant information and (3) an intention on the part of the defendant to conceal the facts or facts in question."

123. Leaving aside issues of whether relevant information was disclosed, where, Mr Lord asks, is there evidence of an intention to conceal facts even if facts were not, in fact, disclosed? His answer, with which I agree, is that there is no such evidence. He points out that it was not even suggested to the defendant's witness, Mr O'Connor, that there was any intentional concealment.

124. He goes further, he submits that in fact he does not have to rely on an absence of evidence of intentional or deliberate concealment, rather he can rely on positive evidence of a lack of intention on the part of the defendant to conceal. He prays in aid the brokerage agreements and the requirement imposed by them on UW to be fair, honest, transparent and professional.

125. Perhaps even more fundamentally, however, is the fact that the claimant knew that commission was payable. Its case is built around the proposition that the amount of that commission should have been disclosed. The result is that in February 2016 it knew that there had been non-disclosure. In the context of a claim essentially founded on a complaint of non-disclosure it knew of the non-disclosure in excess of 6 years before bringing its claim.

126. It seems to me that in all the circumstances s32(1)(b) does not come to the assistance of the claimant and the claim in respect of the first contract is indeed statute barred. Further, even if I my analysis is wrong about that, the claimant complains that

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the concealed facts was the amount of the commission and that the commission, which was set by UW, was added to the unit tariff. It seems to me that the amount of commission and how and by whom it would be paid could have been discovered by a simple request by the claimant, knowing as it did, that commission was payable.. It is in my view a fact that was discoverable there and then with reasonable diligence by simply adopting the expedient of asking the question.

127. I shall however nonetheless consider whether the claims for equitable compensation/money had and received would have succeeded in respect of contract 1 as well as contracts 2 to 5 in the event that I am wrong about limitation.

Was UW acting as agent for the claimant?

128. I need dwell on this only briefly. The fact that UW was the claimant's agent is acknowledged by the defendant. One need go no further than paragraph 6(3) of the defence to recognise that. It would indeed have been a hopeless task for the defendant to assert otherwise, whatever was said in clause 8.5 of UW's T&Cs.

129. There is some dispute as to the nature of the agency, whether it is a paradigm agency where the principal manifests assent to the agent acting on his behalf so as to affect his legal relations with third parties or whether the agency was something less than that and consisted simply of an arrangement whereby UW simply introduced the claimant to energy supply companies to obtain information and quotations and relayed this to the claimant with an indication as to the cheapest energy supply proposal, essentially leaving it up to the claimant to decide whether to enter into a contractual arrangement with the defendant.

130. That issue however is relevant to the nature and scope of the duty that is owed as an agent rather than the question of whether an agency arrangement exists.

Did UW owe fiduciary duties to the Defendant?

131. I think the starting point for a consideration of an agent's fiduciary duties is Millet LJ's judgment in *Bristol and West Building Society v Mothew* [1996] 4 All ER 698 at 711-712

> *"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 ... where the fiduciary deals with his principal."*

132. Mr Brown submits that UW was clearly a fiduciary because it was able to change its principal's legal relations with third parties. It will be remembered that the first 3 contracts for the supply of electricity were actually signed on behalf of the claimant by UW's employee pursuant to a letter of authority.

133. It is asserted that it is this power to change the principal's legal relations that requires the important protection offered by the fiduciary responsibilities of trust, confidence and single minded loyalty.

134. The authority for the proposition that the power to alter the principal's legal position is a hallmark of a paradigm agency importing fiduciary relationship is perhaps best made clear in *McWilliam v Norton* (2015) 1All ER 1026 at paragraph 40 where Tomlinson LJ cites with apparent approval *Bowstead and Reynolds on Agency* that;

"*since the paradigm agent has conferred on him special powers which enable him to change the legal position of another, the law also imposes on him special duties of a fiduciary nature towards that other."*

135. Mr Brown points out that in both cases in the county court concerning commission paid to UW arising out of energy contracts entered into by customers with the defendant the court had no difficulty in finding that there was a fiduciary relationship because UW was empowered to enter into contracts on behalf of the claimant.

136. As the judge puts it in paragraph 43 of his judgment in *Dark Blue Pig Ltd* v *Engie:*

"*They did not merely introduce the parties, but were given special powers to change the legal position of the claimant. In my judgment this was a situation where the trust and confidence thus being reposed in UW was such that the obligations of a fiduciary are to be imposed*."

137. His Honour Judge Hedley in *Leicester Bowls and Social Club v Drax Energy Solutions Ltd* came to exactly the same conclusion. At paragraph 74 of his judgment he explains that if one did not exist previously a fiduciary relationship between the principal in his case and the agent was created when the agent "*was authorised to submit a signed written contract to Drax and so to affect the legal relationship of the club with Drax*"

138. Mr Lord accepts that if this were a paradigm agency then UW would have fiduciary obligations but this was not a paradigm agency situation and there was no duty of trust and confidence.

139. Adopting paragraph 6(b) of the Defence he argues that the services provided by UW were "*limited to obtaining information and quotations or proposals from energy providers and relaying this to the claimant with an indication as to the cheapest energy supply proposal"*.

140. By paragraph 6(c) he argues that UW *"were not obliged to, and did not, provide advice and recommendations as to energy suppliers and energy supply contracts. Any reference to recommendations is simply a reference to the cheapest energy supply proposal and not a recommendation in the*

ordinary sense that the defendant's proposals were "the best and most suitable energy supply deal" for the claimant".

141. He cites the observations of Professor Paul Finn in "*Fiduciary Law and the Modern Commercial World"* in "*Commercial Aspects of Trusts and Fiduciary Obligations"*, 1st edition section 1.1 "*The Adviser/Information Provider*".

142. Professor Finn observed:

"1. *While one can find readily enough judicial assertions that at least particular types of advisers are fiduciary, it is clear that so diverse are the circumstances in which, and reasons for which, information and opinion and advice are exchanged in commercial and business dealings, that no instructive generalisation can be given other than "the mere giving of advice does not convert a business relationship into a fiduciary relationship".*

2. The expectations that can be had of the information provider/adviser may vary widely. These, for the most part will be unrelated to any consideration of loyal service: they will demand no more than honesty, frank disclosure, care and skill or accuracy and, if they attract consequential legal responsibilities at all, these will ensue from doctrines in tort, contract or equity which are quite unrelated to fiduciary law.

3. The expectation required to found a fiduciary finding requires "crossing of the line" from that merely of honest, care and skill and the like. It requires a factual matrix which can justify both the entitlement to expect that the adviser is acting, and the consequential obligation that he must act, in the other's interest in giving the advice, information et cetera."

143. Mr Lord argues that "*line*" referred to above has not been crossed in this case and he cites a number of reasons for that in paragraph 55 of his skeleton argument namely:

a. UW's T&Cs make it clear that it was not intended that either party shall be able to bind the other party in any way.
b. There was no duty of impartiality or disinterest owed by UW to the claimant.
c. The relationship was not one of trust and confidence and there was no inequality of knowledge by reason of the following:
    (1) The payment of commission is common practice within the energy supply market to commercial entities and any quotes obtained by any energy broker from the defendant would inevitably have included an amount of commission for the energy broker.
    (2) The payment of commission by the defendant to UW does not represent any commercial advantage for the defendant over and above other energy providers.

(3) The unit rate that would have been available and offered to the claimant if the defendant did not use brokers and the claimant had approached the defendant directly could have been more than the unit rates offered under the contracts less the commission due to the need
for the defendant to cover the costs of a direct sales force rather than conducting sales through a TPI.

(4) The practice of paying commission was so commonplace it was a matter of trade practice and in the public domain that commission payments are received by TPI's from the energy supply company by adding an amount to the unit energy supply rate per kWh as set out in Ofgem's Factsheet dated March 2015 to which I have already referred.

(5) Mr Forster considers himself to have the requisite ability to arrange energy contracts for his business, admitting in his witness statement that part of his role was "*dealing with the factory energy supplies"*.

(6) The claimant is a well-established successful business and the directing mind and will of the claimant, its directors (Mr and Mrs Luciano) - could not be said to have inequality of knowledge with UW.

(7) The ability to arrange energy supply contracts and even sign them did not mean that there was a relationship of trust and confidence. The ability for an energy supply broker to be able to sign an energy contract enabled the quoted price to be locked in due to the fastmoving nature of the energy industry and prices fluctuating significantly on a daily basis.

144. I am satisfied that there was a fiduciary relationship between UW and the claimant and this was a paradigm agency. The passage from the work of Prof Finn does not suggest that even the power to affect the principal's legal relations would not necessarily amount to "*crossing the line*". In any event however, there seems to be clear judicial authority for the proposition that that power is sufficiently "*special*" to make the relationship a fiduciary one.

145. Furthermore, I am not persuaded that any of the reasons offered by the defendant which are set out in paragraph 55 of the skeleton and reproduced above have the effect for which Mr Lord contends because:

a. UW's T&Cs seeking to negate an agency clearly do not do so, especially when they are wholly inconsistent with the agency acknowledged to be created by the letter of authority.[11]

11 See paragraph 43 above

b. Reason 2 is circular. There is only no duty of impartiality or disinterest if there is no fiduciary relationship.

c. Reason 3(1) to (6) do not, in my view, go to the question of whether a fiduciary duty existed. The issues raised by these are, in my opinion, more relevant to questions of scope, knowledge, trade usage and informed consent.

d. As regard reason 3(7), just because the motivation for the creation of authority to alter the principal's legal position is that it benefits the principal to authorise this in a fast-moving market does not detract from the fundamental position that UW had "*special power*" to change the claimant's legal position. Every principal who confers that "*special power*" on his agent must have his reasons

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for doing so. I see nothing unique or distinctive in the fact that the reason in this case was that this is a fast-moving market.

146. In summary, I am satisfied, for the reasons suggested by Mr Brown and adopted by the learned judges in the *Dark Blue Pig* and *Leicester Indoor Bowls*, as well as of course the reasoning in *McWilliam*, that UW owed fiduciary duties to the claimant.

What was the nature, scope and extent of any fiduciary duties?

147. I do not think it can be sensibly denied that the commission arrangement in this case gave rise to a conflict between the interests of UW and those of its principal, the claimant. In *Hurstanger v Wilson* [2007] 4 All ER 1118 at paragraph 33 Tuckey LJ observed:

"As a fiduciary the agent was required to act loyally for the defendants [principal] and not put himself into a position where he had a conflict of interest. Yet he agreed that he would be paid a commission by the other party to the transaction which his clients had retained him to procure. By doing so he obviously put himself into a position where he had a conflict of interest. The defendants were entitled to expect him to get them the best possible deal, but the broker's interest in obtaining a further commission for himself from the lender gave him an incentive to look for the lender who would give him the biggest commission."

148. This case is no different. If he puts himself in a position where his interests conflict with those of his principal then, to the extent that the nature of that conflict is within the scope of his fiduciary obligations, the agent is in breach of his fiduciary obligations unless the principal had given informed consent to the agent to act on the principal's behalf notwithstanding or trade custom and usage acquit the agent from specifically seeking it.

149. The fact that this is a question of scope was recognised in *Medsted Associates Ltd v Cannaccord Genuity Wealth (International) Ltd* (2019) EWCA Civ 83. At paragraph 34 Longmore LJ said:

"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 at para 90 that the clients must have assumed that Medsted was receiving payment from Collins Stewart (the third party), his conclusion that the commission which Medsted was receiving was secret is an overstatement of the position. The client knew that Medsted was being paid commission by Collins Stewart; what they did not know was the amount of 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."

150. How does this square with the well-known statement of Millett LJ in *Bristol and West Building Society* to which I have referred at paragraph 131 above?

151. Longmore LJ addresses that. At paragraph 45 he cites it in full but goes on to say that:

"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."

Having considered that issue, at paragraph 42 Longmore LJ says:

".....in my judgment, 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."

And at paragraph 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 in breach of that duty for it not to disclose the amounts of commission it was receiving."*

152. As can be seen, in *Medsted* it was held that the need to give the principal details of the amount of commission earned by the agent was not within the scope of the fiduciary duty owed by the agent to the principal. However, it must be emphasised

that that was premised on the fact that the principal was aware that commission was payable. It was only unaware of the amount.

153. In my view, the conclusion in *Medsted* rested substantially on commentary in *Bowstead and Reynolds on Agency* at paragraph 6-084[12]:

"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."

154. Indeed, Longmore LJ quotes that passage verbatim in paragraph 42 of his judgment. But it also rested upon the acknowledgement that scope can be affected by other factors such as the level of sophistication and vulnerability of the principal. In *Medsted* the principals were "*wealthy Greek citizens and it is likely that they were experienced investors"* (per paragraph 42).

155. This concept of the unsophisticated and vulnerable principal appears in *Hurstanger*, a case involving commission paid by a lender to an agent for brokering a

loan to the principals to defray mortgage arrears and provide the principals with some extra funds. 156. At paragraph 36 Tuckey LJ recognised that:

"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 the borrowers the potential conflict of interest."

157. Similarly, in *McWilliam* to which I have also referred the court was exercised by lack of sophistication and the vulnerability of the principals. In that case, like in *Potter*, the principals also engaged the agent broker to arrange a loan and PPI cover to secure the repayments. Unbeknown to the principals the agent received a commission from the lender and the insurer. In a claim for recovery of the commission for breach of fiduciary obligations Tomlinson LJ observed, when describing the principals, that:

"They were not financial sophisticates. They were people of relatively modest means with a history of credit problems. They were vulnerable in that they had debt which, for them, was substantial in respect of which they needed assistance in finding a loan to ease the burden of servicing that debt and to put them in a position where they could carry out an improvement to their home…… I do not regard reasonable

12 Similar wording included in Bowstead and Reynolds on Agency, 23rd Edition, Paragraph 6-086.

competence and sophistication as descriptions of the same quality or as synonymous. It is possible in matters of finance to display reasonable competence in handling relatively straightforward transactions and yet to lack what would ordinarily be called financial sophistication.
"

158. So what is the scope of the fiduciary obligations that I have found to exist in this case?

159. Clearly, it is within the scope of the fiduciary relationship that the agent ensures that the principal is aware that the agent is receiving a commission. If that detail is not disclosed then the commission received by the agent is a secret profit. That is wholly impermissible. Indeed, not only is it impermissible, it was recognised in *Hurstanger* at paragraph 38 that:

"the payment or receipt of secret commission is considered to be a form of bribe and is treated by the authorities as a special category of fraud in which it is unnecessary to prove motive or loss up to the amount of the bribe."

160. However, what is the position in this particular case where the principal knows that commission is receivable by the agent from a third party but simply does not know the amount? In the circumstances of this case, is the need to disclose the amount within the scope of the relationship such that failure to disclose it amounts to a breach of the fiduciary obligations owed by UW?

161. In *Hurstanger* it was recognised that there was this halfway house between full disclosure of the fact of commission and the amount (which would of course acquit the agent from any accusation of breach) and total non-disclosure of the existence of commission (which would be a clear breach of the principal/agent relationship). 162. At paragraph 39 Tuckey LJ said:

"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 has been obtained."

163. The scenario that Tuckey LJ describes where secrecy has been negated but the situation falls short of full disclosure has become known as the "*half secret commission*". This was the position in *Medsted* and it is accepted by the parties that it is the position in this case. As I have said, the claimant accepts that it

knew that commission was payable but it did not know the amount or that, essentially, it was paying it by the supplement on the unit cost per kWh.

164. The claimant falls squarely within the scenario described in the passage from *Bowstead and Reynolds* that I have referred to above but so does every principal where the commission is half secret. However, as that passage clearly indicates, it does not follow that in such a case the scope of the duty is always so limited as to absolve the agent. It depends on the specificity of the principal's knowledge.

165. In *FHR European Ventures LLP v Mankarious* (2011) EWHC 2308 (Ch) a number of experienced business entities entered into a deal to purchase a long lease of a hotel in Monaco at a cost of €211.5m. They did so through the use of a broker who, unbeknown to at least some of the buyers, had also negotiated an arrangement with the seller for a commission of €10m once the deal had gone through. When this was discovered the buyers successfully sued the broker for €10m for breach of its fiduciary obligations.

166. Clearly these principals were experienced business people, it would be difficult to describe them as unsophisticated or vulnerable but I do not think the decision in that case was premised on a finding that they were.

167. This case is unusual in that there were a number of investors involved in the purchase. It was questionable whether one investor, Bank of Scotland (BoS) was told that the agent was expecting a commission from the third party seller but the others clearly were not told. That led to the case being both a secret commission and, possibly, a half secret commission case.

168. Even if it were the latter though, so far as BoS were concerned the nub of the case, to my mind, is to be found in paragraph 104 where Simon J says:

> *"Although it plainly did not need to enter into a formal agreement along the lines of its exclusive brokerage agreement with the vendors it was incumbent on (the agent) to inform BoS not only that it was receiving a commission payment but the amount, €10m. It was an exceptionally large sum in proportion to the rewards that (the agent) was likely to be able to negotiate from its acquisition work for the purchasers and it was a significantly larger percentage than would have been expected……. It was neither a customary rate of reward nor a standard amount which BoS could have discovered upon enquiry. Mr Middleton and Mr Shankland (representatives of BoS) appear to have been strikingly incurious and complacent; but I am satisfied that this was because they were not sufficiently alerted to the significance of the terms of the commission. It follows that there was not a sufficient disclosure of material circumstances as to the nature and extent of (the agent's) interest in the sale to which BoS consented."*

169. It is important to note that the learned judge was exercised by the fact that the commission "*was neither a customary rate of reward nor a standard amount which BoS could have discovered upon enquiry",* it was *"a significantly larger percentage than would have been expected"* and that the BoS representatives *"were not sufficiently alerted to the significance of the terms of the commission"*.

170. In this case I am not satisfied that Mr Forster or Mr Gazeley were vulnerable or unsophisticated. They were both in positions of some seniority in a fairly large company (albeit an SME) and they both had specific responsibility for the supply of energy. Both had set up or, at least, negotiated energy contracts before. As I understand it, in the case of Mr Forster, through the agency of UW.

171. Although I understand that at least one of those cases is under appeal, I derive some comfort for that view from the knowledge that Deputy District Judge Restall in the *Dark Blue Pig* formed the conclusion that the principal in that case was not unsophisticated even though she simply owned one public house (see paragraph 59). Equally, His Honour Judge Hedley in *Leicester Indoor Bowls* reached the same conclusion in respect of a gentleman who, on a voluntary basis, ran a bowling club because he was an experienced company secretary involved in the day to day running of a small business with 6 employees and a turnover of no more than £180,000 (see paragraph 81).

172. I should add, at the risk of making myself something of a hostage to fortune and recognising that it did not figure in argument, that even if Messrs Forster and Gazeley were not experts and even if they lacked confidence in the energy market, there is no reason to believe that UW had any grounds for thinking that that was the case. The claimants in *Hurstanger* and *McWilliam* were obviously unsophisticates and I apprehend that would have been obvious to their respective agents. That is not so in this case. In considering scope of duty I would be surprised if the law takes no account of the perception of an air of sophistication where that emanates from the principal itself.

173. I should also add for completeness that I accept that questions of vulnerability and sophistication and the knowledge of the existence of a commission structure are not an exhaustive yard stick by which to assess scope. Different facts may produce different results. In *Leicester Indoor Bowls* HHJ Hedley at paragraph 78 identified 3 other factors which might play into the question of whether there was informed consent. There is a very significant overlap between scope and informed consent and so it seems to me that his list has some relevance to issues of scope as it does to the separate issue of informed consent.

174. At paragraph 78 as well as issues of vulnerability and lack of sophistication he identified 3 further things to consider:
   a. The nature of the contract being entered into.
   b. The reasons why the broker is being engaged including the circumstances of the principal and any inequality of bargaining power.
   c. The nature of the commission being paid by the supplier and how ascertainable by the principal that was.

175. I do not think that the answer to any of these questions assists the claimant. This was a contract entered into in the course of business by a fairly senior manager whose job it was, amongst other jobs, to secure an energy supply to the factories for which he was responsible.

176. The broker was engaged by Mr Forster because he thought it would make his life easier. There was not really an inequality of bargaining power. This is not like the principals in *Hurstanger* and *McWilliam* who were short of money. There was no pressing need to have contracts in place when these contracts were executed. The contract dated 8 February 2016 did not go live until 1 April 2016. The other 4 subsequent contracts went live 5 years after they were executed.

177. As to the ascertainability of the commission, all Mr Forster and indeed Mr Gazeley needed to do was ask. They were told that a commission was payable, they were invited to ask any questions they liked but questions came there none.

178. As for Mr Gazeley, I sympathise with his desire to get home to start his weekend but really the transcript of the conversation Mr Jackson had with him gives him no grounds for believing that he was not contracting. One only has to read the transcript or even remind oneself of my summary of it to see that. In any event, it is hopeless to suggest that it was not open to Mr Jackson to believe that a binding commitment had been made.

179. Mr Brown argues that *FHR European Ventures* requires the principal to be *sufficiently alerted to the significance of the terms of the commission". Hurstanger* speaks of "*bringing home to the borrowers the potential conflict of interest*." Neither, he suggests happened in this case. With respect, I disagree. Tuckey LJ makes his comment about bringing home to the principals the significance of the commission in the context *of "borrowers like the defendants coming to the non-status lending market*" and are thus "*likely to be vulnerable and unsophisticated." FHR European Ventures* was about an "*exceptionally large commission",* that was *"significantly larger percentage than would have been expected"* and which was other "*than the customary rate of reward".*

180. Accordingly, in my judgment, not only is *Hurstanger* distinguishable because here we do not have unsophisticated or vulnerable principals, *FHR European Ventures* is also distinguishable for the reasons set out by Simon J to which I refer in paragraph 168 and the paragraph immediately above.

181. I have not heard any evidence that the commission paid to UW was an "*exceptionally large sum*" or was anything other than the "*customary rate of reward"*

in the market. Indeed, such evidence as I did hear suggests the opposite. The email talking about "*champagne*" commission did not appear to have only UW in mind and, in practical terms, it is perhaps difficult to imagine that other energy companies would be able to compete in securing contracts via TPI's unless they offered broadly the same sort of commission as that payable to UW by the defendant.

182. In all the circumstances I am driven to conclude that the need to advise on the amount of commission was not within scope. I can find no sensible basis to distinguish this case from *Medsted*.

183. Here I make something of a confession. Absent the close analysis of the law which this case has demanded I would have instinctively assumed that, absent informed consent,[13] the scope of a fiduciary's obligation extended not only to the disclosure of the fact of commission but also the amount. As can be seen, that is not, I think, where the case law takes one.

184. Finally on this issue, there is the question of whether the scope of the fiduciary duty extended to telling Mr Gazeley that the commission that was payable to UW would be added to the unit cost per kWh.

185. I do not think it does. I adopt all the observations above in reaching that conclusion. Mr Gazeley was not vulnerable or unsophisticated. He was the manager of a factory with specific responsibility for securing the electricity supply. Nor can he really take succour from the answers to any of the questions formulated by HHJ Hedley in *Leicester Indoor Bowls* that I refer to above.

186. He was told that commission was payable. All he had to do was ask for further details. Mr Jackson invited him to seek clarification on anything, even giving him his direct line number. I appreciate he did not think that he was entering into a binding contract in that telephone call but, as I have said, there is not only no basis for his forming that view, it actually flies in the face of the conversation.

13 or trade usage and custom

187. In any event, Mr Gazeley was not the principal. The claimant was. The claimant knew more than Mr Gazeley. It knew what Mr Forster knew. What was said to him about commission is recorded at paragraph 54 above. It is not the clearest description but in my view it gives the flavour that the commission is part of the unit cost. Not only that, the fact that that often happened was in the public domain. I have already referred to a factsheet issued by Ofgem in March 2015.

188. Further, I do not overlook that this was not the first contract for energy that the claimant had negotiated with the defendant. 5 contracts had been previously executed for the supply on energy to the Midland plants. There is no reason to believe that the 5 prior contracts were any different to the contracts with which I am concerned. They state: *"If you use a third party consultant or broker to negotiate your contract prices quoted may include commission due to them*".

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189. Mr Brown draws attention to the use of the word "*may*" as opposed to "*will*". I do not think that the distinction is as important as Mr Brown would have me believe. In *Hurstanger* at paragraph 43 Tuckey LJ says;

> *"If you tell someone that something may happen and it does, I do not think that the person you tell can claim that what happened was a secret. The secret was out when he was told that it might happen."*

190. I do not overlook that there is some dispute as to whether the claimant ever received these contracts. Clearly it received contracts 4 and 5 because one of its employees signed them. And I note that contract 5 was signed even though contract 4 will have contained the wording about commissions that I have recorded above. Mr Forster seemed to think he probably received them but really was not sure. Mr Gazeley was sure that he did not. Mr Brown reminded me of the Ofgem research that I record at paragraph 80 above.

191. I have to say I find it difficult to accept that a professional and successful business would not want to keep a record of the contacts for the supply of its energy and chase them up if not received. These were not minor or trivial contracts. It is clear that the money spent each year on energy by the claimant was substantial.

192. I do not think I have to decide whether Mr Gazeley himself received the contracts for the North East but I do think it more likely than not that the claimant will have received the contracts either in a fully executed form or as executed by UW's representative despite the shortcomings identified by

Ofgem. As Mr Gazeley said, the contracts had to be approved by the accounts department in Coventry and at least one (contract 4) was signed by Mr Forster. If Mr Gazeley did not see them it seems likely they went to Coventry.

193. However, I should add that the contracts are only a part of the whole picture. Even if I was satisfied that the contracts had not been received there still remains the phone call to Mr Forster and what that said about commission which adds significantly to the claimant's bank of knowledge.

194. Finally, it strikes me that there would be some difficulty in holding that the scope of the agent's duty extended to disclosure of the arrangements for the funding of commission when it does not extend to disclosing the amount of the commission.

195. However, even if that is not a problem and questions of the amount of commission can be divorced from questions relating to how the commission is to be funded, as I have said, Mr Gazeley could have asked. He will have been aware that somebody must be paying UW its commission. He had no reason to believe that the defendant would be funding that out of its own resources. He apparently just assumed that, even though it was in the public domain that that is often not what happens.

What was the claimant's knowledge in respect of commissions/commission arrangements?

196. I am satisfied that the claimant knew that commission would be charged. Indeed, that is the claimant's accepted position. The fact that they did not know the amount is conceded by the defendant.

197. I accept that neither Mr Forster nor Mr Gazeley say that they appreciated that, in fact, the commission would be funded by the claimant and assumed it would be absorbed by the defendant as an overhead. I also accept that neither of them had any grounds for making that assumption, a fact that Mr Forster was prepared to concede.

198. Indeed, so far as Mr Forster is concerned, there are the prior contracts which, if similar to the relevant contracts, made reference to the prices including the commission. It seems to me that this must also be added to the bank of knowledge that reposed in the claimant as an entity in its own right.

199. Furthermore, the assumption that commission will be funded by the defendant is not supported by information in the public domain to which I have referred. Yet further, I would suggest that the fact that commission was mentioned by Mr Jackson to both Mr Forster and Mr Gazeley could be said to bring with it an implication that the claimant would be paying it. If A tells B that A's services will result in a payment to A, it may well be that B would assume that

he is being told because he is expected to pay. If he is not then the information is likely to be of considerably less interest to him.

200. Of course, the first 3 contracts with which I am concerned have nothing to do directly with Mr Forster. It was the conversation with Mr Gazeley that resulted in the long contract of 8 February 2016 if not also its successors.

201. I accept that he was not told in terms that commission would be added to the unit price. He was given the opportunity of clarifying but he did not do so. No doubt because he thought he was not making any commitment there and then. As I have said, there is not only no basis for his forming that view, it actually flies in the face of the conversation. The fact is that neither did he have reason to assume that the commission would be funded by the defendant without recourse to the claimant.

202. Finally, as I have explained above, I think that Mr Gazeley can be taken to know what the claimant knew and that included what Mr Foster knew. I have already explored that extensively.

What was the relationship between the claimant and UW?

203. I have covered this at length. The relationship was one of agent and principal. It imported fiduciary duties on the part of UW as the agent, the scope of which has already been discussed.

What was the nature and extent of disclosure provided by UW to the claimant?

204. This too has been extensively covered. The claimant was told that commission was payable. It was not told how much. Mr Forster was told that it would be funded as "*part of the energy package*". The fact that that may be done is contained in the energy contracts so far as the claimant received them and the fact of the payment of commission is referred to, albeit a little obtusely, in the T&Cs.

What was the nature and extent of disclosure provided by the defendant to the claimant?

205. I do not intend to dwell on this at all. I have covered it elsewhere. The defendant
relies on its contracts to which I have referred.

What was the nature and effect of the brokerage agreements between UW and the defendant?

206. I have been through the brokerage agreements and do not intend to do so again. Mr Brown relies on the contention that the brokerage agreements and side letters incentivised UW to sell the defendant's products irrespective of whether that was in the customer's interest.

207. Mr Brown argues that the defendant has positively contributed to the creation of the conflict. He cites the fact that to all intents and purposes, at least until the commission cap was put in place, it was expected that UW would set its own level of commission subject only to it being agreed by the defendant. And he asks rhetorically, why would the defendant take issue with the level of commission UW sought when the defendant was not actually paying it?

208. He also relies on the fact that the side letters provide for the payment of very substantial commissions up front but with the possibility of claw back. Of course, he argues, UW is going to push its principals in the direction of the defendant in order to avoid those commissions being clawed back.

209. I agree that these provisions incentivised UW to deal with the defendant, that was presumably the intention. More importantly, Mr O'Connor accepted that the provisions could have that effect when that question was put to him.

210. He did say that the defendant did not actually exercise its right to clawback but the point is that it could have done to the extent it wanted to. He was clear that the right to claw back was not waived, it was just that at that time the defendant's reconciliation processes were not that effective.

211. It seems to me that the relevance of the brokerage agreements and side letters in the context of this case is the extent to which they fix the defendant with accessory liability. A matter to which I shall come later.

Did the claimant need to provide informed consent in respect of the commission structure and if so was that consent provided?

212. Of course, this question is now academic because informed consent is only necessary to enable an agent to act in a way that would otherwise be forbidden as falling within the scope of its fiduciary duties. Nevertheless, in the event that I am wrong on the issue of scope, I shall deal with this.

213. The need to answer the question becomes apparent by reference to *Bowstead and Reynolds* which states at paragraph 6-046 that:

> *"Agents may not put themselves in a position or enter into transactions in which their personal interest, or their duty to another principal, may conflict with their duty to their principal, unless the principal, with full knowledge of all the material circumstances and of the nature and extent of the agent's interest, consents."*

214. The answer to the question set out above is clearly "yes" where the agent seeks to act in a way that conflicts with the interest of the principal and what he wants to do is within the scope of his fiduciary obligations. The real question is what is informed consent? And was it given in this case?

215. As I have said, there is a very significant overlap between issues of informed consent and issues of scope. Largely the same case law is germane to both.

216. Starting however from basic principles, informed consent means consent "*with the full knowledge of all the material circumstances and of the nature and extent of the (agent's) interest."* Per Tuckey LJ in *Hurstanger* (paragraph 34) quoting from *Bowstead and Reynolds.*

217. Tuckey LJ goes on to say in paragraph 36, in order to give informed consent to an agent to act in a way which conflicts with the interests of the principal and which would otherwise be in the scope of the agent's fiduciary duty, the principal must have enough information "*to bring home to the (principal) the potential conflict of interest"*. In other words, there must be *"sufficient disclosure"*. It is also important to bear in mind that the onus is on the agent to show sufficient disclosure and informed consent. It is not up to the principal to show an absence of it. As he did in relation to scope, Mr Brown prays in aid of his case the *FHR European Ventures* case and in particular the observation of Simon J at paragraph 104. In that case it was found that the principals "*were not sufficiently alerted to the significance of the terms of the commission by "the agent". It follows that there was not a sufficient disclosure of material circumstances as to the nature and extent of (the agent's) interest in the sale to which BoS consented".*

218. As with scope, much depends on other factors such as the level of vulnerability and sophistication of the principal. The fact that that is so can be derived from a number of cases. In *Hurstanger* Tuckey LJ makes the point in paragraph 36. He felt that a statement of the amount the broker was to receive by way of commission was necessary because "*defendants coming to the non status lending market (as the defendant principals were in that case) are likely to be vulnerable and unsophisticated".*

219. Similarly, in *McWilliam* to which I have also referred the court was exercised by lack of sophistication and the vulnerability of the principals. I refer to the extracts from that case cited above.

220. Mr Brown argues that, in the context of informed consent, I have to assess the level of sophistication of Mr Gazeley. It seems to me however that I have to assess the level of sophistication of the claimant as an entity. But in any event, I have already found that Mr Gazeley was neither unsophisticated nor

vulnerable in the context of scope. I adopt the same reasoning in reaching the conclusion that he was neither in the context of informed consent.

221. I understand Mr Brown's reliance of *FHR European Ventures* and a finding in favour of the principals when they were clearly not naïve but I have explained how that

can be distinguished and that distinction I think applies equally to the issue of informed consent.

222. HHJ Hedley's criteria which I applied to scope but which he formulated with informed consent in mind does not, in my view, tilt things any further in favour of the claimant principal. I say that for the reasons I set out in paragraphs 175 to 177 above.

223. I have already said what the claimant was told ie what the extent of the disclosure was. Was that enough in the context of a case where the principal, whether that be the company or the individuals concerned, was sufficiently sophisticated and lacking in vulnerability and where there is no evidence that commissions were of the nature which caused Simon J in *FHR European Ventures* to take the course that he took?

224. I think that the answer is that it was and that the defendant has satisfied the onus of establishing informed consent. I do not think I need to repeat my reasoning. I hope it is clear from what has gone before. In summary, it includes the fact that the claimant knew commission was to be charged. It knew it was not paying it directly. It was getting, or so it believed, other services like a smart meter, an account manager and some software, and in the case of Mr Gazeley help with completing forms relating to FITT, all of which it could not seriously have thought the defendant would pay for. Insofar as it received the defendant's contracts, commission was mentioned in them and the fact that if commission was applicable it may be added to the unit price. UW's T&Cs refer to commission and various documents refer the claimant to the T&Cs. Neither Mr Forster nor Mr Gazeley nor the claimant company were naïve or vulnerable and, of course there are the phone calls to Mr Forster and to Mr Gazeley and their failure to drill into the commission element once told about it.

225. I would also add that in coming to my conclusion that there was sufficient disclosure it is right to note that the fact that commission was added to the unit cost was a known industry practice. It is referred to in the factsheet to which I have already referred. To that extent, insofar as it reflects trade usage and custom it actually obviates the need for specific informed consent because the principal is taken to know of the trade custom and to have consented to it. In

so far as it is not a trade custom, it is simply another brick in the wall erected by the defendant to defeat the claimant's case.

226. Finally, once again I note that my conclusions accord with those of the court in the *Dark Blue Pig* and *Leicester Indoor Bowls* where the principals were clearly far less sophisticated than the principal here.

Was UW in breach of any fiduciary duty?

227. No. Giving information about the amount of commission and the adding of it to the unit cost was out of scope. If it was not, the principal gave informed consent.

Did the defendant procure any such breach by UW?

228. Once again, this is academic. However, I shall deal with it in the event that I am wrong on breach of duty.

229. If there had been a breach then Mr Brown relies predominantly on *Hurstanger* paragraph 34*:*

"an agent who received commission without the informed consent of his principal will be in breach of fiduciary duty. A third party paying commission knowing of the agency will be an accessory to such breach."

230. Mr Lord argues that insofar as that observation relates to accessory liability where the commission is half secret, it is not the law. Nor, he says, did Tuckey LJ suggest it was the law in a case concerning half secret commissions. He points out that paragraph 34 is in a section of the judgment dealing with secret commissions. That is not this case.

231. Mr Lord argues that the claimant must show that the defendant acted dishonestly and had knowledge of the fiduciary relationship between UW and the claimant and knew that what UW was doing breached its obligations to its principal. Mr Lord emphasised that dishonesty on the part of the defendant was a vital ingredient in a claim for accessory liability. That had not been pleaded and was not even asserted by the claimant.

232. I shall come to dishonesty shortly but before I do let me summarise Mr Brown's submissions.

233. He argues that the defendant must have known that UW was the claimant's agent and that that status brought with it fiduciary duties and obligations on the part of UW not to act contrary to the claimant's interests. But, for the reasons set out in paragraphs 207 and 208 above and elsewhere, together with the size

of the "*champagne*" and "*extortionate*" commissions[14], all it did was put in place incentives to breach that duty. Even the contract did not separate that part of the unit cost which was attributable to commission. It just gave an overall unit cost.

234. He points out that while the defendant's brokerage agreements seek to impose transparency and fairness in the dealings that UW has with its principals it has no effective procedures in place to verify compliance. It has one compliance officer for 100 to 150 TPIs.

235. He reminds me of Mr O'Connor's evidence in *Dark Blue Pig and Leicester Indoor Bowling* that, "*he would expect a customer to be aware that there was commission. That "to be transparent did not mean disclose" and that non-disclosure of commission and amount was "because that was how the market operated".*

236. He also reminds me of the Ofgem reports are ones that a company like the defendant might be expected to be particularly interested in digesting.

237. In *Wood v Commercial First Business Ltd* (2020) CTLC 1 at paragraph 74 the learned deputy High Court Judge cites Millet J in *Logicrose Ltd v Southend United Football Club (No 2)* 1988 1 WLR 1256 wherein Millett J says:

"It is clear that where one party to a transaction takes what Collins LJ described as "the hazardous course" of making a payment for the personal benefit of the other's agent and does not disclose it to the principal, he cannot afterwards defend the transaction by claiming that he believed the agent to be an honest man who would disclose it himself. Where therefore, knowing that the agent has an interest of his own, he does not himself disclose it to the other party then, in the words of Collins LJ, "he must at least accept the risk of the agents not doing so…."."

238. Mr Lord disputes that analysis. He says that the brokerage agreement evidences an intention by the defendant positively to control the conduct of the agent for the benefit of the principal. As he says in paragraph 64 of his skeleton argument:

"*(The defendant) did nothing to procure any breach of fiduciary duty and, in fact, pursuant to the brokerage agreements contractually obliged UW not to act in breach of fiduciary duty. Further its energy contracts made it clear that if a principal used a third party consultant or broker the prices quoted may include commission due to them and it received assurances from the broker*

14 The email of 22 August 2017

that the claimant had been properly informed about the inclusion of fees in what they were being charged."[15]

The skeleton concludes with the submission that, since the defendant had no direct contact with the claimant (other than the contracts themselves) it is submitted there is nothing more that the defendants could have done.

239. Of course, all this is essentially irrelevant if accessory liability depends on dishonesty. The question is, does it?

240. Mr Lord took me first to *Twinsectra Ltd v Yardley* (2002) UKHL 12. At paragraph 19 and 20 Lord Hoffmann said:

"19 *My noble and learned friend, Lord Millett considers that the Court of Appeal was justified in taking this view because liability as an accessory to a breach of trust does not depend upon dishonesty in the normal sense of that expression. It is sufficient that the defendant knew all the facts which made it wrongful for him to participate in the way in which he did…..*

20 I do not think it is fairly open to your Lordships to take this view of the law without departing from the principles laid down by the Privy Council in Royal Brunei Airlines Sdn Bhd v Tan (1995) 2 AC 378. For the reasons given by my noble and learned friend, Lord Hutton, I consider that those principles require more than knowledge of the facts which make the conduct wrongful. They require a dishonest state of mind that is to say, consciousness that one is transgressing ordinary standards of honest behaviour."

241. It is as well to refer to what Lord Hutton said in the same case. Citing Lord Nicholls in *Royal Brunei Airlines* he says, at paragraph 33:

"Lord Nicholls stated the general principle that dishonesty is a necessary ingredient of accessory liability and that knowledge is not an appropriate test."

"The accessory liability principle"

"Drawing the threads together, their Lordships' overall conclusion is that dishonesty is a necessary ingredient of accessory liability. It is also a sufficient ingredient. A liability in equity to make good resulting loss attaches to a person who dishonestly procures or assists in the breach of trust or fiduciary obligation. It is not necessary that, in addition the trustee or fiduciary was acting dishonestly although this will usually be so where the third party who is assisting him is acting dishonestly. "Knowingly" is better avoided as a defining ingredient of the principal, and in the context of this principle the Baden (1993) 1WLR 509 scale of knowledge is best forgotten."

I consider that this was a statement of general principle and was not confined to the doubtful case when the propriety of the transaction in question was uncertain."

15 The emails referred to in paragraph 95 above

242. I was referred to *Fiona Trust & Holding Corporation v Privalov* (2010) EWHC 3199 (Comm) albeit counsel for the claimant kindly took me only to a digest of what was clearly a complicated case. Mr Brown did not suggest that the digest was not a reflection of the conclusions reached by the judge.

243. The digest records the judge's finding that "*a defendant will be liable for procuring or assisting in a breach of trust or fiduciary duty if a person acted in breach of a fiduciary duty owed to the claimant and the defendant dishonestly persuaded that person to do so, or assisted him to do so…… It was established that an account of profits was available under English law against a defendant who was an assistant or secondary participant in a breach of fiduciary duty, by dishonestly procuring or assisting a breach of fiduciary duty."*

244. In that case the court found that a Russian businessman was liable to pay equitable compensation for dishonestly procuring or assisting breaches of fiduciary duty.

245. Mr Brown argues that *Fiona Trust* is not this case. That is true but what matters are the general principles applied in it following the guidance in *Twinsectra*. That guidance seems to me to point only in one direction, namely that dishonesty is an ingredient of accessory liability.

246. Accordingly, while I do not believe that the defendant covered itself in glory in its approach to business through TPIs, far from it in fact, there is no evidence of dishonesty and it cannot therefore be held to be an accessory.

To the extent of the claimant succeeds, what is the quantum of damages?

247. I have dealt with issues which were rendered academic by my finding in respect of scope. This is another such issue. It is whether equitable compensation that would be payable by the accessory had the claimant succeeded should be assessed by reference to what is paid by the principal or what is received by the agent.

248. I was not referred to any authorities on this point. Mr Lord says the vice to be addressed if the claim had gone the claimant's way is the payment of the commission. The accessory ought not to be made to pay more than the agent received. Mr Brown argues that he would have been seeking an equitable remedy which is restitutional and so should be what the claimant has paid.

249. I have to say I prefer the argument of Mr Brown on this. Mr Lord's argument is based on the fact there were some set offs which reduced the amount that the defendant physically paid and the agent received. But to my mind, the set off is only another way of making a payment. If A owes B £100 and B owes A £50,

to my mind B has paid £100 to A and A has received £100 if B gives him £50 and waives entitlement to the £50 from A.

Inducement to Breach of Contract claim.

250. I need deal with this only very briefly. In fact, Mr Brown recognised in submissions that this and the equitable claim stand or fall together.

251. The claim is pleaded in paragraph 5 of the Particulars of Claim. The claimant alleges that the defendant induced the breach by UW of implied terms in the contract between UW and the claimant:

- To act in good faith in the best interests of the claimant,
- To provide the claimant with information, advice and recommendations concerning energy suppliers and energy supply contracts on an impartial and disinterested basis.
- To use its best endeavours to promote the interests of the claimant in dealings with and in relation to energy suppliers and energy contracts.

252. Mr Brown's repeated his assertion that the position that the defendant took with regard to commissions, lack of verification of the obligations of transparency etc and its recognition that it did not expect the agent to discuss commissions with its principal even though it must have known that UW was the principal's agent meant that it was wholly inevitable and completely foreseeable that the conduct required by those implied terms would be abandoned. As he put it: *"everything the defendant did had the obvious effect of causing a conflict of interest*".

253. Mr Lord disputes that any such terms are implied. A contract in law does not require good faith, it only requires honesty.

254. In any event, there must be an intention to procure a breach. That suggestion was not put to Mr O'Connor and so cannot be advanced but in any event it is argued that it is hopeless to suggest that the defendant intended UW to break its contract with the claimant. He argues that the brokerage agreements suggest exactly the opposite.

255. What is the authority for Mr Lord's assertion that a there must be an intention to induce a breach? It is *OBG Ltd v Allan* (2007 (UKHL) 21.

256. At paragraphs 191 and 192 Lord Nicholls explained in the section of the judgment entitled "*Inducing Breach of Contract: the Mental Element*":

> *"191 The mental ingredient is an intention by the defendant to procure or persuade (induce) the third party to break his contract with the claimant. The defendant is made responsible for the third party's breach because of his intentional causative participation in that breach. Causative participation is not enough. A stranger to a contract may know nothing of the contract. Quite unknowingly and unintentionally he may procure a breach of the contract by offering an inconsistent deal to the contracting party which persuades the latter to default on his contractual obligations. The stranger is not liable in such a case. Nor is he liable if he acts carelessly. He owes no duty of care to the victim of the breach of contract.*
>
> *192 The additional, necessary factor is the defendant's intent. He is liable if he intended to persuade the contracting party to breach the contract. Intentional interference presupposes knowledge of the contract. With that knowledge the defendant proceeded to induce the other contracting party to act in a way the defendant knew was a breach of the parties' obligations under the contract. If the defendant deliberately turned a blind eye and proceeded regardless he may be treated as having intended the consequence he brought about*"

257. Mr Brown will no doubt take comfort in the concept that if you close your eyes to the obvious that may amount to an intention to bring about the consequences about which the innocent party to the contract complains; but I simply cannot accept that there has been a sufficient "*blind eye*" here where there is a brokerage agreement that demands transparency and an ethical approach and it is not inevitable that UW will breach its obligations to its customer. I remind myself that UW told the defendant more than once in emails that it had disclosed the commission arrangements to the claimant[16].

258. Furthermore, it was not put to Mr O'Connor that a breach was intended either deliberately or by turning a blind eye and neither was it pleaded.

259. In my judgment, this inducement to breach of contract must also fail.

Summary

260. I have concluded that:

- The claim in respect if the contract dated 8 February 2016 is statute barred.
- The claim for accessory liability is dismissed.
- The claim for procuring or inducing a breach of contract is dismissed.

Final Remarks

I am very grateful to counsel for their very able assistance in this matter.

16 See paragraph 95 above

HH Andrew Saffman
Circuit Judge sitting in Retirement