TYPICAL TRIPARTITE CASES

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3 HARE COURT

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TYPICAL TRIPARTITE CASES

A. Breach of Fiduciary Duty

1. It is a duty of fiduciaries to owe their principal single-minded loyalty. "*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*" (per Millett LJ in *Bristol and West Building Society v Mothew* [1998] Ch 1).

2. The key is that the person must be acting in the interests of the claimant and must put his interests after those of the claimant. This will rarely be the case in a commercial transaction where there is evidently a financial interest at stake. Nor is it enough that a person gives advice as they may simply have undertaken a duty to exercise reasonable care and skill in the provision of advice rather than undertaking to serve the interests of the claimant with single-minded loyalty. Nor is it sufficient that a bank is bound by GISC or ICOB Rules or that OFT guidance aimed at consumer protection may apply to them (Barnes v Black Horse [2011] EWHC 1416). Such rules and guidance are generic only and do not give rise to a fiduciary relationship without more.

3. For this reason it will be very rare that a lender/bank will be held to owe a fiduciary duty. However, there is more of a chance of establishing a fiduciary duty owed by a broker.

4. Some fiduciary relationships arise as a result of presumptions arising from settled categories of relationships and others arise if "*the circumstances justify the imposition of such duties*" (Snell's Equity at para 7-004 & 7-005).

5. The general rule is that a broker, an appointee of the assured, acts as the agent of the assured (Colinvaux 15-026- 15-028).

6. Thus a broker may be a fiduciary agent of the consumer because of a settled category (as could be suggested based on Colinvaux's view) or because of the facts in the case.

7. Receipt of a secret or halfway house commission (see section (B) below) is almost certainly going to be a breach of fiduciary duty.

B. Procuring a Breach of Fiduciary Duty: Hurstanger

1. This cause of action typically arises in commission cases although it applies to procuring a breach of *any* fiduciary duty not just the duty not to make a secret profit without informed consent.

2. NB. These commission cases are not the same as ***Harrison*** commission cases. Where the lender receives a commission from the insurer, it is widely accepted that there is no cause of action per se. The lender does not normally owe fiduciary duties. The critical ingredient for ***Hurstanger*** actions are that the person receiving the commission does owe a fiduciary duty. This very often will cover the broker.

Hurstanger

3. The leading case on secret commissions paid by a lender in the context of PPI is the Court of Appeal decision in ***Hurstanger Ltd v Wilson*** [2007] EWCA Civ 299. In that case the defendant consumers applied through a broker to obtain a loan from the claimant lender. The consumer signed a pre-contractual document of the lender's acknowledging that "in certain circumstances this company does pay commission to brokers". The broker received (a) a fee of £1000 paid by the consumers and (b) a commission of £240 paid by the lender to the broker.

4. Tuckey LJ, with whom the Waller and Jacob LJJ agreed, distinguished between wholly secret commission cases and 'half-way house' cases. Secret commission cases arose when the principal had no knowledge of the commission. The latter arose when the commission paid was not secret per

se but was not given by the consumer with informed consent. Lord Justice Tuckey applied the principles to the pre-contractual document as follows:

> "[44] Was the defendants' informed consent obtained? I do not think it was. The passage which I have quoted was muddled although, read carefully, for the reasons given by Mr Seymour, it may not in fact have been ambiguous. But it could and should have been clearer and informed the defendants that a commission was to be paid and its amount and done so in terms which made it clear that the defendants were being asked to consent to this....[45]...This is a half-way house case. The claimant did not pay the broker a secret commission but procured the broker's breach of fiduciary duty by failing to obtain the defendants' informed consent to the broker acting in the way he did."

5. There is little authority save for ***Hurstanger*** on the cause of action of procuring a breach of fiduciary duty. This is important for 2 reasons (a) limitation and (b) establishing the ingredients to fulfil the cause of action. Accordingly these notes should be taken as a 'best guess' only.

Limitation

6. There is nothing expressly dealing with procuring a breach of fiduciary duty in the Limitation Act 1980. Accordingly, either there is no limitation period applicable to this cause of action or a Court would need to apply a limitation period by analogy pursuant to LA, section 36.

7. The banks will argue that the analogy is with the tort of procuring a breach of contract which has a 6 year time limit pursuant to LA, section 2. However, it is clear that procuring a breach of fiduciary duty is not itself a tort (Metall und Rohstoff v Donaldson Lufkin & Jenrette Inc. [1990] 1 QB 391). It is therefore questionable why an analogy should be drawn with a tort limitation period.

8. In my view there is a good argument that procuring a breach of fiduciary duty is analogous to dishonest assistance in a breach of trust. It is broadly

accepted that a claim for a bare breach of fiduciary duty is treated as analogous with a bare claim for breach of trust for the purposes of limitation (para 7-063). Thus there is a sensible link between a claim based on a third party assisting a breach of fiduciary duty and a third party assisting in a breach of trust. Dishonest assistance in breach of trust falls within s21(1) of the Limitation Act 1980 and has no applicable limitation period (Central Bank of Nigeria v Williams [2012] EWCA Civ 415).

Ingredients

9. There is very little guidance on the ingredients of the cause of action. The leading case remains *Hurstanger* and from this it seems that a claimant will have to establish (a) the existence of a fiduciary duty (b) breach of that fiduciary duty and (c) procurement.

10. The existence of a fiduciary duty will be determined according to the principles set out above.

11. In the context of commissions, there will be a breach of the fiduciary duty if either of the categories of *Hurstanger* is fulfilled. There may be a secret commission in the sense that the claimant didn't know (and wasn't told in any of the documents) that the lender would pay the broker a commission. Alternatively there may be a halfway house situation where the claimant knew of the possibility of a payment of a commission but lacked sufficient information to give their informed consent.

12. In most cases the lender (and sometimes the broker if involved in the litigation) will rely upon the FISA booklet which expressly states that a commission may be paid to the broker. This may be sufficient and would mean that secret commission cases will be rare. However, it seems possible to argue that commission on 'the loan' is a reference to the base loan only and accordingly the commission on the PPI remains secret.

13. However, the extent of the information given to the claimant about the particular commission varies greatly. In FHR European Ventures LLP v Mankarious [2001] EWHC 2308 (Ch) the Court stated that the materiality of what had to be disclosed as to be assessed on the basis of whether it *might* have affected the principal's decision and not whether it would have done so. This leaves much room for disagreement.

14. There will be easy cases where the claimant was not told any amounts or percentages or any other facts from which they could form an informed view. This could well be a halfway house case. There will be other more difficult cases where some information was given but the information can be criticised as being incomplete or unclear. For example, is it enough that the claimant is told the commission on the total loan (comprising the base loan and the PPI loan) or must the claimant be told the commission on each of the separate financial products, i.e. commission on the PPI must be specified and singled out? It's difficult to predict which way the Courts will go on this issue.

15. The most difficult ingredient to define is 'procuring'. What does this mean? Banks commonly argue that the claimant must establish that the bank had (i) knowledge of the fiduciary duty and (ii) knowledge of the breach. This is not supported by *Hurstanger*.

16. In *Hurstanger* it was sufficient that the lender knew the broker was the agent of the consumer, had knowingly paid a commission and then the burden was on the lender to show it had obtained informed consent (at para 42G). Thus it is arguably enough for the claimant to establish that the bank paid a commission knowing of the existence of a fiduciary duty between the payee and the claimant. The bank then has to show that it took steps to ensure informed consent had been obtained.

17. Accordingly, and crucially, there is no support for the bank's argument that the claimant has to show the bank knew of the breach of fiduciary duty. There appears to be almost a presumption that it knew of the breach unless it

can show evidence of informed consent. There is little indication of what this will mean in practice.

18. A further issue is how far the analogy with dishonest assistance (used for limitation reasons) can be taken. In an action for dishonest assistance in breach of trust, it is necessary to establish that the third party 'assister' was acting in a way which an ordinary honest person would appreciate was wrong or improper. By analogy with this, a claimant in a procuring a breach of fiduciary duty claim would have to show that the bank acted in a way which an ordinary honest person would appreciate was wrong or improper. Whether this is what was meant in ***Hurstanger*** or whether an analogy with dishonest assistance would require something further is unclear.

19. All that can be sure is that this is a developing cause of action. If the claimant can fall exactly within ***Hurstanger*** then the cause of action has good prospects of success. However, if the facts differ slightly and the issue of the ingredients of the cause of action is raised, it will be difficult to predict which way a court will go.

C. Unfair Relationship with bank due to acts/words of broker

1. It is common for claimants to argue that acts done or words said by brokers are done or said on behalf of the lender within the meaning of CCA, s140A. It should be noted that this will almost certainly be inconsistent with (A) and (B) above in which the claimant is arguing that the broker was a fiduciary of and therefore acting on behalf of the claimant. It is therefore important for the Particulars of Claim to be drafted *in the alternative* so that the claimant is not accused of inconsistency.

2. Banks will argue that 'done ...on behalf of' means that the broker must be the bank's agent. My view is that the Act was not intended to be this narrow and to apply rules of agency or contract law, otherwise contract defences would always prevail over the Act which was plainly intended to protect consumers from the ordinary consequences of a binding contract. This was accepted in

the ULL case of Vines which I did in Peterborough and I imagine that normally the county courts would agree with this.

3. If 'done....on behalf of' is limited to strict agency principles then the claimant will almost always lose. As is set out at the top of this handout, the presumption is that the broker acts as agent of the claimant and therefore owes him or her fiduciary duties. The claimant would need to point to some pretty strong facts to displace this presumption.

4. At para 12.5 of the OFT's '*Consumer Credit Law and Practice – A Guide'* it is said:

> "12.5 Credit-brokers with reference to unfair relationships
>
> The conduct of credit-brokers is relevant in determining whether the relationship between the creditor and debtor is unfair because of anything done, or not done, by the credit-broker acting on behalf of the creditor, either before or after the making of the agreement or any related agreement.
>
> In deciding whether to make a determination, the court must have regard to all matters it thinks relevant. A creditor transacting on an ongoing basis with a specific credit-broker should therefore procure undertakings from the credit-broker to conduct himself lawfully, fairly, in accordance with OFT guidance and relevant codes of practice. Moreover, as any claim would lie against the creditor, without an automatic right of recourse against the credit-broker, the creditor should obtain an appropriate indemnity from the credit-broker including in respect of any acts, omissions and representations made by the credit-broker on his behalf."

5. This is a crucial bit of OFT guidance. It gives strong support for the claimant's argument that a broker may be acting on behalf of a bank and it gives an idea of the regulator's view of what a bank will need to show to avoid liability.

That said, I do not know of any court which has been persuaded that the OFT's view reflects the law in this area. Other regulatory guidance applicable at the time the loan was taken out should also be referred to in accordance with the judgment of *Harrison*.

6. In *Yates & Lorenzelli v Nemo* the Court considered that there was an unfair relationship because the bank, by paying a broker a commission, created a incentive to the broker to sell the product without discharging its proper duties. Accordingly, the bank had created an unfair relationship unless it could show the claimant had given fully informed consent.

7. My experience is that arguments based on suing a lender for a broker's acts or statements are likely to fail. The broker will usually be considered to be acting in his own interests at most and not on behalf of the lender. *Yates* was a useful case for a while but has now been largely discredited by *Harrison*. There may occasionally be a great case which can fit the requirements of s140A and it may be worth pleading it for tactical reasons, but in general it will be a difficult case to succeed on.

HELEN PUGH

Cost only hearings – Brawley v Marczinsky

1. The first question should be: is it worth consenting to a Brawley type hearing? What are the chances of succeeding at Brawley hearing v chances of succeeding at trial.

2. Technically, the client must pay solicitor's fees + uplift. Position in practice?

3. Check whether client has accepted payment in „full and final settlement".

4. Where a cheque payment is made in „full and final settlement" it is a rebuttable presumption that it is accepted on that basis. This may be contradicted – say it is accepted „without prejudice to full entitlement" or as only interim payment etc.

5. CoA in **Brawley** emphasised that there will be some obvious cases and – at the other extreme – some where it is impossible to decide who would have won.

6. Consider whether case can really be decided on the papers. If there is no defence but there are Particulars of Claim – unlikely that D will put in a defence for the Brawley hearing – in which case can argue that there is only evidence in C's favour.

7. Where there is a Defence, cases would boil down to credibility. Clearly, a Court cannot decide this without hearing the evidence.

8. Having said that some courts will accept the submission that Bank settled after investigating the matter, therefore, C would have won. They should not accept this, but they often do...

9. Is the client clearly the overall winner? Claim forms often value the claim much higher than the settlement amount.

10. Court can also take into account which track the case would have been allocated to. This can be a problem with smaller value claims. Here C needs to

rely on usual arguments on allocation: complexity, public importance, C could not be expected to fight such a claim unaided etc.

11. Note that as courts are getting more and more familiar with this area, allocation on small claims track is much more likely.

12. Note that the famous guidance by HHJ Waksman QC (fast track or multi track) was said in the context of cases that by virtue of their value were destined to be on fast track...

13. Finally, court can consider party's conduct. Therefore, be reasonable.

Maximising costs

14. In correspondence, be reasonable and co-operative. Avoid aggressive language in writing. Don't write „outrageous", „beggars belief" etc; just disagree, do not accept. Thank D in advance. Thank D for their response.

15. Always comply with Court orders. They are orders made to be obeyed and you are officers of the court. Deadlines should never be missed.

16. If you are going to miss a deadline, write to the Court beforehand. Apologise and explain. Give an alternative date that is realistic.

17. Even better, if you are going to miss a deadline due to D's conduct (late service of bundles etc), write to the Court. Apologise for D's fault!

18. Cost schedules: Comply with the CPR requirements: serve 24 hours in advance, file at Court; tell Counsel that it has been filed and served.

19. Ensure there is a statement of truth and it is signed by a partner.

20. The more information you can provide Counsel with, the better. „Documents 14 hours" does not help as much as setting out which documents you spent how long on and why the case took longer to prepare that one would expect.

21. Notice of funding should be filed and served. A simple mistake and you are halving your recoverable costs.

22. If it has not filed/served – apply for relief from sanction.

23. Get your ATE insurance figures right.

Witness statements

24. The client's statement should be a statement by the client. In her own words. You may lose the client's credibility if in her statement she is arguing about ICOB r. 4.2(1)(c).

25. All documents in litigation should tell the same story. The Letter Before Action, the Particulars, correspondence and statements. The Court will assume that everything is drafted on client's instructions and you client will be cross-examined on differences.

26. It is, therefore, essential that the case is front-loaded and you know your client's case right from the outset. Get all the information at the beginning; decide whether the case should be run and then run it.

27. Do not include argument – especially in the client's statement.

DANIEL TIVADAR