

RECENT DEVELOPMENTS IN COMMERCIAL LAW

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Welcome and opening remarks

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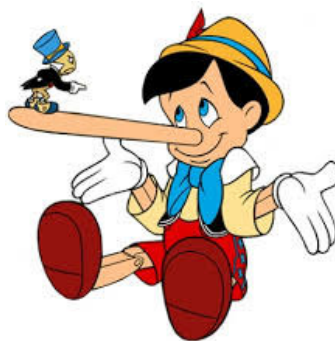
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Setting Aside Judgments Obtained by Fraud

David Mohyuddin QC

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A cause of action

- Fresh action to set aside earlier judgment
 - **Jonesco v Beard** [1930] AC 298
- Alternative: appeal with fresh evidence
 - **Noble v Owens** [2010] EWCA Civ 224
- Not a procedural application
 - **BCS Corporate Acceptances v Terry** [2018] EWCA Civ 2422

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A bare knuckle fight

- **Fraud** principle
 - Fraud unravels all
- **Finality** principle
 - There must come an end to litigation

Fraud principle wins...

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Takhar v Gracefield: decisions

- Facts
- [2015] EWHC 1276 (Ch)
 - Newey J
- [2017] EWCA Civ 147
 - Patten, King, Simon LJJ
- [2019] UKSC 13
 - Kerr, Hodge, Lloyd-Jones, Briggs, Arden, Kitchin JJSC, Sumption

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Takhar v Gracefield: takeaways 1

- If fraud not alleged in proceedings which led to judgment now attacked, no need to show that fraud could not have been uncovered with reasonable diligence
- Therefore absence of reasonable diligence not a reason to stay second claim as an abuse

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Takhar v Gracefield: takeaways 2

- Procedural rules may prevent allegation of fraud being raised in later proceedings
- Must have been conscious & deliberate dishonesty which must have been causative of terms of impugned judgment
 - **RBS v Highland** [2013] 1 CLC 596

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Takhar v Gracefield: takeaways 3

- Two potential qualifications
 - Where fraud was alleged at original trial
 - Where deliberate decision taken not to investigate suspected fraud in advance of original trial

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Examples

- **Horler v Rubin** [2019] EWHC 2016 (Ch)
 - Absence of due diligence requirement
 - Whether deliberate decision taken not to investigate suspected fraud
- **Gregor Fiskens Ltd v Carl** [2019] EWHC 3360 (Comm)
 - Procedural rules prevent fraud allegation from being raised

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Is it a bribe or not a bribe?

Stuart Cutting

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An exploration of the current law
on secret commissions in light of
**Wood v Commercial First Business
Limited (2019)**

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Agents, Bribes & Secret Commissions

- The Issue
 - Third party pays commission to agent without knowledge of Principal
- Causes of Action
 - Money had and received (recover bribe)
 - Breach of fiduciary duty as special category of fraud (damages for losses and rescission)

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Agents, Bribes & Secret Commissions

- Conflict between 2 High Court authorities
 - **Wood v Commercial First Business Ltd & ors**
[2019] EWHC 2205 (Ch)
 - **Commercial First Business Ltd v Pickup & Vernon** [2017] CTLC 1

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Law before Wood v Commercial First

Industries & General Mortgage Co Ltd v Lewis [1949] 2 All ER 573 at 575G-H, Slade J

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

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Law before Wood v Commercial First

Hurstanger Ltd v Wilson & anor

[2007] 1 WLR 2351, Tuckey LJ

- Where broker was acting as an agent the "relationship created was obviously a fiduciary one." Owe a duty of loyalty so as to cause a conflict of interest (at [33]).
- Not disclose receipt of a commission this is a "... blatant breach of his fiduciary duty but additionally the payment or receipt of a secret commission is considered to be a form of bribe and is treated in the authorities as a special category of fraud..." – "Fully Secret Commission" (at [38]).
- Sufficient disclosure - negates secrecy – "Half-Secret Commission" where no informed consent by principal (at [39], [43] and [47]).

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Law before Wood v Commercial First

McWilliams v Norton Finance (UK) Ltd (in liqn)

[2015] EWCA Civ 186

- Contract of agency even though it was "an information only sale" and no advice was given the broker was tasked with identifying the "lender willing to lend to these borrowers which offered terms most advantageous to these borrowers. That is likely to mean the lender offering the most competitive interest rate ..." (at [38]-[39]).
- Identifying a contract and characterising the relationship as one of agency is not conclusive as to whether a fiduciary duty was owed. The key question is whether the broker was acting in a capacity involving reposing trust and confidence (at [40]).
- Advice or recommendation is not relevant to the question of whether a fiduciary duty exists – it is whether the principal so relies on the agent as to leave them vulnerable to any disloyalty of the agent and so reliant on their good faith (at [46]).
- Bound to follow **Hurstanger** and find fiduciary relationship (at [48])

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Law before Wood v Commercial First

Commercial First Business Ltd v Pickup & Vernon

[2017] CTLC 1, HHJ Raynor QC

- Distinguished **Hurstanger** and found that there was no agency or fiduciary relationship (like County Court cases).
- Correct approach in cases of a bribe or secret commission (whether fully secret or half-secret) is a two-staged approach:
 - i. Is there an agency relationship? and
 - ii. If so, is it a fiduciary agency (including the scope)? (at [53])
- Notification of the possibility of the payment of a commission - the borrower did not have an expectation of "undivided loyalty" from the broker. This impacts on whether a fiduciary duty exists at all, or alternatively, impacts on the scope of any such fiduciary duty that exists (at [52])

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Wood v Commercial First

Key Findings (1)

- The line of authorities in the County Court distinguishing **Hurstanger** and ending in the High Court decision of HHJ Raynor QC in **Commercial First Business Ltd v Pickup and Vernon** were wrong (Judgment @ [130(8)]).
- Fully-Secret Commission (Judgment @ [129(1) and(4)] and [142])
 - Not necessary to consider whether there is a fiduciary relationship owed by the broker/intermediary and whether that fiduciary relationship has been breached.
 - Apply the threefold test for determining a "bribe" in **Industries and General Mortgage Co Ltd v Lewis**.
 - If the broker/intermediary did not owe fiduciary duties to the principal, a third party who paid a commission to the broker/intermediary could still be liable to the principal if the threefold test was satisfied.

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Wood v Commercial First

Key Findings (2)

- Three-Stage Test Satisfied - The broker was acting as the agent of the borrower, the lender must have known that the broker was acting as agent of the borrower and the payment of commission by lender to the broker was not disclosed to the borrower by anyone (Judgment @ [138]-[140]).
- The enquiry as to whether a fiduciary duty exists (and the scope of that duty) is only required when considering a "half-secret commission" case (Judgment @ [130(5)]).
- In relation to Mrs Wood "in my view it is abundantly clear that not only was UKMFS Mrs Wood's agent but moreover that their relationship was a fiduciary one." (Judgment @ [142])

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Wood v Commercial First

Key Findings (3)

- Mrs Wood's broker - put in a position of conflict and in breach of fiduciary duty by accepting commission payments – No informed consent and the lender was an accessory to the breach of fiduciary duty (Judgment @ [143]).
- Broker's terms and conditions did not provide notice to Mrs Wood of the possibility of the payment of a commission by the lender to the broker.
- Specific words considered were:

"We may receive fees from lenders with whom we place mortgages. Before you take out a mortgage, we will tell you the amount of the fee in writing. If the fee is less than £250, we will confirm that we will receive up to this amount. If the fee is £250 or more, we will tell the exact amount."

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Wood v Commercial First

Is it necessary for a fiduciary relationship to exist for a secret commission payment or bribe to be actionable?

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Wood v Commercial First

Fiduciary relationship necessary? (1)

- Put simply "Yes"
- Threefold test for determining a "bribe" in **Industries and General Mortgage Co Ltd v Lewis** not fully determinative of the legal position where a commission was fully secret (a bribe) – assumes "agent" owes a fiduciary duty.
- Where no fiduciary duty there is no legal basis for a cause of action as against the third party who has paid the secret commission.
- Not all agency relationships are fiduciary relationships whereby a fiduciary duty is owed – See **Bowstead & Reynolds on Agency, 21st Ed, Paragraph 6-037**
 "...not every person who can be described by the word "agent" is subject to fiduciary duties..."

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Wood v Commercial First

Fiduciary relationship necessary? (2)

- Case law progressed over last 70 years
 - **Boardman v Phipps** [1967] 2 AC 46 at 127A-C per Lord Upjohn
 "...The facts and circumstances must be carefully examined to see whether in fact a purported agent and even a confidential agent is in a fiduciary relationship to his principal. It does not necessarily follow that he is in such a position (see **In re Coomber**)."
 - **Henry Lennox (Industrial Engines) Ltd v Grahame Puttick Ltd** [1984] 1 WLR 485 at 498G-H. Having considered **Boardman v Phipps** Staughton J stated:
 "...One therefore has to examine the relationship in each individual case, to see whether it is of a fiduciary nature..."

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Wood v Commercial First

Fiduciary relationship necessary? (3)

- **UBS AG (London Branch) v Kommunale Wasserwerke Peipkiz GmbH** [2017] EWCA Civ 1567; [2017] 2 CLC 584 at [92] per Lord Briggs and Lord Justice Hamblen
 "... the existence of a fiduciary duty was by no means an essential characteristic of agency. We agree. There are no doubt many forms of non-fiduciary agency ..."
- The leading authorities considered by Judge Pickering make no specific reference to **Industries and General Mortgage Co Ltd v Lewis**
- Two recent authorities that refer to **Industries and General Mortgage Co Ltd v Lewis** make it clear that a "fiduciary relationship" is required:
 - **Tarn Insurance Services Ltd v Kirby** [2009] EWCA Civ 19 at [63], per Sir John Chadwick
 - **Prince EZE v Conway** [2019] EWCA Civ 88 at [35], per Asplin LJ

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Wood v Commercial First

Fiduciary relationship necessary?(4)

- All Secret Commission Cases - Enquiry as to whether a fiduciary duty exists (and the scope of that duty) is required - liability of the third party depends on the third party being an accessory to the agent's conflict and breach of fiduciary duty

- The existence of a fiduciary duty is essential to liability – see Tuckey LJ in **Hurstanger** at [38]:

“Obviously if there has been no disclosure the agent will have received a secret commission. This is a blatant breach of his fiduciary duty”

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Wood v Commercial First

Fiduciary relationship necessary? (5)

- It is the very nature of the fiduciary relationship that gives rise to the liability that Slade J recognized in the threefold test: however, in cases where it is not clear whether or not an agent is also a fiduciary, before considering that threefold test, the court must first consider whether or not there is a fiduciary relationship at all.
- All Secret Commission Claims –
 - Court should first undertake HHJ Raynor QC's two-stage test – (i) as to whether there is an agency relationship and (ii) whether that is a fiduciary agency (including the scope). Such an approach is necessary because not all agency relationships are fiduciary.
 - Only if a fiduciary relationship exists can the payment of a secret commission amount to a breach of a fiduciary duty and the threefold test in **Industries and General Mortgage Co Ltd v Lewis** becomes relevant.

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Wood v Commercial First

What should the Court consider when determining whether there is a fiduciary agency relationship?

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Wood v Commercial First

Factors for determining whether fiduciary relationship exists (1)

- Well-known definition of “agency” set out in **Bowstead & Reynolds on Agency, 21st Ed, Paragraph 1-001**:
“Agency is the fiduciary relationship which exists between two persons, one of whom expressly or impliedly manifests assent that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly manifests assent so as to or so acts pursuant to the manifestation.”
- Key question is whether the alleged principal establishes that the alleged agent is an agent in the “*paradigm sense*” of being able to affect the legal relations of the alleged principal.

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Wood v Commercial First

Factors for determining whether fiduciary relationship exists (2)

- "incomplete agent" in the sense referred to **Bowstead & Reynolds on Agency, 21st Ed, Paragraph 1-020**
 "well-established type of intermediary who makes no contracts and disposes no property but is simply hired, whether as an employee or independent contractor, to introduce parties desirous of contracting and leaves them to contract between themselves."
- Providing services that are purely administrative in nature and the giving of advice by an agent does not automatically turn the relationship into a fiduciary relationship, and, in fact, seldom will
 (see Professor Paul Finn in "Fiduciary Law and the Modern Commercial World" in "Commercial Aspects of Trusts and Fiduciary Obligations" by Ewan McKendrick, First Edition, Section 1.1 "The Adviser/Information Provider", Page 10)

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Wood v Commercial First

Factors for determining whether fiduciary relationship exists (3)

- Critical feature of fiduciary relationships - **Hospital Products Ltd v United States Surgical Corpn** (1984) 156 CLR 41 at 96 and 97 (Mason J in the High Court in Australia)
 "The critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that person in a legal or practical sense."
- Well-known passage of Millett LJ in **Bristol & West Building Society v Mothew** [1998] Ch 1 at 18A-C: two necessary elements:
 - Duty of Loyalty – "single minded loyalty"
 - Repose Trust and Confidence

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Wood v Commercial First

Factors for determining whether fiduciary relationship exists (4)

- When considering whether a relationship is an agency relationship and whether fiduciary duties exist the Court must analyse all of the facts and circumstances of the case (**Boardman v Phipps** at 127A-B).
- Relevant test is objective, not subjective. It does not matter what the alleged principal or beneficiary thought. It is also irrelevant that the alleged principal in fact reposed trust or confidence in the alleged fiduciary (see **Snell's Equity, 32nd Edn., Paragraph 7-005**).
- Most brokers are not a "full-blooded" agent as they are unable to affect the borrower's legal relations (e.g. by signing the loan agreement on their behalf).

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Wood v Commercial First

Does the fact that a Broker puts a Borrower on Notice of the Potential Receipt of a Commission Payment mean there is no Fiduciary Relationship?

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Wood v Commercial First

Notice of Potential Commission Payment (1)

- Notification to the borrower of the possibility of the payment of a commission payment is sufficient to negate any secrecy - at the very least turns a "fully secret commission" case into a "half-secret commission" case.
- Tuckey LJ observed in **Hurstanger at [43]**:
 "If you tell someone that something may happen, and it does, I do not think that the person you told can claim that what happened was a secret. The secret was out when he was told that it might happen."
- Judge Pickering construed the following wording:
 "We may receive fees from lenders with whom we place mortgages. Before you take out a mortgage, we will tell you the amount of the fee in writing. If the fee is less than £250, we will confirm that we will receive up to this amount. If the fee is £250 or more, we will tell the exact amount."

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Wood v Commercial First

Notice of Potential Commission Payment (2)

- Judge Pickering stated this is an implied representation that if the borrower was not notified of the amount of any commission paid, she was entitled to assume that in fact no such commission had been paid at all.
- Plainly wrong and stretches the wording too far. The secret is out of the bag by the notification of the possibility of the payment of a commission payment and once the genie is out of the bottle it cannot be put back.
- HHJ Raynor QC in **Commercial First Business Ltd v Pickup and Vernon** the notification of the possibility of the payment of a commission meant that the borrower did not have an expectation of "*undivided loyalty*" from the broker thereby impacting on whether a fiduciary duty exists at all.

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Wood v Commercial First

And finally...

It is hoped that the Court of Appeal will determine these issues and provide the much-needed certainty and guidance at appellate level

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Chabra Orders
Hot tips on freezing
third party assets

James Woolrich

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Overview

- I. Setting the Scene
- II. Legal Power
- III. (International) Jurisdiction
- IV. Traps for the Unwary
- V. Drawing the Threads Together

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Setting the Scene

- Non-proprietary freezing injunction
- Against a Non Cause of Action Defendant (NCAD)
- In respect of assets which will be amenable to enforcement to satisfy judgment against the Cause of Action Defendant (CAD)

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Legal Power

- In support of (substantive) English proceedings – **s.37 Senior Courts Act 1981**
- In the absence of substantive English proceedings – **s.25 Civil Jurisdiction and Judgments Act 1982**
- In support of arbitral proceedings – **s.2(3) and s.44 Arbitration Act 1996?** See **s.37 SCA 1981**

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Legal Power (Test)

- Basic test (under **s.37 SCA 1981**):
 - Gac (cause of action vs. CAD)
 - Grts/gac assets amenable to process of enforcement in respect of judgment against CAD
 - Risk of dissipation
 - Is it 'just and convenient' to grant the order?
- NB - additional requirements **under s.25 CJJA 1982**

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(International) Jurisdiction

- Does the English Court have personal jurisdiction over the NCAD?
 - Domestic?
 - European rules of jurisdiction?
 - Don't forget **Van Uden** / real connecting link (C-391/95, [1999] QB 1225)
 - Common law rules of jurisdiction?
 - Identify your **CPR Practice Direction 6B** gateway(s)

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Traps for the Unwary

- Legal Power
 - NCAD (just) 'mixed up'
 - CAD (only) has substantial control
 - No or limited assets in England
- (International) Jurisdiction
 - Effective sanction?
 - Post-judgment/award

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Drawing the Threads Together

- Consider constituent elements
- Alternatives?
 - Can you achieve the effect of **Chabra** relief through a (WW)FO against the CAD?
 - NB **Ablyazov (No 10)** [2015] UKSC 64
 - Notification injunction only?
 - Disclosure under **CPR r.25.1(1)(g)**?
- Which national court?
- Full and fair disclosure at *ex parte* stage

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Appendix

- Recent/Useful Cases* (1)
 - Useful summary of principles: **PJSC VAB v Maksimov & Ors** [2013] EWHC 422 (Comm) at [7] (approved in **Lakatamia Shipping** [2014] EWCA Civ 636 at [32])
 - Existence of assets: **Ras al Khaimah Investment Authority & Ors v Besfort Development** [2018] 1 WLR 1099 at [39]
 - Risk of dissipation; notification orders: **Holyoake v Candy** [2017] EWCA Civ 92
 - Risk of dissipation; full and fair disclosure: **FSDEA & Ors v Dos Santos & Ors** [2018] EWHC 2199 (Comm) at [82], [86]
 - Limits: **Phoenix Group Foundation v Cochrane & Stewarts Law LLP** [2017] EWHC 418 (Comm)

* Not exhaustive!

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Appendix

• Recent/Useful Cases* (2)

- Limits; full and fair disclosure: **Banca Turco Română S.A. (in liquidation) v Çörtük & Ors** [2018] EWHC 662 (Comm)
- Control: **TSMF v Merrill Lynch Bank** [2011] UKPC 17
- s.25 CJA 1982: **Credit Suisse Fides Trust SA v Cuoghi** [1998] QB 818; **Motorola Credit Corp v Uzan & Ors (No 2)** [2003] EWCA Civ 752
- s.44 AA 1996 and its limits: **Cruz City** [2014] EWHC 3704 (Comm); **DTEK v Morozov** [2017] EWHC 94 (Comm) ; **Trans-Oil v Savoy** [2020] EWHC 57 (Comm); **A, B v C, D, E** [2020] EWHC 258 (Comm)
- Disclosure under CPR r.25.1(1)(g): **Pugachev** [2015] EWCA Civ 139 [52]

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Closing remarks

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