

(Half-) Secret Commissions and Unfair Credit Relationships:

***Wood v Commercial First Business Limited (In Liquidation)* [2019] EWHC 2205 (Ch)**

1 Quality Court
Chancery Lane
London
WC2A 1HR

This note is essential reading for mortgage providers, brokers and any practitioners with a practice or interest in civil fraud as the case constitutes perhaps the most detailed review of the law on secret commissions to date. In particular, it addresses the distinction between full secret commissions and so-called half-secret commissions where there is a partial disclosure. It clarifies the law in the area and solidifies the basis for a broker being held liable where a commission is only partially disclosed.

Facts

This case concerned two mortgages and a loan secured over property owned by C. D1 was the lender and the other Ds were assignees of the relevant debts, D1 having gone into liquidation.

In all of the transactions C was assisted by a broker, B. On two occasions B received a fee from C and on all three occasions B received commissions from D1.

C's claim had six elements:

1. Forgery, in respect of the second mortgage;
2. Lack of attestation, in respect of the first mortgage;
3. Undue influence;
4. Breach of duty;
5. Secret commissions; and
6. Unfair relationship under the Consumer Credit Act 1974.

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Decision

James Pickering (sitting as a Deputy High Court Judge) dismissed the first four claims and granted judgment to C on the basis of the final two. The judgment is particularly useful in reviewing the law on secret commissions.

In terms of remedies, the Judge held that C was entitled to recover from D1 (but not the other Ds as assignees) sums equivalent to the secret commissions and was entitled to rescission.

A secret commission is a commission paid by one person (D) to the agent (B) of the person with whom he is dealing (C) without all of the details of that commission being disclosed to C. Particular points to note are that:

- Secret commissions come in two types: fully secret and half-secret commissions.
 - A fully secret commission is one where C does not know that D has paid B a commission at all.
 - A half-secret commission is one where C knows that D may pay or has paid B a commission but does not know the amount of the commission.
- The test for secret commissions was as set out by Slade J in *Industries and General Mortgage Co Ltd v Lewis* [1949] 2 All ER 573, requiring:
 - That the person making the payment (D) makes it to the agent (B) of the other person with whom he is dealing (C);
 - That D makes it to B knowing that B is acting as the agent of C; and
 - That D fails to disclose to C that he has made that payment to B whom he knows to be C's agent.
- Where an agent receives a fully secret commission, the remedies for the principal will be money had and received (in respect of the amount of the bribe) and damages for fraud (in respect of any losses). Rescission was available as of right.

- Where an agent receives a half-secret commission, because there has been partial disclosure, it cannot be said there has been fraud so the remedies for a full secret commission do not apply. However, there could still be liability (and there could be an additional route to liability in the case of a secret commission) where there was a breach of fiduciary duty by B.
- The Judge considered that the decision in *Commercial First Business Ltd v Pickup* [2017] CTLC 1 was incorrect in considering that, where there was a half secret commission, because a borrower knew that his broker would receive a commission, the broker did not owe the borrower a fiduciary duty.

There was also some helpful discussion on limitation in respect of secret commission and unfair relationship claims:

- Section 5 of the Limitation Act 1980 applies to a claim for money had and received;
- Even if a secret commission claim should actually be characterised as a claim for equitable compensation, section 36 of the 1980 Act would apply by analogy; and
- Limitation for an unfair relationship claim was to be assessed in accordance with *Patel v Patel* [2009] EWHC 3264 and, if it had not already ended, the relevant relationship would only come to an end (and limitation begin to run) on the order of rescission.

Discussion

The judgment is instructive in reviewing the relevant case law on secret commissions and setting out the different tests succeeding on claims regarding full and half secret commissions.

The scope for rendering brokers liable for half-secret commissions on the basis of breaches of fiduciary duty (and the rejection of the *Pickup* decision) provides some much-needed additional protection for consumers who could otherwise potentially not have recourse for a limited disclosure of commission on the part of a broker.

Although the Judge clearly considered that the fiduciary duty would be less likely to be breached where the principals were sophisticated, the line of argument nonetheless constitutes a useful weapon for consumers who would not fall into that category.

The decision is unlikely to be the last word on the subject.

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