Neutral Citation Number: [2025] EWCA Civ 292

Case No: CA 2024 000841

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN LEEDS
BUSINESS LIST (ChD)
HHJ SAFFMAN
BL-2024-LDS 0000003

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 March 2025

Before:

LADY JUSTICE ASPLIN
LORD JUSTICE SNOWDEN
and
LORD JUSTICE ZACAROLI

- -

Between:

Expert Tooling and Automation Limited	**Appellant**
- and -	
Engie Power Limited	**Respondent**

- -
- -

Thomas Grant KC Professor Paul Davies and Ryan James Turner (instructed by **BC Legal Limited**) for the **Appellant**
David Lord KC and Stuart Cutting (instructed by **Walker Morris LLP**) for the **Respondent**

Hearing dates: 29 and 30 January 2025

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Approved Judgment

This judgment was handed down remotely at 10.30am on 21 March 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Zacaroli:

Introduction

1. This case concerns the liability of someone who pays commission to the agent of a third party principal, where the circumstances of the commission are only partially disclosed to the principal (sometimes referred to as a "half-secret" commission case).

2. The claimant, Expert Tooling and Automation Limited ("Tooling") is a company carrying on business as a manufacturer of tools and related equipment and machinery. It consumes significant amounts of energy. The defendant, Engie Power Limited ("Engie"), supplies electricity. Tooling used the services of a third party broker, Utilitywise Plc ("UW"), to negotiate and, in some cases, execute on its behalf electricity supply contracts with Engie.

3. UW was paid nothing by Tooling, but received a commission from Engie, the amount of which was added to the unit price Tooling paid for electricity under its contracts with Engie. Tooling was aware that UW Would be paid commission by Engie, but did not know other material matters, including how much.

4. The authorities concerning secret commissions (or bribes) and partially disclosed commissions were recently reviewed by this court, in *Johnson v FirstRand Bank Limited* [2024] EWCA Civ 1282 ("*FirstRand*"). That case concerned commissions which motor car dealers received from finance companies where, the purchaser having requested financing, the motor dealer also acted as broker between the purchaser and the finance company. An appeal against that decision is due to be heard by the Supreme Court at the beginning of April 2025. The hearing of the present appeal was expedited to be heard – and if possible for judgment to be given – before the Supreme Court hearing in *FirstRand*.

5. UW has played no part in these proceedings. It was dissolved on 19 May 2022, having gone into administration on 13 February 2019.

6. The claim form was issued on 1 April 2022. Tooling claimed, in essence, that: (1) UW owed it contractual and fiduciary duties, in particular a duty not to allow its interests to conflict with those of Tooling; (2) the receipt of commission from Engie without having obtained Tooling's informed consent constituted a breach of those duties; (3) Engie, by paying the commissions, had procured UW's breaches of contractual and/or fiduciary duty; and (4) Tooling was entitled to recover the amount of the commissions paid by Engie as money had and received, alternatively as equitable compensation for inducing UW to breach its duties. The claim for procuring breach of contract was dealt with only briefly at trial, it being conceded that it stood or fell with the equitable claim. It is not pursued on appeal.

7. The claim against Engie was principally based on the decision of this court in *Hurstanger v Wilson* [2007] EWCA Civ 299; [2007] 1 WLR 2351 ("*Hurstanger"*). The principle said to be derived from that case is that the *payer* of a half-secret commission, who is aware that the recipient of the commission is the agent for the claimant, is liable to pay equitable compensation for having procured a breach of fiduciary duty by the agent, unless it (the payer) can establish that the commission

was paid in circumstances where the claimant had given their informed consent to the payment.

8. The judge dismissed Tooling's claim, for reasons I explain in more detail below. Tooling appeals on seven grounds, with the permission of Snowden LJ granted on 7 August 2024. The decision of this court in *FirstRand* was handed down on 25 October 2024. Tooling then applied to add an eighth ground of appeal, described below at [41]. On 14 January 2025, Lewison LJ adjourned Tooling's application to the hearing of the appeal, but gave permission to the parties to file supplemental skeleton arguments addressing the point.

The facts

9. Much of the factual background is common ground, or is the subject of findings by the judge against which no appeal has been brought. The following are the essential matters relevant to the points raised by this appeal.

The contract between Tooling and UW

10. Under a letter of authority from Tooling dated 1 November 2015, UW was engaged "to act as a service provider to [Tooling] in all matters pertinent to our Gas and Electricity supplies and service." Later letters of authority were provided by Tooling to UW in similar terms. In various emails from UW to Tooling, it was stated that "if you have returned a signed LOA, you acknowledge and accept that you have read the Utilitywise standard terms and conditions, and your instructions will be deemed agreement by you to be bound by Utilitywise standard terms and conditions." There followed a link to the terms and conditions on UW's website.

11. Those terms and conditions obliged UW to provide "the Services" to Tooling. These were defined as the services set out in the schedule of services provided to the customer. In fact, no schedule of services was provided. It was the evidence of Mr Craig Forster, an employee of Tooling who dealt with UW, that UW told him that as experts in the energy market, they would act on Tooling's behalf and in their best interests and save them money. This echoes what appears on UW's website, where the following appeared:

> "With hundreds of different tariffs on offer from dozens of suppliers, having a trusted advisor on your side to reduce uncertainty and help pick the right contract terms for your business will give you real peace of mind and save you time, money and hassle.
>
> At Utilitywise we pride ourselves on taking the hassle out of business energy procurement. We'll negotiate with your energy supplier on your behalf and help you secure a fixed price energy contract that can you give you budget certainty and help your financial planning."

12. In light of these facts, the judge found that UW was Tooling's agent, that this was a case of paradigm agency and, as such, UW owed fiduciary duties to Tooling including

the duty not to allow its interests to conflict with those of Tooling. There is no appeal from those findings.

The contract between UW and Engie

13. There was a separate legal relationship between UW and Engie. At the time of the entry into the first contract between Engie and Tooling, this was contained in a detailed brokerage agreement dated 25 June 2015. The recitals included that UW wished to charge a procurement commission in relation to the introduction of customers to Engie, and that the provisions of the agreement were intended to ensure that UW "will act in a fair, honest, transparent, appropriate and professional manner when dealing with Potential Customers". By clause 4.1.1 UW warranted and undertook that:

> "it has the authority to act on the Potential Customer's behalf; (1) in relation to the procuring and providing to [Engie] of information relating to its Electricity and/or Gas consumption and supply; (2) for the purposes of obtaining quotations and contracts to supply; and (3) In providing all further information and data that may be required by [Engie] on an on-going basis."

14. By clauses 4.1.8 to 4.1.10, UW undertook to act in various ways which amounted to acting fairly and transparently with potential customers. By clause 4.1.11 it undertook that:

> "It will, at all times whether prior to or 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…"

15. The payment of commission was addressed in clause 5. Clause 5.1 provided that Engie would pay a commission in respect of each supply contract Engie entered into with a potential customer, where requested by UW. The rate of commission was, by clause 5.2, to be notified by UW to Engie during the preparation of the quotation by Engie, and "shall be subject to agreement between the Parties." By clause 5.6 it was agreed that the commission to be paid to UW would be based on the potential customer's estimated energy consumption, subject to a reconciliation process at the end of each supply contract.

16. In fact, upon entry into each contract, UW was paid a substantial sum up-front, calculated as 80% of the commission UW would ultimately be entitled to, based on Tooling's expected consumption over the life of the contract. In the case of the first contract, the price charged to Tooling was 17.82p per kWh (day rate) and 15.598p per kWh (night rate) over the five-year term. 5.6p per kWh of these prices represented the amount of UW's commission. The estimated consumption over the life of the contract was over 2 million kWh, producing an estimated commission of just over £112,000. UW received an up-front payment from Engie of £89,000.

17. By clause 8.4, both parties agreed not to disclose the details of the 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."

18. Later brokerage agreements between UW and Engie were in materially similar terms.

19. For certain time periods, pursuant to side letters between UW and Engie, UW was entitled to receive substantial additional commission, up to £5 million in 2015 and up to £6.5 million in 2016, as part of a campaign to increase the number of customers introduced by Tooling to Engie. This was subject to a clawback to the extent that UW failed to meet certain targets in terms of the number of new customers introduced. The arrangement pursuant to these side letters created an obvious incentive on UW to direct all new customers towards Engie. It was not disclosed to Tooling. In fact, however, Tooling was not a new customer, and/or the relevant contracts in this case between Tooling and Engie were not entered into within the periods within which this additional commission would have been earned by UW. Accordingly, the side letters do not have any application to this case.

The contracts between Tooling and Engie

20. Five contracts are at issue, all for the supply of electricity to Tooling's premises in the Northeast of England. The first contract was dated 8 February 2016, for supply during the period of 60 months from 1 April 2016. The subsequent contracts were entered into:

    (1) On 17 May 2016, for supply for the period 1 April 2021 to 30 September 2021;

    (2) On 28 November 2016, for supply for the period 1 October 2021 to 31 March 2022;

    (3) On 9 November 2017, for supply for the period 1 April 2022 to 30 September 2022; and

    (4) On 30 November 2017, for supply for the period 1 October 2022 to 31 March 2023.

21. The first three contracts were executed by UW on Tooling's behalf. The fourth and fifth contracts were signed by an employee of Tooling.

The extent to which commission was disclosed to Tooling

22. It is common ground that UW disclosed to Tooling the *fact* that it would be paid commission by Engie. Mr Forster said that UW told him they would receive payment from the supplier that they put Tooling's business with.

23. Another employee of Tooling, Phil Gazeley, was telephoned on 29 January 2016 by Dean Jackson of UW, in relation to the first contract to be entered into with Engie. In the course of that call, Mr Jackson said: "as I'm sure you're aware as a consultancy we *do* get paid a commission from the supplier as well. Is that okay?", to which Mr Gazeley replied "yes".

24. UW's terms and conditions included an oblique reference to commission, limiting its 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".

25. Engie itself disclosed to Tooling that the prices quoted by it *may* include commission due to any third party consultant or broker which Tooling used to negotiate their contract with Engie, albeit that this appeared only in small print on its quotation, beneath the terms of the particular contract.

26. It remains in dispute whether Tooling was told that UW's commission was in fact added to the unit price under any of the five contracts. Mr Lord KC (who appeared for Engie) submitted that the judge found as a fact that Mr Jackson of UW told Mr Forster, in a telephone call on 21 January 2016, that UW's commission was added to the price. The transcript of that call records Mr Jackson running through a prepared script, including the following:

> "and as I'm sure you are as (sic) 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) your utility management plan consisting of the following, that is your dedicated account manager."

To which Mr Forster responded "yep".

27. The judge's findings on this issue are set out at §197 to §202, and can be summarised as follows:

(1) He accepted 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."

(2) He also accepted that neither of them had any grounds for making that assumption, as Mr Forster was prepared to concede.

(3) So far as Mr Forster is concerned, prior contracts which – if similar to the relevant contracts – "made reference to the prices including the commission" (albeit the judge must have meant that they made reference to the fact that the price "may" include commission, because this was all that was said in the relevant contracts).

(4) The assumption that commission will be funded by Engie is not supported by information in the public domain.

(5) The first three contracts had nothing to do with Mr Forster. So far as Mr Gazeley is concerned, he was *not* told in terms that commission would be added to the price, although he was given the opportunity of clarifying but did not do so.

(6) Mr Gazeley can be taken to know what Tooling knew, which included what Mr Forster knew.

28. In my judgment, save potentially for the point made in sub-paragraph (6) above, this does *not* amount to a finding that Tooling was aware that commission was in fact added to the price in respect of the relevant contracts.

29. The telephone call with Mr Forster is not relevant, because it did not relate to the contracts in question. In any event, the judge appears to have accepted Mr Forster's evidence that he had not understood he was being told that the unit price included commission. That is not surprising, given the garbled nature of what was said on this topic, as appears from the transcript of the telephone call.

30. The findings in sub-paragraphs (2) to (4) and the finding that Mr Gazeley was given the opportunity of clarifying do not support any finding of actual knowledge, but of something akin to constructive knowledge. The judge did not find, for example, that Mr Forster or Mr Gazeley was aware of the information in the public domain.

31. So far as sub-paragraph (6) is concerned, if it does amount to a finding that Mr Gazeley was told that UW's commission would be added to the unit price, then it is wrong in law. Specifically, it is wrong in law to say that Mr Gazeley can be taken to know what Tooling knew, and thus what Mr Forster knew. Even if one agent of Tooling (Mr Forster) was aware that commission was added to the price payable under contract which he caused Tooling to enter into, it does not follow that another agent of Tooling (Mr Gazeley) must be taken to know of – and consent to on behalf of Tooling – commission being added to the price under a different contract that he caused Tooling to enter into.

32. Aside from the above matters, it is common ground that Tooling was not given any further details about the commission payable to UW under any of the five contracts.

Brief summary of the judge's conclusions

33. The judge found that UW acted as agent for Tooling, and owed it fiduciary duties, including the duty not to allow its interests to conflict with those of Tooling.

34. He concluded, however, that the *scope* of the fiduciary duty did not include a duty to inform Tooling either of the amount of the commission to which UW was entitled or the fact that it was added to the price charged by Engie to Tooling.

35. Given the judge's conclusion as to the scope of the fiduciary duty, he did not need to deal with the question of whether informed consent was given by Tooling to the payment of commission to UW. In case he was wrong as to the scope of duty, he nevertheless dealt with it, and concluded that Tooling did give its informed consent to the commission that was paid to UW.

36. It followed from the judge's conclusion on scope of duty (alternatively his conclusion on informed consent) that UW did not commit a breach of fiduciary duty.

37. While the question whether Engie procured a breach of duty was therefore academic, the judge concluded that he would not have found that Engie was guilty of procuring UW's breach of fiduciary duty because (1) dishonesty is an essential ingredient of such accessory liability and (2) there was no evidence of dishonesty on the part of Engie.

38. Had it been necessary to determine the amount of any award of compensation against Engie, the judge preferred the argument that Engie would have been required to pay an amount equal to the additional amounts Tooling paid to Engie in order to fund the

commission payable to UW, rather than the (lesser) aggregate sum that UW in fact received.

39. Finally, the judge held that, in relation to the commission paid pursuant to the first contract, which was entered into more than six years before the commencement of the action, the claim was time-barred, and there had been no deliberate concealment by Engie of any fact relevant to Tooling's right of action within the meaning of s.32(1)(b) of the Limitation Act 1980 so as to extend time.

Grounds of appeal

40. The seven grounds of appeal on the basis of which Tooling was given permission are as follows:

(1) Having rightly found that the agent was a "fiduciary", the Judge erred in law in his analysis of the "scope" of the duties of the fiduciary agent and the consequential finding, on the basis of the attenuated "scope", that the Broker was not in breach of its fiduciary duty.

(2) The Judge erred in law in his analysis of the requirements for the principal to give "informed" consent to the breach of duty and, it follows, that C had given its informed consent to the Broker's breach of duty.

(3) The Judge erred in law in his approach to "sophistication" and "vulnerability" as a basis to distinguish *Hurstanger*.

(4) To the extent that the Judge relied on trade, custom or usage as part of his analysis of the content of the duties or the giving of informed consent, he plainly erred in law.

(5) The Judge erred in law in deciding that dishonesty was required for the Supplier to be liable and in any event that argument was not open to the Supplier.

(6) The Judge erred in law in identifying the date of formation of the contract induced by the expectation of an illicit commission as the date of accrual of the cause of action. The cause of action accrued upon payment of the commission.

(7) The Judge failed to take into account material facts in his analysis of whether the Supplier had deliberately concealed material facts and whether C could, with reasonable diligence, have discovered those facts.

41. The further ground of appeal which Tooling seeks to add is that the judge erred in finding that there was no evidence of dishonesty; he ought to have found that Engie was in fact dishonest, in the sense that word was accorded by the Court of Appeal in *FirstRand*.

Ground 1: the scope of UW's fiduciary duty

42. The distinguishing obligation of a fiduciary is loyalty, the facets of which include the duty not to make a profit and not to place oneself in a position where duty and interest conflict: *Bristol & West Building Society v Mothew* [1998] Ch 1, per Millett LJ at p.18B-C. These are not outright prohibitions, however, but merely proscribe conflicts

and profiting that have not been consented to by the principal: Bowstead & Reynolds on Agency, 23rd ed, 6-039.

43. The issue raised by ground 1 is whether (as the judge found) informed consent narrows the scope of the fiduciary duty (so that in this case it did not extend to a duty to disclose the amount and funding details of the commission received) or whether (as Tooling contends) informed consent operates to negative what would otherwise be a breach of duty.

44. Little, if anything, turns on this issue in this case, since Mr Lord accepted that the facts and matters which go to the question whether there was informed consent are the same as those which define the scope of the fiduciary duty. Moreover, he accepted that if those matters were not sufficient to limit the scope of duty so as to exclude a duty to inform Tooling of the amount and funding arrangements of the commission, then neither were they sufficient to show that Tooling's informed consent had been obtained so as to negative a breach of that duty.

45. This demonstrates that the real battleground on this appeal, so far as it relates to UW's fiduciary duty, is in respect of ground 2, namely whether the extent of disclosure of the commission was sufficient to obtain Tooling's informed consent to what would otherwise have been a breach of UW's fiduciary duty.

46. In case the issue raised by ground 1 has relevance if this matter goes further, and since it was fully argued before us, I set out my reasons for disagreeing with the judge's conclusion on it in the following paragraphs.

47. The question of limiting the scope of fiduciary duties arises where they co-exist with contractual (or, perhaps, other) duties, as Mason J said in *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 C.L.R. 41, at p.97:

> "That contractual and fiduciary relationships may co-exist between the same parties has never been doubted. Indeed, the existence of a basic contractual relationship has in many situations provided a foundation for the erection of a fiduciary relationship. In these situations it is the contractual foundation which is all important because it is the contract that regulates the basic rights and liabilities of the parties. The fiduciary relationship, if it is to exist at all, must accommodate itself to the terms of the contract so that it is consistent with, and conforms to, them. The fiduciary relationship cannot be superimposed upon the contract in such a way as to alter the operation which the contract was intended to have according to its true construction."

48. This passage was relied on by the Privy Council in *Kelly v Cooper* [1993] AC 205, to conclude that the scope of the fiduciary duty of an estate agent not to put itself in a position where its duty and interest conflicted was confined by the terms of the agency contract, into which was implied a term that the agent was permitted to act for other principals selling competing properties and to keep confidential information obtained from each of his principals: see the judgment of Lord Browne-Wilkinson at p.214B to p.215F.

49. In *Hilton v Barker Booth & Eastwood* [2005] 1 WLR 567, on the other hand, Lord Walker (at §30) concluded that no question of moulding the fiduciary relationship between solicitor and client arose "…since there were no express terms agreed" as to the retainer between them.

50. Similarly here, as Mr Grant KC (who appeared for Tooling) submitted, there was nothing in the contractual terms between Tooling and UW which required any moulding or narrowing of the scope of UW's fiduciary duties.

51. In concluding that UW's fiduciary duties did not extend to a duty either to advise on the amount of commission or to disclose the arrangements for the funding of the commission, the judge based himself, not on the terms of the contract between Tooling and UW, but on the extent to which Tooling knew, or could be expected to have found out, about the commission. Specifically, he relied on the following: (1) Tooling was told that UW would be paid commission by Engie; (2) neither Mr Forster nor Mr Gazeley were vulnerable or financially unsophisticated; and (3) all that they had to do, if they wished to know more about the commission, was to ask.

52. In my judgment, these are matters that go to the question whether informed consent was obtained, so as to negative a breach of fiduciary duty, rather than to the definition of the scope of duty in the first place.

53. The same is true of the broader range of factors on which Mr Lord relied: (1) the fact that Tooling did not pay anything to UW; (2) Mr Forster's acceptance that he appreciated and was informed that UW would receive a commission from Engie; (3) the contracts with Engie stated that the prices quoted "may" include a commission due to a third party broker; (4) it was a matter of public knowledge and trade practice that energy brokers such as UW received a commission as part of the kWh unit rate charged to customers; (5) questions of vulnerability and sophistication are key factors in determining the scope of duty; and (6) Tooling was neither vulnerable nor unsophisticated, and nor were its employees.

54. These are all matters which relate to the extent that Tooling was in fact informed about UW's commission, or could have found out about it. Consistent with the authorities to which I now turn, these are more appropriately regarded as being relevant to the question whether the fiduciary's duty is negatived by informed consent. If – as Mr Lord was minded to accept at least on the facts of this case – the level of knowledge and consent required in order to limit the scope of the duty is the same as that required for informed consent to be established, then any case where informed consent is found would be one in which no duty was owed in the first place, yet none of the authorities suggest that is the case. If, on the other hand, a lesser standard is applied when considering the scope of duty, then that would risk unacceptably watering down the strict core duty of loyalty.

55. Aside, possibly, from the decision of the Court of Appeal in *Medsted Associates Ltd v Canaccord Genuity Wealth (International) Ltd* [2019] EWCA Civ 83; [2019] 1 WLR 4481, there is no authority which supports the approach taken by the judge.

56. In each of these cases, the question was whether the agent's fiduciary duty not to allow its duty and interests to conflict was breached because the agent did not obtain its principal's informed consent. There was no suggestion that the scope of the duty

was curtailed in any way. Thus, in *Hurstanger*, Tuckey LJ was considering, at §34 to §36, the extent of disclosure required to constitute informed consent and, in that context, discussed the relevance of the fact that the principal was vulnerable or unsophisticated. In *McWilliam v Norton Finance (UK) Ltd* [2015] EWCA Civ 186, Tomlinson LJ, at §49 to §52, addressed whether the level of disclosure to the principals amounted to informed consent, similarly taking into account the vulnerability and lack of sophistication of the principals. In *FHR Ventures LLP v Mankarious* [2011] EWHC 2308 (Ch), Simon J, at §77 to §81 and §104 to §106 was dealing only with the question of informed consent so as to negative a breach of duty. The same is true of the final authority referred to by the judge in this section of his judgment, *Leicester Indoor Bowls and Social Club Ltd v Drax Energy Solutions Ltd* (unreported, 8 December 2023, Case No 073DC859) where HHJ Hedley listed factors relevant to the question of informed consent.

57. On a careful analysis of the decision in *Medsted*, it, too, provides no support for the judge's conclusion. The issue in that case arose in unusual circumstances. The claimant agreed to introduce individuals to the defendant for the purpose of enabling them to trade contracts for difference. The claimant's clients paid commission to the defendant, and the defendant agreed to pay a portion of that to the claimant. The claimant's clients knew that the claimant was paid a portion of the commission which they had paid to the defendant but did not know how much. The defendant subsequently entered into business directly with some of the claimant's clients, on terms which cut the claimant out from receiving commission. The claimant sued the defendant for breach of contract. The judge found in favour of the claimant but awarded only nominal damages on the basis that, because the claimant had failed to inform its clients of the share of commission it received from the defendant, it was in breach of fiduciary duty.

58. In the Court of Appeal, Longmore LJ (with whom Peter Jackson and Asplin LJJ agreed) concluded that the scope of the claimant's fiduciary duty did not extend to informing its clients of the share of commission to which it was entitled from the defendant. He noted, at §45, citing among other things the passage from Mason J's judgment in *Hospital Products* quoted above:

> "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."

59. On the basis of the facts found by the judge as to the nature of the relationship, he concluded, at §46, that the claimant had not been under a duty to the clients to disclose the exact amount of the commission it received. (I note that in any event Longmore LJ continued: "to put the matter another way, to the extent that Medsted was the fiduciary of its clients it was not a breach of that duty for it not to disclose the amounts of commission it was receiving.")

60. Accordingly, the conclusion as to scope of duty in *Medsted* was a conclusion of fact based on the nature of the relationship, aside from its fiduciary nature, between the parties. It does not support, in my view, the conclusion that the nature of the relationship between Tooling and UW in this case was such as to limit or mould the core fiduciary duty of loyalty which UW owed to Tooling.

61. I turn, then, to deal with the real battleground between the parties on the question of UW's fiduciary duty, namely whether the judge was right to hold that there had been sufficient disclosure of the commission arrangements so that Tooling's informed consent had been obtained. This encompasses ground 2, and grounds 3 and 4 which raise discrete aspects of the same question.

Grounds 2, 3 and 4: informed consent

62. On the judge's analysis, the question whether informed consent was required and, if so, whether it was obtained, did not arise. He addressed this on the assumption that he was wrong as to scope of duty, but noting the "very significant overlap" between issues of informed consent and issues of scope, and that largely the same case law is germane to both.

63. As to the applicable test, he cited Bowstead & Reynolds on Agency, at §6-046, that agents may not enter transactions in which their personal interest may conflict with that of 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."

64. He cited Tuckey LJ at §34 of *Hurstanger* for the proposition that informed consent means "with the full knowledge of all the material circumstances and of the nature and extent of the (agent's) interest."

65. At §224, he summarised his conclusion (based on what had gone before, including – given the overlap between the two issues – his conclusions on the extent of disclosure reached in the context of his decision as to scope) as follows:

> "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."

66. At §225, he added that in coming to his conclusion "it is right to note that the fact that commission was added to the unit cost was a known industry practice". This was referred to in a fact sheet produced by Ofgem. He continued:

> "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."

67. Mr Lord submitted that the judge applied the correct test, and that the appeal against this part of his decision is against findings of fact, with which this Court should not interfere.

68. Mr Grant submitted that, although the judge referred to the correct test (as set out in the passages cited from Bowstead & Reynolds and *Hurstanger*, above) he failed to apply that test, in particular because (1) Tooling was clearly not fully informed of all material circumstances and (2) the judge erred in finding that it was enough that Tooling could have asked for further details.

69. As to the first point, the test for materiality is a low one: whether the information might (not would) have affected the principal's decision: see *FHR Ventures* (above) at §79 (as re-affirmed by this Court in *FirstRand* at §120).

70. So far as Tooling's awareness of the commission is concerned, as I have noted above, the judge's findings go no further than that Tooling was aware that commission in an unknown amount was payable by Engie to Tooling. Tooling was not told of the following matters:

(1) The amount of the commission;

(2) The fact that the commission was added to the unit price for electricity purchased by Tooling from Engie (being informed in boilerplate language on the face of the quotation from Engie that such commission "may" be added is materially different);

(3) The fact (which follows from (2) above) that the amount of commission to which UW would be entitled depended on the length of the contract Tooling entered into with Engie;

(4) The fact that UW was free to indicate what commission it wished to add to the unit price, subject to Engie's confirmation, in circumstances where Engie had little incentive to dispute the amount as it was passed through to the customer;

(5) The fact that a very substantial up-front payment of anticipated commission was payable to UW on commencement of each contract which, in the case of the first contract, was £89,000.

71. I have no doubt that these are all factors which might, at least, have affected Tooling's decision to enter into the contracts with Engie on the terms that they did. Individually and cumulatively, they created significant incentives for UW to cause Tooling to

contract with Engie, whether or not that was in the best interests of Tooling. For example, the up-front payment of 80% of estimated commission provided an incentive to procure that Tooling entered into a long term contract (in the case of the first contract), or forward contracts long before the period of supply commenced, irrespective of whether that was in Tooling's best interests.

72. It appears that the judge was influenced in deciding that informed consent was given, by his conclusion that Tooling could have asked and, had it done so, it would have been informed of these details. I note that in this respect he appears to have relied on the following passage from Bowstead & Reynolds (now §6-086):

> "where the principal leaves the agent to look to the other party for remuneration or knows that the agent will receive something from the other party, the principal cannot object on the ground that it did not know the precise particulars of the amount paid."

73. That passage, however, is in a section addressing bribes and fully secret commissions, and is not concerned with the question of when informed consent of the principal is sufficient to negative a breach of fiduciary duty. The latter is addressed in an earlier section of the book (§6-039 in the 23rd ed).

74. More broadly, as Mr Grant submitted, this approach misunderstands the duties of a fiduciary, in particular that it is not sufficient, in order to obtain the consent of the principal, that they are given some information, leaving them to ask for more: *Dunne v English* (1874) LR 18 Eq 524, per Sir George Jessel MR, at p.536:

> "… even a statement which would in other cases be constructive notice sufficient to put the party on inquiry will not be sufficient in the case of principal and agent … for reasons of policy he must not only put the principal on inquiry, but must give him full information and make full disclosure."

75. Accordingly, I consider that this constitutes an error of law affecting the judge's conclusion that informed consent was obtained. In light of that conclusion, I deal only briefly with grounds 3 and 4.

76. Ground 3 specifically relates to the judge's reliance on his conclusion that Tooling was not vulnerable or unsophisticated. The relative vulnerability or sophistication of a principal can be a relevant consideration in determining whether they ought to have appreciated, from what they were told, all of the material matters of which they were entitled to be informed. Where, as here, however, it is clear that the principal was *not* told a number of material matters, I do not think that this can be overcome by relying on the fact that the principal was not particularly vulnerable or unsophisticated. The principle that it is insufficient for a fiduciary to comply with the requirement to obtain fully informed consent by putting the principal on enquiry holds good irrespective of how vulnerable, unsophisticated or otherwise the principal happens to be.

77. So far as ground 4 is concerned, it is common ground that there is no question of a trade custom or practice in this case. The judge did not in terms suggest that there was. He referred to the "known industry practice" that commission was added to the

unit cost as "simply another brick in the wall erected by the defendant". I interpret this as saying that it was at least a factor in the judge's conclusion that there had been sufficient disclosure. If so, since there was no evidence that Mr Gazeley, Mr Forster or anyone else at Tooling was aware of this practice or the fact sheet which referred to it, I consider that it was wrong to place any reliance on it at all.

78. For the above reasons, I would allow the appeal on ground 2 (and to the extent necessary on grounds 3 and 4). On the basis of the primary findings of fact by the judge, I do not think he was right to conclude that Tooling's informed consent had been obtained to the commissions that were in fact paid to UW.

Ground 5: whether the judge was correct to find that dishonesty was a necessary ingredient in the claim against Engie

79. The first submission made by Tooling under this ground is that it was not one which it was open to Engie to take at trial. The question is whether the judge erred in law in allowing the point to be taken. Tooling says that until shortly before trial Engie had not suggested that in order to be liable as an accessory to UW's breach of trust it had to be shown to be dishonest. It describes this as an "ambush" and inconsistent with the "cards face up on the table" approach to modern litigation.

80. I reject this submission. Tooling's then counsel did not contend that he was unable to deal with the argument, and no application was made for an adjournment. In any event, the decision to entertain the argument was a case management one, with which an appeal court will rarely interfere. No grounds for doing so have been provided here.

81. Turning to the substance of ground 5, Mr Grant submitted, in essence, as follows:

(1) If C's agent, A, is paid a commission by C's contractual counterpart, D, in circumstances where the fact of the commission is disclosed to C, but A fails – in breach of its fiduciary duty to C – to disclose the amount of the commission (or other pertinent information relating to it), then D is liable to pay equitable compensation to C in the amount of the commission, provided only that D knew A was C's agent.

(2) The nature of C's claim against D is an equitable claim for money had and received, which mirrors the common law claim for money had and received that would apply in the case of a fully secret commission paid by D to A, the foundation of which is that D procured A's breach of duty by paying it the commission.

(3) Whether or not D knew that A had failed to disclose the commission to C is irrelevant. Dishonesty on the part of D forms no part of this cause of action. Accordingly, even if D contractually obliged A to inform C, and honestly believed that A had done so, D is nevertheless liable if C was unaware of it.

82. The cause of action is said to be based on the decision of this court in *Hurstanger*, which Mr Grant contended created a new species of equitable liability. It is distinct from the claim of accessory liability in equity known as dishonest assistance in a

breach of fiduciary duty, in three respects: it is a primary liability; it is based on "procuration" not assistance; and it does not require dishonesty.

83. Before turning to deal with *Hurstanger* in detail, it is important to understand the starting point in Mr Grant's analysis, namely the restitutionary claim for money had and received in the case of a fully secret commission or bribe. The genesis and development of that cause of action was authoritatively explained by David Richards LJ in *Wood v Commercial First Business Ltd* [2021] EWCA Civ 123; [2022] Ch 123 ("*Wood*"). That explanation was for the purpose of showing that in such cases it is unnecessary to establish that the recipient of the bribe owed fiduciary duties to the claimant, merely that it owed a duty to be impartial and to give disinterested advice, information or recommendations.

84. The following is a brief summary of the principles explained at §40 to §102 of David Richards LJ's judgment in *Wood*, insofar as they are of particular relevance to this appeal:

(1) The law has for a long time set its face against the corrosive practice of bribery (§42), which includes any payment or gift made as an inducement to an "agent" and not disclosed to the "principal" (§43), and involves the vice that it may induce the payee to depart, consciously or otherwise, from the duty he owes to another person (§44).

(2) Special rules apply to such payments, including two of general application: (i) the court does not inquire into the payer's motives or allow evidence to be given as to that motive; and (ii) there is an irrebuttable presumption that the agent was influenced by the payment (§43).

(3) Bribery is an actionable wrong at common law, and in equity, for which common law remedies, as well as equitable remedies, are available, including rescission of the transaction in connection with which the bribe or secret commission was paid. "The payer of the bribe is rightly viewed not as an accessory but as a primary wrongdoer." (§94).

(4) The right to recover the bribe (against both the payer and the payee) at common law as money had and received, without needing to show loss, as well as damages in tort for damage suffered, was clearly established by the late 19th century, citing Lord Diplock in *Mahesan s/o Thambiah v Malaysia Government Officers' Co-operative Housing Society Ltd* [1979] AC 374. In that case Lord Diplock referred to the fact that the extension to the briber of liability to account to the principal for the amount of the bribe as money had and received, whatever conceptual difficulties it may raise, was too well established in English law to be questioned.

85. In *Hurstanger*, commission was paid by a lender to a third party broker, who acted as agent for the borrower. In a pre-contractual document, the lender disclosed to the borrower that "in certain circumstances this company does pay a commission to brokers".

86. At first instance, the judge rejected the contention that the loan was void on the ground that the lender paid a secret commission to the broker. That was reversed on appeal. Tuckey LJ (with whom Jacob and Waller LJJ agreed) held as follows:

(1) The relationship between the broker and the borrower was obviously a fiduciary one. The broker was required to act loyally for the borrower. By agreeing to be paid a commission by the lender, the broker put himself into a position where he had a conflict of interest, as it gave him an incentive to look for the lender who would give him the biggest commission. (§33)

(2) The broker was permitted to act in that way only with the fully informed consent of the borrower. An agent who receives 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 a breach." (§34)

(3) At §38, Tuckey LJ addressed the position if there had been no disclosure:

> "Obviously if there had been *no* disclosure the agent will have received a secret commission. This is a blatant breach of his fiduciary duty but additionally the payment or receipt of a secret commission is considered to be a form of bribe and is treated in the authorities as a special category of fraud in which it is unnecessary to prove motive, inducement or loss up to the amount of the bribe. The principal has alternative remedies against both the briber and the agent for money had and received where he can recover the amount of the bribe or for damages for fraud where he can recover the amount of any actual loss sustained by entering into the transaction in respect of which the bribe was given [citing *Mahesan*]. Furthermore the transaction is voidable at the election of the principal who can rescind it provided counter-restitution can be made…"

(4) He noted, at §39, that the "real evil" is not the payment, but the secrecy attending it, quoting Chitty LJ in *Shipway v Broadwood* [1899] 1 QB 369, 373, and went on to consider the possibility of 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" and said:

> "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 had been obtained. There is no authority which sheds any light on this question."

(5) He concluded, at §42 to §44, that the level of disclosure made by the lender was sufficient "to negate secrecy" but was insufficient to obtain the borrower's fully informed consent to the payment of the commission. He went on, at §45:

> "So for these reasons I do not accept either party's submissions about the disclosure. This is a half-way house case. The [lender] did not pay the broker a secret commission but

> procured the broker's breach of fiduciary duty by failing to obtain the [borrower's] informed consent to the broker acting in the way he did."

(6) That conclusion meant that the borrowers were not entitled to deploy "the full armoury of remedies which would have been available if this had been a true secret commission case" (§46). He noted (at §47) that, had it been a case of fully secret commission, then a difficult question would have arisen as to whether the borrowers were entitled to rescind the agreement as of right. No such difficulty arose on the facts, however, because purely equitable relief is available for breach of fiduciary duty, and the court has a discretion whether or not to grant rescission, citing *Johnson v EBS Pensioner Trustees Ltd* [2002] Lloyd's Rep PN 309.

(7) At §48, Tuckey LJ said:

> "In this case the broker could similarly have been required to account to the [borrowers] for the £240 commission he received from the [lender]. But no such claim has been made against the broker and so, alternatively, the [borrowers] have a claim for equitable compensation against the [lender] as it procured the broker's breach of fiduciary duty. This mirrors the common law right to claim the return of a bribe as money had received."

87. Mr Grant submitted that *Hurstanger* recognised, for the first time, an equitable claim of money had and received against the payer of a commission, where liability is established merely by showing that: (1) the payer knows that the recipient of the commission is an agent, owing fiduciary duties to its principal; and (2) the principal has not in fact given its informed consent to the commission, irrespective of whether that was known to the payer.

88. He pointed out that, while the tension between the approach taken in *Hurstanger* and the well-established principle that the liability of a person who assists in another's breach of trust is based on dishonesty was noted by this court in *FirstRand*, it did not decide the point, because it was conceded that dishonesty was required: see §127 of *FirstRand*. I will need to return to *FirstRand* in connection with ground 8.

89. I reject Mr Grant's submission, for the following reasons.

90. First, I do not accept that Tuckey LJ was contemplating a new species of *primary* liability. At §34, he referred to the possibility of a third party paying commission to an agent where the principal's informed consent was not obtained as being liable "as an accessory". At §39, having concluded that partial disclosure negated secrecy, so as not to attract a finding of fraud and the other consequences that flow in the cases of bribery, he nevertheless considered it unfair to acquit the payer altogether, in a case of partially disclosed commission, "for their involvement in what would still be a breach of fiduciary duty". The liability of those, who are not themselves fiduciaries or trustees, but who assist in the commission of a breach of fiduciary duty of another is an accessory liability: see for example *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 ("*Brunei*"), per Lord Nicholls at p.382E: "it is a form of secondary liability in the sense that it only arises where there has been a breach of trust". Moreover, as Lord

Nicholls explained, the liability is *not* restitution-based (p.386E-F); it is fault-based, and the touchstone (and a necessary ingredient) of liability is dishonesty (at p.387G-H and p.392F-G).

91. On this point, at §18 of *FirstRand*, it was pointed out that *Hurstanger* is binding authority in this court for the proposition that in a case where partial disclosure negates secrecy, a lender can only be held liable in equity as an accessory to the broker's breach of fiduciary duty.

92. Mr Grant placed much significance on the fact that Tuckey LJ, at §48 of *Hurstanger*, referred to the payer being liable because it "procured the broker's breach". He submitted this was different from "assisting" in another's breach of trust or fiduciary duty. I do not accept that. Procuring a breach of duty is a form of assisting in that breach: see *Brunei* at p.392F-G, where Lord Nicholls stated the principle as follows: "A liability in equity to make good resulting loss attaches to a person who dishonestly procures or assists in a breach of trust or fiduciary obligation." That is reinforced by the analogy drawn by Lord Nicholls at p.387B-C with liability for knowingly procuring a breach of contract.

93. Mr Grant also relied on the final sentence of §48 of Tuckey LJ's judgment ("This mirrors the common law right to claim the return of the bribe as money had and received"). When read in context, however, it is clear that Tuckey LJ was not suggesting that the elements of the cause of action in equity, in a case of partial disclosure, replicated those at common law in the case of a secret bribe. He was referring only to the fact that the *remedy* of compensation in equity – in the sum of the commission paid – was the mirror image of the remedy of the return of the bribe as money had and received at common law.

94. Mr Grant's reading of this part of Tuckey LJ's judgment also fails to give effect to the conclusion at §39 that disclosure sufficient to negate secrecy renders it unfair to visit the agent and any third party with a finding of fraud and the consequences which flow from it. *Hurstanger* draws, in my judgment, a clear distinction between cases of bribery (which are a "special category of fraud" – see §38), the essence of which is the secrecy of the payment made, and cases of partially disclosed commissions which, by definition, are not *secret*.

95. Mr Grant's approach would render that distinction virtually meaningless: the only difference he pointed to between the claim against a lender who paid a bribe and one who paid a partially disclosed commission would be that it is only in the latter case that the remedy of rescission *in equity* would be available.

96. Mr Grant's submission gets most support from the fact that Tuckey LJ appears to have concluded, at §48, that the lenders' obligation to compensate the borrowers arose merely from the fact that they had procured the broker's breach of fiduciary duty.

97. I do not accept, however, that the Court of Appeal was purporting to lay down a principle of law that would have varied the established law on accessory liability for breach of fiduciary duty. It would be surprising had it intended to do so, but made no reference to any of the cases which set out the principles on that topic – including House of Lords authority (e.g. *Twinsectra v Yardley* [2002] 2 AC 164, which

specifically endorses the Privy Council decision in *Brunei*) – none of which was cited to it.

98. For these reasons, I would dismiss the appeal under ground 5. The liability of the payer of a partially disclosed commission is an accessory liability for assistance in the breach of fiduciary duty of the agent, in which dishonesty is an essential element.

Ground 6: When the cause of action accrued for limitation purposes in respect of the first contract

99. It was common ground in this court that, through a combination of s.5 and s.36 of the Limitation Act 1980, the applicable limitation period (unless postponed pursuant to s.32) was six years from the date on which the cause of action accrued.

100. A cause of action accrues when all the facts necessary to establish that cause of action are capable of being pleaded. "To identify when a cause of action has accrued it is thus necessary to identify first, the remedy sought by the claimant and, second, the material facts which, if proved, would as a matter of law entitle the claimant (subject to any positive defences) to obtain that remedy": *Smith v Royal Bank of Scotland plc* [2023] UKSC 34; [2024] AC 955, per Lord Leggatt at §38.

101. The judge held that the claim was time barred, so far as the first contract is concerned, because it was commenced more than six years from the date on which the contract was entered into.

102. That is factually correct: the first contract was entered into on 8 February 2016, and the claim form was not issued until 1 April 2022.

103. Tooling contends, however, that the judge was wrong to find that the cause of action accrued on the date the contract was entered into.

104. Mr Grant first submitted that, since the cause of action – being that identified for the first time in *Hurstanger* – is for money had and received, it did not accrue until commission was first paid under the first contract. It is common ground that commission was first paid within six years of 1 April 2022. If that was the proper analysis of the cause of action, then I would accept that submission. The cause of action for money had and received would not have accrued until the payment of commission was made.

105. Under ground 5, however, I have concluded that the claim is not properly characterised as one for money had and received, but one against Engie as an accessory to UW's breach of fiduciary duty.

106. Mr Lord submitted that such a cause of action was completed when UW breached its fiduciary duty, being when it caused Tooling to enter into the first contract with Engie, because it was at that point that UW became entitled to payment of commission by Engie.

107. That is not factually correct. UW's entitlement to commission stems initially from the relevant brokerage agreement, being that entered into on 25 June 2015. Once it caused Tooling to enter into the first contract with Engie, that gave rise to the possibility that it would become entitled to commission. Since, however, UW's commission was

dependent on supply of electricity under the contract, no entitlement to commission could arise until there was a supply, which was only after 1 April 2016.

108. I accept that Tooling may have had a cause of action of some kind, for example for rescission of the contract with Engie, immediately upon entering into the first contract with it (if that had been necessary, in circumstances where it would only be required to pay Engie to the extent that it commenced taking a supply of electricity from it). That is because it was a breach of fiduciary duty by UW to commit Tooling to a contract which entitled it (UW) to profit without that being fully disclosed to Tooling.

109. That is not, however, the remedy sought in this action. The pleaded cause of action for equitable compensation is for payment of an amount equal to the commissions paid by Engie to UW because "by paying the commissions", Engie wrongfully induced UW's breach of duties owed to Tooling. In my judgment, the facts necessary to establish that cause of action were not completed until Engie paid commission to UW. Accordingly, I conclude that the claim against Engie in respect of the first contract was not statute-barred.

Ground 7: whether the commencement of the limitation period was postponed pursuant to s.32 of the Limitation Act 1980

110. Given my conclusion on ground 6, it is unnecessary to consider whether the judge was right to refuse to extend time under s.32 Limitation Act 1980. Had it been necessary to do so, I would have concluded that the judge was entitled to reach the view he did, because:

(1) By s.32(1)(b) of the Limitation Act 1980, if "any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant", then the period of limitation does not begin until the claimant has discovered the concealment "or could with reasonable diligence have discovered it".

(2) The judge's finding that, had Tooling asked UW for further details of the commission it was being paid, it would have been told (see §129) means that – even assuming deliberate concealment by Engie – it could with reasonable diligence have discovered that which had been concealed at the time it entered into the first contract with Engie.

Prospective ground 8

111. This ground, for which permission to amend the grounds of appeal is sought, is based on that part of the decision in *FirstRand* (at §128 to §137) which addressed Mr Johnson's case that FirstRand was liable in dishonest assistance in the sense explained in *Twinsectra*, it being conceded (as noted above) that notwithstanding *Hurstanger*, dishonesty is an essential ingredient in establishing accessory liability.

112. Mr Lord submitted that permission should not be granted to argue dishonesty for the first time on appeal because: (1) dishonesty was neither pleaded nor put to witnesses at trial; (2) the discretion to permit a new point on appeal (per the principles enunciated in, for example, *Notting Hill Finance Ltd v Sheikh* [2019] EWCA Civ 1337; [2019] 4 WLR 146) should be exercised by refusing permission, principally

because it would raise issues of fact which were not raised and so not investigated at trial; and (3) the point has no realistic prospect of success.

113. It is common ground, as we have noted above, that Tooling's counsel expressly disavowed advancing a claim in dishonesty at trial. In order to determine whether permission should be refused because it would raise issues of fact that would need to be investigated at a further trial, it is necessary to understand the nature of the claim sought to be advanced.

114. Under ground 8 Tooling contends that the judge should have found that Engie was dishonest "*in the sense that word was accorded by the Court of Appeal in* [*FirstRand*]", by which it contends that dishonesty would be established – given that Engie knew that it paid commissions to UW – if Engie knew that UW owed fiduciary duties to Tooling as its agent (i.e. without the need to show that Engie knew that this constituted a breach of duty because of the lack of informed consent by Tooling).

115. That proposition is at odds with the principle, derived from the leading authorities on dishonest assistance in a breach of trust or fiduciary duty, that to be liable the accessory must be aware of (or turn a blind eye to) the facts which give rise to the breach of trust or fiduciary duty (as this court noted in *FirstRand* at §128: "dishonesty, in this context, means knowing about, or deliberately turning a blind eye to, the breach of the broker's fiduciary duty to their principal").

116. In the case of the fiduciary duty of loyalty, as expressed in the duty not to allow a conflict between the fiduciary's interests and those of its principal, there will be no breach of duty if the principal's informed consent is obtained. Considering the matter from first principles, therefore, a person who assists in or procures the payment of the commission will not be dishonest unless they are aware that the principal's informed consent was not obtained, or they at least "turned a blind eye" to that possibility.

117. Mr Grant submits, however, that this is not a conclusion open to us, because we are bound by the decision of this court in *FirstRand* to the opposite effect. I turn, then, to consider that case in more detail.

118. *FirstRand* involved three separate appeals. They each involved a motor dealer who, in seeking to sell a car to a purchaser, offered the option of finance which the dealer said it could arrange. The dealer presented an offer of finance to the purchaser, on the basis it had selected an offer which was competitive and suitable for the purchaser's needs. The dealer was paid a commission by the finance company, under a side arrangement to which the purchaser was not a party.

119. In one of the appeals, it was found that there was no disclosure of the commission at all. In the second appeal, there was insufficient disclosure to negate secrecy. Each of these was dealt with, therefore, on the basis of the law relating to bribes.

120. In the third appeal, in the claim by Mr Johnson, it was common ground that there had been partial disclosure sufficient to negate secrecy. On the basis of the concession recorded at §127, it was therefore necessary to establish that FirstRand was dishonest. The judge at first instance had made no findings about FirstRand's state of mind. The Court of Appeal considered, however, that it was open to it to make findings of dishonesty, as "there was the clearest possible breach of fiduciary duty because the

payment was made in circumstances in which the broker (and the lender) could not establish that Mr Johnson gave his fully informed consent to it."

121. Having concluded, as noted above, that *Hurstanger* was binding authority for the proposition that liability in a case of partially disclosed commission was based on accessory liability for breach of fiduciary duty, the court of appeal proceeded to apply the test of dishonesty as explained in *Twinsectra*.

122. I will continue to refer, as this court did in *FirstRand* to dishonesty in the *Twinsectra* sense, but note that the approach suggested in some of the speeches in that case needs to be read in the light of the later decision in *Barlow Clowes International Ltd v Eurotrust International Ltd* [2005] UKPC 37; [2006] 1 WLR 1476: the test whether a person was consciously dishonest in providing assistance required him to have knowledge of the elements of the transaction that rendered his participating contrary to ordinary standards of honest behaviour, but did not require him to have reflections on what those normally acceptable standards were.

123. Mr Johnson had not been made aware of the commission by the dealer, but there was some reference to it in clause 12.6 of FirstRand's standard terms and conditions (under a heading "General"), which were among a large quantity of documentation supplied to Mr Johnson. This provided:

> "A commission may be payable by us to the broker who introduced the transaction to us. The amount is available from the Broker on request."

124. The "Rates and Terms" agreement between FirstRand and the dealer contained provisions to the following effect:

(1) It tied the dealer to FirstRand by preventing it from referring a customer to any other finance party without giving FirstRand the right of first refusal.

(2) It obliged the dealer to take reasonable steps to ensure that the customer selected a product that was suitable for their needs, and to provide the customer with balanced information about the range of finance products that were available to enable the customer to make an informed choice.

(3) It also obliged the dealer to disclose to the customer early in the sales process that commission "may" be payable to it and, if requested by the customer, to inform the customer of the amount.

125. The court noted, at §128, that dishonesty means knowing about, or deliberately turning a blind eye to, the breach of the broker's fiduciary duty. It noted that a lender that does not itself make disclosure to the customer "deliberately takes the risk" that the broker would not do so, and that the risk in this case was obvious: "the brokers plainly had a motive for keeping quiet about the amount of commission, or how it was calculated, particularly if a DIC model was used". (That was a reference to a model which entitled the broker to charge commission of 80% of the difference in interest charge between the lowest rate and the agreement rate.)

126. The court then concluded (at §129) that the passages in the documentation referred to above demonstrated that:

> "FirstRand was actively encouraging the broker *not* to make full disclosure and therefore that it neither wanted nor expected full disclosure to be made. In particular, the Dealer Terms do not require disclosure of the tie between FirstRand and the dealer and this renders FirstRand complicit in the concealment of that highly material fact. That is enough, in our judgment, to meet the requirements of *Twinsectra*."

127. That conclusion was supported (see §130) by the other provisions of the Rates and Terms agreement quoted above: although on their face these obliged the dealer to offer customers the most suitable product, it was either impossible for the dealer to comply with that, without breaching its obligation to give FirstRand first refusal, or (if interpreted as requiring the dealer to offer the best terms available *from FirstRand*) this served to reinforce the tie which was being kept secret from the customer.

128. So far, there is nothing in the decision which departs from the conventional application of *Twinsectra*.

129. At §131 the Court of Appeal considered the approach of the Supreme Court in *Lifestyle Equities CV v Ahmed* [2024] UKSC 17; [2025] AC 1 to accessory liability at common law, noting that "It is enough to establish liability in this context to prove that the person who procures the wrongful act knows, or deliberately turns a blind eye to, the essential facts which make the act unlawful", and that although this specifically addressed the position at common law, Lord Leggatt had earlier recognised the same concept in equity.

130. At §132 to §135, the Court of Appeal applied that approach to the facts in Mr Johnson's appeal, concluding at §134 that "[FirstRand] was effectively turning a blind eye to the dealer painting an entirely misleading picture of its role to the consumer simply by appearing to act as an ordinary credit broker. Most people would regard that as dishonest." Its further conclusion at §135 – that "there was in fact no informed consent and there was nothing to suggest to FirstRand that informed consent had been given" must be seen in light of the finding that FirstRand's conduct amounted to turning a blind eye in circumstances that most people would regard as dishonest. Again, therefore, this does not depart from the conventional application of *Twinsectra*.

131. Mr Grant relies, however, on what follows in §136 and §137 and the conclusion stated in §173(3), which I set out in full:

> "136. The next question is whether the consumer must also establish that the lender knew or turned a blind eye to the fact that informed consent had not been obtained, or whether (as Hurstanger suggests) because the receipt of the commission from the lender by the broker is on the face of it a breach of fiduciary duty, it is for the lender to prove that in fact there was no such breach because there was informed consent. As we have said, informed consent would be a defence if the claim

> were made against the broker, and the burden of establishing it would lie on them. For that reason, we consider that the same must follow if the claim is brought against the lender as an accessory. The lender would not be able to defend the claim on the basis that it had genuinely tried (but failed) to obtain informed consent itself – as the lender, who was held liable, did in Hurstanger.
>
> 137. In a "half-way house" case, which we must assume Johnson to be for the purposes of this issue, the fact that there is no informed consent follows automatically from the finding that there was only partial disclosure, and on that analysis, the lender must be liable as an accessory for procuring the breach of duty. This appears to be consistent with the decision in *Hurstanger*. Just in case this is wrong, however, and it is incumbent on the claimant to prove that the lender knew or turned a blind eye to the fact that the borrower's informed consent had not been obtained, we will consider the state of FirstRand's knowledge concerning the extent of any disclosure.
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> …
>
> 173(3). If there is a fiduciary duty in a partial disclosure case, what are the necessary requirements to establish accessory liability on the part of the lender?
>
> Answer: knowledge of the existence of the fiduciary relationship and payment of the commission to the broker in circumstances in which the lender has not satisfied itself that the borrower has given their fully informed consent to the payment. Those circumstances will inevitably arise if the disclosure is partial, particularly if the lender has encouraged partial disclosure."

132. Taken in isolation, these paragraphs suggest that a lender's accessory liability will be established, in a case where the fiduciary has only partially disclosed their commission to the consumer, irrespective of whether the lender knew (or turned a blind eye to the fact) that the fiduciary had acted in breach of duty by failing to obtain the informed consent of the consumer. If these paragraphs are to be read in this way, then I agree with Lord Justice Snowden's analysis at paragraphs 165 to 171 below.

133. When viewed in context, however, I do not think they have that effect. They are to be understood in light of, and consistently with, the following: (1) the Court of Appeal proceeded on the basis (by reason of the concession referred to in §127) that in order to establish accessory liability the lender must act dishonestly in the *Twinsectra* sense; (2) that involved showing that the lender was aware of – or turned a blind eye to – the broker's breach of fiduciary duty (see §128); and (3) the court made findings (at §129 and §134) that FirstRand *had* acted dishonestly, in particular by actively encouraging the broker *not* to make full disclosure.

134. I also note that the Court of Appeal noted, at §177, that the "half-way house" category of case gave rise to numerous difficulties, including "how the dishonesty requirement, explained in *Twinsectra* (but nowhere mentioned in *Hurstanger*) is satisfied in that scenario (especially when the lender's behaviour is not as blameworthy as we have found FirstRand's to have been)".

135. In *FirstRand* itself, in circumstances where the lender had actively encouraged the broker not to give full disclosure to the consumer, the Court of Appeal found it possible to reach the finding that FirstRand turned a blind eye to the broker's breach of fiduciary duty without showing that it knew there had actually been no consent by the consumer.

136. For reasons I set out below, whatever conclusions the Court reached in *FirstRand*, I do not think that the same can be said in this case, without the facts as to Engie's state of mind being properly investigated at trial.

137. The case sought to be introduced by ground 8 is one that in this case gives rise to questions of fact which cannot be resolved on appeal on the basis of the findings of the trial judge and the other materials in the case:

(1) Not only was no case in dishonesty pleaded, but Tooling positively disavowed making any such claim at trial. A case in dishonesty was therefore not put to the only witness who attended trial on behalf of Engie, Mr O'Connor. (Unsurprisingly, since the case was not pursued in that way, the judge said – at §246 – that "in fact, there is no evidence of dishonesty".)

(2) Mr Grant referred to certain answers given by Mr O'Connor in cross-examination, which related to evidence he had given in other proceedings to the effect that he would not have expected a broker like UW to tell the customer about the fact and amount of the commission, although he would have expected a customer to be aware that there was a commission, and he would have expected UW to act honestly if asked about the amount of commission.

(3) The difficulty with this, however, is that Mr O'Connor was not involved in entering into the relevant contracts with Tooling. If Tooling had been making an allegation of dishonesty against Engie, the corporate entity, it would have been necessary to identify the natural person involved with the transactions, whose state of mind was to be imputed to Engie. As that was not done, Engie was not alerted to the need to adduce evidence from relevant employee(s), and there was no opportunity for their state of mind to be investigated at trial.

(4) Mr Grant also referred to an email exchange in 2019 between Tooling and Engie, in which Engie, in reliance on the confidentiality clause in its brokerage agreement with UW, refused to disclose details of the commission paid to UW. This is not enough to justify a finding of dishonesty against Engie. It is after the event, and involves different employees to those who were involved in the transactions at the time.

(5) There are also significant differences in the facts between this case and *FirstRand:*

(i) In *FirstRand*, customers of the dealer, who were found to be vulnerable, would naturally understand that the dealer selling them the car would make a profit on the sale of the car but not that, in addition, it would be acting as a finance broker entitled to commission from the company providing finance.

(ii) In contrast, as Tooling's witnesses accepted, as Tooling was not paying UW anything, it was naturally to be expected that it would be paid for its services by the suppliers with whom Tooling contracted.

(iii) Although the side letters between Engie and UW would have created an incentive to refer business to Engie similar to the "tie" arrangement in *FirstRand* they are not in fact relevant to this case, for the reasons given above.

(iv) As recorded above, the brokerage agreement between Engie and UW expressly obliged UW to be transparent with potential customers as to the commission it was being paid. Mr Grant submitted that these were significantly watered down by clause 8.4 of the brokerage agreement, which prevented either side from disclosing the details of the agreement or any information disclosed under it, to any third party. That obligation, however, did not apply to disclosure by either party "to fulfil their obligations under this Agreement". It did nothing to water down, therefore, UW's obligations of transparency towards its customers.

138. Accordingly, I conclude that the findings of the judge and the other materials in this case are not (unlike the matters referred to at §128 to §130 and §134 of *FirstRand*) of a kind from which it can safely be inferred that Engie was either complicit in a breach of fiduciary duty by UW, or turned a blind eye to it, without those materials being tested in a trial in which the allegation of dishonest assistance is squarely put to the relevant witnesses on behalf of Engie.

139. In these circumstances, having regard to the prejudice to Engie in requiring a further factual enquiry, and the importance of achieving finality in litigation, I would refuse permission to amend the grounds of appeal to advance a case in dishonesty.

Conclusion

140. For the above reasons, and for the further elaboration of them in the judgment of Lord Justice Snowden, with which I agree, while I consider that the judge was wrong to conclude that there was no breach of fiduciary duty by UW:

(1) He was right to conclude that there is no basis in law for a claim against Engie in money had and received;

(2) He was right to conclude that a necessary ingredient in the claim against Engie for procuring or assisting in UW's breach of fiduciary duty is dishonesty;

(3) Accordingly, given that no allegation of dishonesty was made against Engie, he was right to dismiss the claim; and

(4) Permission to amend the grounds of appeal to advance a case based on dishonesty should be refused.

Lord Justice Snowden

141. I agree with Lord Justice Zacaroli that for the reasons he gives, the appeal should be allowed on grounds 1-4 and 6, but dismissed on the remaining grounds 5-7; and that permission should not be given to Engie to raise prospective ground 8.

Grounds 1-4

142. As Lord Justice Zacaroli has explained, it is common ground that UW disclosed to Tooling the fact that it would be paid commission by Engie. Engie's email quotations to Tooling also contained a small line of print under the quotation that stated, "*If you use a third party consultant or broker to negotiate your contract prices quoted may include commission due to them*".

143. Beyond that, there was no finding that Tooling was actually aware that commission payable by Engie to UW would be recharged to Tooling by being added to the unit price charged to Tooling for the energy that it consumed. Nor was there any suggestion that Tooling was ever told that the contract between UW and Engie provided for UW to put forward a suggested rate of commission to Engie for agreement. It follows that Tooling had no idea that because Engie would simply be adding the commission to the price which it charged for the energy, it would have little or no incentive to do anything other than agree to the commission that UW suggested. Tooling was also not told that when it entered into an energy contract, Engie would make an up-front payment to UW of 80% of the anticipated commission payable over the life of the contract. This gave UW a financial incentive to commit Tooling to longer contracts.

144. These features of the arrangement between UW and Engie undoubtedly meant that UW was in a position where its own financial interests were in direct conflict with those of Tooling, and it was in a position where it could make a substantial profit from acting as Tooling's agent. This directly engaged the fundamental equitable duties that apply to fiduciaries, as explained by Millett LJ in *Bristol and West BS v Mothew* [1998] Ch 1 at 18,

> "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."

145. The rationale behind such duties and the strictness with which they are enforced was explained by Lord Herschell in *Bray v Ford* [1896] AC 44 at 51,

> "It is an inflexible rule of a Court of Equity that a person in a fiduciary position … is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict. It does not appear to me that this rule is, as has been said, founded upon principles of morality. I regard it rather as based on the consideration that, human nature being what it is, there

> is danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect."

Similar expressions of the strictness with which the principles are applied can be found in cases such as *Aberdeen Railway v Blaikie Bros* (1854) 1 Macq. 461 at 471 and *Regal Hastings Ltd v Gulliver* [1967] 2 AC 134 at 144.

146. Although the no conflict and no profit rules are strictly applied, they are not absolute. As Millett LJ indicated, a fiduciary can avoid liability by obtaining the informed consent of his principal. In the case of an agent, the most obvious way that this can occur is if the contract under which he is appointed expressly or implicitly authorises him to act notwithstanding any potential conflict of interest. This was explained by Lord Browne-Wilkinson in *Kelly v Cooper* [1993] AC 205 (PC) at 214-215,

> "The existence and scope of [the fiduciary duties of agents] depends upon the terms on which they are acting. In *New Zealand Netherlands Society "Oranje" Inc v Kuys* [1973] 1 WLR 1126, 1129-1130, Lord Wilberforce, in giving the judgment of this Board, said:
>
> > "The obligation not to profit from a position of trust, or, as it is sometimes relevant to put it, not to allow a conflict to arise between duty and interest, is one of strictness. The strength, and indeed the severity, of the rule has recently been emphasised by the House of Lords: *Phipps v Boardman* [1967] 2 AC 46. It retains its vigour in all jurisdictions where the principles of equity are applied. Naturally it has different applications in different contexts. It applies, in principle, whether the case is one of a trust, express or implied, of partnership, of directorship of a limited company, of principal and agent, or master and servant, but the precise scope of it must be moulded according to the nature of the relationship. As Lord Upjohn said in *Phipps v. Boardman*, at p.123: 'Rules of equity have to be applied to such a great diversity of circumstances that they can be stated only in the most general terms and applied with particular attention to the exact circumstances of each case.'"
>
> In *Hospital Products Ltd. v. United States Surgical Corporation* (1984) 156 C.L.R. 41, 97, Mason J. in the High Court of Australia said:
>
> > "That contractual and fiduciary relationships may co-exist between the same parties has never been doubted. Indeed, the existence of a basic contractual relationship has in many situations provided a foundation for the erection of a fiduciary relationship. In these situations it is the contractual foundation which is all important because it is the contract that regulates the basic rights and liabilities of the parties. The fiduciary relationship, if it is to exist at all, must

> accommodate itself to the terms of the contract so that it is consistent with, and conforms to, them. The fiduciary relationship cannot be superimposed upon the contract in such a way as to alter the operation which the contract was intended to have according to its true construction."
>
> Thus, in the present case, the scope of the fiduciary duties owed by the defendants to the plaintiff (and in particular the alleged duty not to put themselves in a position where their duty and their interest conflicted) are to be defined by the terms of the contract of agency."

147. In the instant case, however, there were no terms, express or implied, of the contract between UW and Tooling that might have served to mould or modify the scope of UW's fiduciary duties to Tooling. Instead, the judge relied upon a number of other factors identified in paragraphs [51] and [53] above to arrive at the conclusion that the scope of UW's fiduciary duties had been limited. In my judgment he was plainly wrong to treat these factors as in any sense amounting to a contractual agreement by Tooling to modify the scope of UW's duties.

148. Rather, I agree with Lord Justice Zacaroli that, at best, these factors could only go to the alternative way in which an agent can avoid liability for breach of fiduciary duty, namely by showing, on an *ad hoc* basis, that they have made full disclosure and obtained the fully informed consent of the principal.

149. If this means of avoiding liability is to be successful, it is clear that the burden of making such disclosure and obtaining informed consent lies upon the fiduciary. It is not enough for the fiduciary to say that the principal could have discovered the true position if he had asked, or that he was told enough to put him on inquiry: *Dunne v English* (1874) LR 18 Eq 524.

150. It is also clear that in its disclosure, the fiduciary must identify all the material circumstances, together with the nature and extent of its interest and the conflict to which it seeks the principal's consent. So, in *Clark Boyce v Mouat* [1994] 1 AC 428 at 435, in the context of a solicitor acting for both parties to a transaction, the Privy Council made it clear that the disclosure must identify both that there is a conflict, and the nature of it, so as to bring home to the principal what they are being asked to consent to,

> "Informed consent means consent given in the knowledge that there is a conflict between the parties and that as a result the solicitor may be disabled from disclosing to each party the full knowledge which he possesses as to the transaction or may be disabled from giving advice to one party which conflicts with the interests of the other."

151. Likewise, in *Hurstanger* at paragraph [35], Tuckey LJ stated,

> "What amounts to sufficient disclosure for these purposes? *Bowstead & Reynolds* says, at para 6–057:

> "Consent of the principal is not uncommon. But it must be positively shown. The burden of proving full disclosure lies on the agent and it is not sufficient for him merely to disclose that he has an interest or to make such statements as would put the principal on inquiry: nor is it a defence to prove that had he asked for permission it would have been given."
>
> I think this is an accurate statement of the law. Whether there has been sufficient disclosure must depend upon on the facts of each case given that the requirement is for the principal's informed consent to his agent acting with a potential conflict of interest."

152. In the instant case, in determining whether the level of disclosure was sufficient, the judge embarked upon a brief evaluation of the level of sophistication of the representatives of Tooling who gave evidence (Mr. Forster and Mr. Gazeley) and concluded that they were neither unsophisticated nor vulnerable. He then summarised his conclusion on the issue of full disclosure and fully informed consent at paragraphs [224]-[225] as follows,

> "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 … help with completing forms … , 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."

153. In my judgment, the factors set out in paragraph [224] went nowhere near what was required to satisfy the requirement of full disclosure and fully informed consent. There was no disclosure whatever to Tooling of the terms of the arrangements between UW and Engie, nor any identification that they gave rise to a conflict of interest, nor any explanation of the nature and extent of that conflict, so as to bring home to Tooling precisely what it was being asked to consent to.

154. Further, although I do not find paragraph [225] of the judgment easy to follow, if and to the extent that the judge suggested that the arrangements in the instant case in some way reflected a "known industry practice" or "trade usage and custom", I consider that he had no basis for such a conclusion.

155. Conceptually, where it is proven to exist, a trade usage or custom operates as an implied term authorising the agent to act in a manner that would not normally be permitted. As such, the requirements and rules for proof of the existence of such a trade usage and custom are strict: see, generally, *Bowstead and Reynolds* at Article 31. The cases cited there demonstrate that, to be a trade usage or custom capable of affecting the relations between the principal and agent, the practice in question must be certain, reasonable, and so notorious and universally accepted in a particular market that it can be said that those who contract in that market necessarily do so on the basis of the usage as an implied term.

156. The only matter relied upon by the judge in this respect was an Ofgem factsheet which he described as follows, at paragraphs [100]-[101],

> "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."

157. Although it indicates that a commission might be added to the customer's bill, the features identified in the Ofgem factsheet fall a long way short of the particular features of the arrangements in the instant case that gave rise to the acute conflict of interest between UW's own interests and the interests of Tooling. Moreover, the judge recorded at paragraph [102] that the factsheet was not even on Engie's website, and he made no finding that anyone at Tooling had even seen it, still less that its contents

were notorious or universally accepted by all small businesses using third party intermediaries to arrange their supplies of energy in the UK.

Grounds 5-7

158. I agree with Lord Justice Zacaroli that, for the reasons that he gives, the appeal should be dismissed on grounds 5-7 and allowed on ground 6.

159. In particular, as regards ground 5, I agree with Lord Justice Zacaroli's analysis that the decision in *Hurstanger* is not authority for the imposition of a new species of equitable liability upon the payer of a partially disclosed commission that does not require dishonesty on the part of the payer.

160. Nor do I think that the court in *FirstRand* should be taken as having reached any different conclusion. At paragraph [127] of its judgment, the court recognised the difficulty in reconciling the approach in *Hurstanger* with the authorities on the state of knowledge required to found accessory liability for breach of fiduciary duty. It then recorded that counsel for the claimant in *FirstRand* accepted that it was necessary for accessory liability that the lender should have acted dishonestly.

161. At paragraph [128] the court also stated, in rejecting the submission that the lender could not be found to be dishonest because a particular provision of the lender's general terms and conditions had required the broker to disclose that a commission *may* be payable, that "dishonesty, in this context, means knowing about, or deliberately turning a blind eye to, the breach of the broker's fiduciary duty to their principal". The court also went on, at paragraph [131], to consider the decision of the Supreme Court in *Lifestyle Equities v Ahmed* [2024] UKSC 17. The court made the point that Lord Leggatt JSC had held that accessory liability at common law required proof "that the person who procures the wrongful act knows, or deliberately turns a blind eye to, the essential facts which make the act unlawful", and observed that in the course of his analysis, Lord Leggatt had recognised the same concept in equity, referring to *Twinsectra v Yardley* [2002] 2 AC 164 and *Brunei*.

162. Given that concession by counsel and the clear statements by the court that accessory liability in equity required dishonesty, it seems to me that the discussion that then followed in *FirstRand* at paragraphs [132]-[141] was intended to be an analysis of whether, and if so, how, the requirement for dishonesty was met in what the court referred to as "the particular circumstances underlying these appeals". I do not consider that the court was suggesting that some different or lesser test than dishonesty should be applied as a matter of law.

Proposed ground 8.

163. As indicated in paragraph [41] above, Tooling's proposed new ground of appeal is that this court ought to find that Engie "was, in fact, dishonest (in the sense that word was accorded by the Court of Appeal in [*FirstRand*])". That proposed argument is essentially founded upon paragraphs [136]-[137] and [173(3)] of *FirstRand.* Lord Justice Zacaroli has set out those paragraphs in paragraph [131] above.

164. Those paragraphs build upon the court's conclusion in *FirstRand*, at paragraph [135], that on the facts, the lender knew that payment of a commission to a dealer would put

the dealer in breach of fiduciary duty unless the customer had given his informed consent to the payment. The discussion that followed related to the question that the court identified at the start of paragraph [136], namely whether a finding of dishonesty could be made without the claimant also establishing that the lender knew or turned a blind eye to the fact that informed consent had not been obtained; or whether the burden was on the lender to prove that there was informed consent in order to prevent a finding that it had been dishonest.

165. The answer that the court gave in this respect was as follows,

> "136. … As we have said, informed consent would be a defence if the claim were made against the broker, and the burden of establishing it would lie on them. For that reason, we consider that the same must follow if the claim is brought against the lender as an accessory. The lender would not be able to defend the claim on the basis that it had genuinely tried (but failed) to obtain informed consent itself – as the lender, who was held liable, did in *Hurstanger*.
>
> 137. In a "half-way house" case … the fact that there is no informed consent follows automatically from the finding that there was only partial disclosure, and on that analysis, the lender must be liable as an accessory for procuring the breach of duty."

166. Lord Justice Zacaroli, in paragraph [133] above, does not think these paragraphs were intended to change the conventional approach to finding dishonesty in the context of accessory liability. I agree it is preferable to read the paragraphs in that way, because I consider that to read them otherwise would be inconsistent with established principles for the following reasons.

167. On the court's analysis the broker was a fiduciary. As I have explained above, equity insists that to prevent a fiduciary from being swayed by personal interest rather than by duty, the fiduciary is strictly liable as a primary wrongdoer for acting in a position of conflict or for receiving a partially disclosed commission, unless the fiduciary can show, as a defence, that it had obtained the fully informed consent of the principal.

168. But the lender was not, on any view, a fiduciary, and it was not subject to the same strict duties and liabilities. The lender could only be liable as an accessory. Far from that being a strict liability (subject to defences), the decision of the House of Lords in *Brunei* makes it clear that accessory liability is based on fault and requires proof of dishonesty on the part of the defendant.

169. Given the very different juridical bases for the two types of claim, it is not easy to see the basis for the assertion in paragraph [136] of *FirstRand* that "the same must follow", so that as a matter of law the burden of proving that there was informed consent in a case against an accessory is placed upon the defendant in the same way as it would be in a claim against a fiduciary.

170. Nor do I agree with the conclusion in paragraph [137], and repeated in paragraph [173(3)] of *FirstRand*, that a person who pays a commission to a fiduciary in a partial

disclosure case must automatically be liable as an accessory. That carries the implication that in a partial disclosure case, a person who pays a commission to someone they know to be a fiduciary must automatically be found to have been dishonest. But not all cases of partially disclosed commissions are the same, and, in my judgment, a finding of dishonesty must depend on the facts of the individual case.

171. In that regard, the conventional approach to making a finding of dishonesty is to ascertain the defendant's state of knowledge or belief as to the relevant facts: see *Ivey v Genting Casinos (UK)* [2018] AC 391 at [74]. Where the allegation is that the defendant was dishonest because it turned a "blind-eye" to the breaches of duty by an agent, it is not enough for a claimant simply to establish that the defendant did not make any inquiries to ascertain whether the claimant had given its informed consent. It is necessary for the claimant to prove that the defendant had a firmly grounded suspicion that no informed consent had been given, and made a deliberate decision not to inquire to avoid confirmation of what the defendant suspected: see *Manifest Shipping v Uni-Polaris Insurance* [2003] 1 AC 469 at [116]. Where the defendant is a company, it is also necessary to identify the natural person whose state of mind and deliberate decision not to inquire is to be attributed to the company: see *Meridian Global Funds Management v Securities Commission* [1995] 2 AC 500.

172. Turning to the facts, in *FirstRand*, the court felt able to reach a finding that the lender had been dishonest on the basis of the contractual arrangements, which the court found actively encouraged the dealer not to make full disclosure and did not require the dealer to tell the customer that it was obliged to give FirstRand a right of first refusal to finance the purchase, irrespective of whether the terms which it offered were competitive: see paragraphs [129] and [134].

173. However, the facts of the instant case are materially different to those of *FirstRand*. The differences include those identified by Lord Justice Zacaroli at paragraph [137(5)] above. Of particular potential relevance is the fact that the contract between Engie and UW required UW to be transparent about commissions with its clients. That is in marked contrast to the arrangements between the lender and dealer in *FirstRand* that the court held actively encouraged the dealer not to make full disclosure to its customer.

174. *FirstRand* also concerned consumers who made a one-off purchase of a car from a dealer whom they would most likely expect to be making its money from selling them the car, rather than obtaining commission on the finance arrangements. Tooling was a more sophisticated company that knew it was getting repeat services in relation to energy contracts from UW, for which it was not paying. Tooling therefore might more obviously have been expected to ask UW how it was being rewarded for the provision of such services.

175. However, because the allegation of dishonesty had not been raised on the pleadings and Tooling expressly disavowed any intent to pursue it, none of these matters were addressed in the evidence at trial.

176. The only witness who gave evidence for Engie was Mr. O'Connor. Although he had some oversight of the sales team that dealt with UW, he had no direct involvement in the making of the relevant contracts with Tooling. He did give evidence in general terms that he would not expect a broker to make disclosure of the commissions to its

customers unless asked, but that if a broker was asked, he would expect it to give a truthful answer. So far as I can tell, it was not suggested to him that he should have made any specific inquiries of UW to ascertain whether it had obtained Tooling's informed consent to the commissions in issue in this case, and nor was he asked why he had not.

177. There was also no evidence as to what led Mr. Gary Proctor, Engie's divisional finance director, to write an email dated 22 August 2017 in which he referred in general terms to earlier commissions paid as "champagne" or "extortionate". Because he did not give evidence, there was no investigation as to whether he thought that the commissions paid in the instant case fell into that category, or whether he had made any inquiry to ascertain whether Tooling had given its informed consent to such commissions, and if not, why not.

178. Finally, none of the employees of Engie who actually dealt with UW in relation to the contracts with Tooling gave evidence. There was therefore no exploration, for example, of what they believed when they received emails from Mr. Jackson at UW in connection with contracts 2 and 3 in 2016, assuring them that "the customer is aware that there is a fee included". Nor was there any exploration of what they knew or believed as to the services that UW might be providing to Tooling to justify the levels of commission that UW was suggesting, or whether it ever occurred to them to make any inquiries into such matters.

179. In these circumstances, on the facts of this case, I consider that it is impossible for this court now to determine the issue of dishonesty in any appropriate or reliable way. Applying the approach in *Singh v Dass* [2019] EWCA Civ 360 at [17] and *Notting Hill Finance v Sheikh* [2019] EWCA Civ 1337 at [27], I therefore agree with Lord Justice Zacaroli that Tooling's application to amend its grounds to raise the issue on appeal should be refused.

Lady Justice Asplin

180. I agree with Lord Justice Zacaroli's conclusions which he sets out at [140] above and the reasons he gives for them. I also agree with the further elaboration and explanation of them set out in the judgment of Lord Justice Snowden.

181. In particular, I agree with Lord Justice Zacaroli's rejection of the submission that a new species of primary liability was recognised for the first time in *Hurstanger,* with which Lord Justice Snowden also agrees. I too, do not accept that Lord Justice Tuckey intended to create a new head of liability. At [34] he referred to the fact that an agent who receives commission without the informed consent of his principal will be in breach of fiduciary duty and went on to note that the third party paying the commission knowing of the agency would be an "accessory" to such a breach. He then concluded at [39] that there was no logical objection to a "half-way house". There may have been sufficient disclosure to negate secrecy but, nevertheless, the principal's informed consent has not been obtained. In those circumstances he concluded that it would be wrong to acquit the agent and the third party altogether for their involvement in what would still be a breach of fiduciary duty. He then concluded at [45] that he was dealing with a "half-way house" case and stated that the claimant had not paid the broker a secret commission but had "procured the broker's breach of fiduciary duty."

182. There is no suggestion that Lord Justice Tuckey intended to create a new primary liability. Nor is there any indication that he intended to stray from the well-trodden path in relation to the liability of an accessory to a breach of fiduciary duty explained by Lord Nicholls in the *Brunei* case and confirmed in *Twinsectra*. He refers expressly to the third party being an "accessory" to the breach of fiduciary duty and to having "procured" it. For there to be an accessory liability in equity for assisting in a breach of fiduciary duty, the accessory must act dishonestly in the sense explained in *Twinsectra*. As Lord Justice Zacaroli points out, there is nothing in Lord Justice Tuckey's use of "procures" rather than "assists". When stating the relevant principle in *Brunei*, Lord Nicholls referred to "a person who dishonestly procures or assists in a breach of trust or fiduciary obligation." If all other requirements are met, the person is liable as an accessory to the breach of fiduciary duty whether they have assisted in it or procured it.

183. I also agree that Lord Justice Tuckey's reference at [48] to the claim for equitable compensation for procuring the breach of fiduciary duty mirroring the common law right to the return of the bribe for money had and received is only concerned with the relevant remedy. It arises in that context.

184. Furthermore, it seems to me that if he had intended to take the radical approach of creating a new primary liability in "half-way house" cases, or to change the essential elements of accessory liability explained in the *Brunei* case, endorsed in *Twinsectra* and considered in *Barlow Clowes* in the "half-way house" situation, he would have considered the relevant cases, entered into an in depth analysis of the relevant principles and set out the requirements of the new liability in clear terms.

185. I should also add that it seems to me that Mr Grant cannot obtain much assistance from the judgment of this court in the *FirstRand* case, despite the first part of [137] in the judgment in that case which might suggest that accessory liability will be established, in a case where the fiduciary has only partially disclosed their commission to the consumer, irrespective of whether the lender knew (or turned a blind eye to that fact) that the fiduciary had acted in breach of duty by failing to obtain the informed consent of the consumer.

186. At [137] the court noted that a lack of fully informed consent follows automatically from a finding that there was only partial disclosure and on that analysis, the lender/third party must be liable as an accessory for procuring the breach of duty. The court went on to state that this appeared to be consistent with the decision in *Hurstanger*. I have already explained that I do not consider that case to be authority for a new primary liability in "half-way house" cases or to mark a departure from the *Brunei/Twinsectra* requirements necessary for accessory liability for assisting or procuring a breach of fiduciary duty.

187. Furthermore, I agree with Lord Justice Zacaroli that if the statement at [137] (albeit repeated at [173(3)]) is viewed in the context of the decision as a whole, it should not be read as having the effect of changing the requirements for accessory liability in a "half-way house" case. In the first part of the judgment, the court proceeded on the basis that dishonesty in the *Twinsectra* sense **was** necessary to establish liability as an accessory to a breach of fiduciary duty, albeit that the point had been conceded. Further, the court found that: the *Twinsectra* requirements **were** met on the facts because FirstRand had actively encouraged the broker not to make full disclosure

([129]); and that FirstRand was effectively turning a blind eye to the dealer painting an entirely misleading picture of its role ([134]) and concluded that: "[M]ost people would regard that as dishonest." It also noted at [177] that the "half-way house" category recognised for the first time in *Hurstanger*, gives rise to difficulties, including "how the dishonesty requirement, explained in *Twinsectra* (but nowhere mentioned in *Hurstanger*), is satisfied in that scenario (especially when the lender's behaviour is not as blameworthy as we have found FirstRand's to have been)."

188. It seems to me, therefore, that read in context, the court did not decide that the *Twinsectra* requirements for accessory liability had been altered by *Hurstanger* nor did it decide for itself that dishonesty in the *Twinsectra* sense was unnecessary. On the facts, the requirements were met. As Lord Justice Zacaroli points out, in *FirstRand* where the lender actively encouraged the broker not to give full disclosure to the consumer, the court could find that the lender turned a blind eye to the broker's breach of fiduciary duty without showing that it knew that there had been no consent.

189. Accordingly, I prefer Lord Justice Zacaroli's interpretation of [137] of *FirstRand* . If that paragraph is to be read in isolation, in the way which Lord Justice Zacaroli describes at [132] above, I also agree with Lord Justice Snowden's analysis at [165] – [171] above.

190. This is clearly a complex area of the law and clarification from the Supreme Court is much needed.