[2025] UKSC 33
On appeal from: [2024] EWCA Civ 1282

JUDGMENT

Hopcraft and another (Respondents) *v* Close Brothers Limited (Appellant); Johnson (Respondent) *v* FirstRand Bank Limited (London Branch) t/a MotoNovo Finance (Appellant); Wrench (Respondent) *v* FirstRand Bank Limited (London Branch) t/a MotoNovo Finance (Appellant)

before

Lord Reed, President
Lord Hodge, Deputy President
Lord Lloyd-Jones
Lord Briggs
Lord Hamblen

JUDGMENT GIVEN ON
1 August 2025

Heard on 1, 2 and 3 April 2025

Appellant – Close Brothers Limited
Laurence Rabinowitz KC
Andrew Scott KC
Ajay Ratan
George Molyneaux
Niranjan Venkatesan
Dame Sarah Worthington KC (Hon)
(Instructed by Slaughter and May Ltd (London))

Appellant – FirstRand Bank Limited
Mark Howard KC
Matthew Hardwick KC
Simon Popplewell
Frederick Wilmot-Smith
(Instructed by Eversheds Sutherland (International) LLP (Birmingham))

Respondents
Robert Weir KC
Jonathan Butters
Thomas Westwell
(Instructed by Consumer Rights Solicitors Ltd (Manchester))

Intervener – Financial Conduct Authority
Jemima Stratford KC
Aarushi Sahore
Jagoda Klimowicz
Jaamae Hafeez Baig
(Instructed by Financial Conduct Authority Legal Department)

Intervener – National Franchised Dealers Association Limited
Jonathan Kirk KC
Richard Roberts
Jack Brady
Lee Finch
(Instructed by Caytons Law LLP)

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LORD REED, LORD HODGE, LORD LLOYD-JONES, LORD BRIGGS AND LORD HAMBLEN:

1. Introduction

1. This judgment determines three conjoined appeals, all of which raise common issues about the lawfulness or otherwise of the payment of commission by finance lenders to motor dealers in connection with the provision of finance for the hire purchase of cars, where that commission is either not disclosed, or only partly disclosed, to the hirers of the cars. Although the individual sums at stake in each of the appeals are modest, the fact that the transactions in issue are of an extremely widely used type, and that non-disclosure, or partial disclosure, of such commission is very widespread, means that the outcome of these appeals is of major financial significance to finance lenders, to motor dealers and to the very large number of members of the public who typically obtain cars in this way, for whom the sums at stake may well be material.

2. Central to each of the appeals is a very well-known type of three-cornered transaction which comes about (broadly speaking) in the following way. Motor dealers offer cars for sale, typically on their forecourts or in showrooms, to the public. A person who wishes to obtain a car for their personal use visits the dealer, chooses a car and agrees a price with the dealer. The price may be reduced for a buyer on credit, below that payable by a cash buyer. If (as in all these appeals and in the majority of car sales) the customer wishes to obtain the car on credit rather than by paying cash, the dealer obtains an offer of finance from a finance company on hire purchase terms. The offer will come from one of a number of lenders on a panel maintained by the dealer, to whom the dealer has disclosed information about the customer’s financial resources previously obtained from the customer. If the offer is acceptable to the customer then (1) the dealer sells the car to the lender, (2) the customer enters into a back to back hire purchase agreement with the lender for a specified term, usually with an option to return or purchase the car at the end of the term, (3) the customer drives away the car, and (4) the lender pays the dealer a commission for the introduction of the hire purchase business. No direct contract is made between the dealer and the customer. Nor does the customer generally meet or speak to any member of the staff of the lender. The offer of the hire purchase agreement is made to the customer in documents presented to the customer by the dealer, acting for that purpose on behalf of the lender.

3. The provision of motor finance on terms exemplified by the transactions under appeal has been widespread for at least 75 years. It is a regulated credit activity under the Consumer Credit Act 1974 (“the CCA”). The regulator has since 2014 been the Financial Conduct Authority (“the FCA”), acting under powers conferred by the Financial Services and Markets Act 2000 (“FSMA”). Previously it was the Office of Fair Trading (“the OFT”). Both lenders, and dealers when acting as credit brokers in the sourcing of finance, fall within that regulatory framework. Nothing in that regulatory regime detracts from

customers' rights at common law or in equity. Although rules made by the FCA in its Consumer Credit Sourcebook ("CONC") require the dealer to disclose commission receivable if it could either affect the dealer's impartiality or have a material impact on the customer's transactional decision, nothing in the regulatory regime requires lenders or dealers generally to disclose the existence or amount of any commission paid by lender to dealer, or to obtain the customer's consent to the payment.

4. These appeals arise from proceedings brought by three customers who obtained used cars (in the case of one customer two cars) from four different dealers under hire purchase arrangements involving two different lenders. It will be necessary to describe each of the transactions in more detail in due course but, in summary, in each case commission was paid by the lender to the dealer. There was either no disclosure of the existence of the commission or the only disclosure was that a commission (of unidentifiable amount) might be paid. The customers claimed that the commissions amounted to bribes, or to secret profits received by the dealers as fiduciaries. They each claimed payment of an amount equivalent to the commissions from the lenders under the tort of bribery. Two of them claimed in the alternative compensation from the lenders for dishonest assistance in the dealers' receipt of secret profits. Each of the customers claimed to re-open their hire purchase agreements under section 140A of the CCA on the basis that they gave rise to an unfair relationship. Only one of those CCA claims has survived for determination on these appeals. There were also claims to rescind the hire purchase agreements at common law or in equity but, for reasons which will appear, they were unlikely to succeed and have not been made the subject of much argument in this court.

5. The claimant customers had limited success at first instance and on first appeal. So they became the appellants in the Court of Appeal. There they each succeeded against their respective lenders, either on the basis of the tort of bribery or on the basis of the lenders' dishonest assistance in the dealers' breach of fiduciary duty. It will be necessary to review the judgment of the Court of Appeal in more detail in due course but, in summary, it was held that:

> (1) All four dealers undertook a fiduciary duty to their customers when acting as credit brokers in obtaining offers of hire purchase finance from the lenders.
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> (2) They all also undertook a duty to act in a disinterested manner in obtaining offers of hire purchase finance sufficient to engage the tort of bribery (something labelled a "disinterested" duty).
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> (3) In three of the four transactions the commissions were secret, so that they were bribes.

(4) In the fourth transaction there was sufficient disclosure to prevent the commission being secret, but not a sufficiently informed consent by the customer to prevent it being an unauthorised profit received by the dealer in breach of fiduciary duty, in respect of which the lender was liable as a dishonest assistant.

(5) In the same case there was an unfair relationship between the lender and the customer sufficient for the hire purchase agreement to be re-opened under the CCA.

6. The lenders, who are the appellants in this court, challenge every element in the Court of Appeal's analysis. They go so far as to submit that there either is not, or should no longer be recognised to be, a distinct tort of bribery at all. A fuller description of the lenders' submissions, and the issues raised, will follow a summary of the key features of each of the four transactions. But it is worthwhile first to identify what the court considers to be the central issue in all three appeals, which is decisive of all of them.

7. Both the tort of bribery and the equitable claim based upon dishonest assistance in a breach of fiduciary duty treat the payment and its receipt as objectionable because it tends to corrupt, undermine or at least conflict with some duty or obligation arising out of a relationship between the recipient of the payment and a third party (typically the claimant), to whom the duty or obligation is owed. The obligation may be a fiduciary duty, which is a feature of the relationship between a trustee and his beneficiary or between a director and her company or between many kinds of agent and their principals. That is often called a duty of single-minded (or undivided) loyalty. Or, according to some authorities, it may be a duty to perform a service in a manner independent from any personal interest (falling short of a full fiduciary duty), sometimes called a "disinterested" duty, such as may be owed by a professional valuer to a client. Or, according to some authorities, it may be a duty of fidelity, generally owed by an employee to her employer.

8. Common to all those types of duty or obligation is a requirement to avoid having the performance of the duty, or of the service to which it relates, affected by any personal interest of the obligor. Generally it requires the obligor to avoid any conflict between his duty and his interest or, at the very least, to declare it. As between fiduciaries and their principals it is usually called the no conflict duty. In several types of well-recognised relationship, such as between trustee and beneficiary, the duty is treated as always arising, so that it may be described as being implied by law. In others the existence of such a duty may be expressly stated, where the relationship is contractual, or governed by statute, such as that between director and company.

9. In other types of relationship a duty to avoid any conflict of interest may be implied as a necessary incident of the service to be performed. Or the particular context in which

the relationship arises may be inimical to the existence of such a duty, or at least of such a duty in an unqualified form. Or there may simply be nothing (or nothing sufficient) about the service to be performed which makes the implication of a no conflict duty necessary. In such cases the question whether a payment made to the obligor under that relationship by a third party is objectionable will depend, as a threshold question, upon whether the factual context requires or permits the implication of a no conflict duty which would be breached by the making and receipt of the payment.

10. Common to these appeals is the relationship between the motor dealer and the customer, during the course of which the dealer selects for the customer a suitable hire purchase (or other) finance package from among a panel of lenders. Viewed separately from the marketing and sale of the car, the service of selecting a finance package for the customer may be labelled "credit brokerage". Viewed in isolation, the provision of a credit brokerage service, or the relationship between the broker and the client, is not one which automatically attracts a no conflict duty as a matter of implication by law, but it may on particular facts be sufficient to import a necessarily implied no conflict duty, such that a secret payment by lender to broker would be objectionable from the perspective of the client. That is what the Court of Appeal concluded was to be implied as between dealer and customer in each of the four transactions, a conclusion which the respondent customers maintain was correct.

11. But the lenders submit that the credit brokerage service provided by the dealers in these typical hire purchase cases cannot be viewed in isolation from the general relationship between dealer, customer and lender in the three-cornered transaction of which the finance package is only a part. Viewed in that way, the lender appellants say that the dealer never loses its status as seller, and acts, and is expected and entitled to act, in its own interests as an arm's length seller throughout. A no conflict duty, or any other duty which would make undisclosed commission payments by the lender to the dealer objectionable in law or in equity, would be incompatible with that continuing arm's length relationship, which persists until the transaction is completed, so that no such duty is to be implied.

12. We have summarised this question at the outset of this judgment for three reasons. The first is that it is the question which we consider necessarily arises from the analysis of the law which follows. The second is that the answer to it will be determinative of this appeal, save for the single surviving CCA claim. The third is that it is a question which needs to be answered by reference to the detail about the facts of the four transactions, and from what may be gathered from them as the typical features of transactions of this type, to which we now turn.

2. *The agreed or assumed facts and the litigation history*

13. As already noted, there are three customer claimants, with claims arising from four transactions, involving four dealers and two lenders. All of the claims went to trial in either the Fast Track or the Small Claims Track. It is therefore no criticism of the judgments that the findings of fact are sometimes brief. In any event the Agreed Statement of Facts and Issues before this court, which is largely based on those judgments and on uncontentious documents, provides a sufficient non-contentious basis for the resolution of the issues arising on the three appeals.

(1) Hopcraft

14. Ms Hopcraft was, in January 2014, a 22 year old student nurse, looking for a replacement car. She found a second-hand Fiat 500 at Jordan & Co (Hull) Ltd ("Jordans"), motor dealers in Hull, priced at £8,530, for which she needed finance. Jordans proffered a finance package from Close Brothers Ltd, licenced to provide motor finance by the OFT, and one of the finance providers on Jordans' panel. For that purpose Jordans obtained financial information from Ms Hopcraft. That may have included three years' address and employment history and three months' income and outgoings, supported by bank statements. Jordans uploaded that information onto a platform together with a finance proposal, available for inspection by its panel of lenders, including Close Brothers, who responded with a hire purchase package for Ms Hopcraft's acquisition of the car.

15. On 10 January 2014, together with her father as co-borrower, Ms Hopcraft signed a hire purchase agreement with Close Brothers, under which:

> (1) Credit of £8,280 would be given to the Hopcrafts to purchase the second-hand Fiat 500 which she had selected. She had previously paid a deposit of £250.
>
> (2) Interest charges would be £2,452.42, calculated at the rate of 5.5% per annum, fixed for the term of the agreement.
>
> (3) The annual percentage rate of charge ("APR") was 12.3%.
>
> (4) The term of the agreement would be 45 months and would involve 43 monthly payments of £144.43, a first payment of £313.43 and a final ("balloon") payment of £4,576.50. This would be payable only if Ms Hopcraft decided to purchase rather than return the car.

(5) Jordans was named as the credit intermediary.

16. Close Brothers paid Jordans a commission of £183.26, pursuant to a formula contained in its standard terms of business with brokers, the details of which were not available at trial. The commission was not disclosed to Ms Hopcraft in any way.

17. The Hopcrafts terminated the hire purchase agreement 13 months early, by paying everything then due, less an early settlement rebate of interest charges.

18. Close Brothers' then standard terms of business with brokers included an undertaking by the dealer that it had made all disclosures to the customer required by law, including as to commission. Its then dealer guide advised dealers to exercise high levels of conduct and integrity, to select finance products from any available range based upon what was best for the customer, to make customers aware of alternative sources of finance and to outline any finance package to the customer in a fair and transparent way so as to enable the customer to make an informed decision.

19. Ms Hopcraft issued a claim against Close Brothers in March 2023 in the County Court at Kingston upon Hull. She claimed:

(1) That the commission paid by Close Brothers to Jordans was a bribe.

(2) That the commission was a secret profit received by Jordans in breach of fiduciary duty for which Close Brothers was liable as an accessory.

(3) That her relationship with Close Brothers was unfair under the CCA.

(4) Relief in the form of damages and/or rescission.

20. In dismissing her claim in September 2023, DDJ Morris found that:

(1) Ms Hopcraft had only been offered one finance package (ie that from Close Brothers) on a take it or leave it basis, and without advice or recommendation.

(2) That she was perhaps a little naïve and vulnerable in some respects, although her father, who took part in considering the finance package on offer, was not.

(3) That Ms Hopcraft's main concern was that the monthly payments were about right.

(4) That she was not told about the commission but that she doubted whether, if she had been told, it would have made any difference to her decision to obtain that car.

(5) That the commission was "very low" and the interest rate neither excessive nor unusual for the time.

21. DDJ Morris's conclusions were that Jordans were not fiduciaries or agents for Ms Hopcraft, nor owed her a disinterested duty, and that the transaction was not unfair for the purposes of her claim under the CCA.

22. Ms Hopcraft, and her father who had been joined as a party by the trial judge, appealed in October 2023. Their appeal challenged the findings that Jordans owed her no relevant fiduciary or disinterested duty, but not the trial judge's adverse conclusion about her CCA claim. Their appeal was transferred to the Court of Appeal to be heard with the Wrench and Johnson appeals described below.

(2) Wrench (1)

23. Mr Wrench was a postman who liked used sports cars. In May 2015 his eye fell on a second-hand Audi TT, offered for sale by Fast Lane Motor Cars Ltd of Stoke-on-Trent ("Fast Lane") for £8,995 cash. Mr Wrench had £3,000 available, but needed to finance the balance.

24. As to the dealer's role in arranging that financing, Mr Wrench's evidence at trial was that the sales representative at Fast Lane told him that the dealership would find him the best rate from their panel of lenders, and he was not directly challenged on this in cross-examination.

25. Fast Lane offered Mr Wrench a finance package from FirstRand Bank Ltd ("FirstRand") on the following terms, reflected in a credit agreement ("the 2015 Wrench Credit Agreement") made on 23 May 2015:

(1) Credit of £5,995 was provided for the purchase, on top of the deposit paid by Mr Wrench of £3,000.

(2) Interest charges amounted to £2,213.20 at a fixed rate of 8.75%.

(3) The APR was 19.3%.

(4) The term was 49 months, with monthly payments of £175.15, and a final payment of £374.15.

(5) Fast Lane was named as the credit intermediary.

26. The 2015 Wrench Credit Agreement was accompanied by FirstRand's then standard terms and conditions ("the 2015 Wrench Terms and Conditions"). These included, at clause 12.6, the following:

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

We will call this "the Commissions Clause". The only reference made to the 2015 Wrench Terms and Conditions in the 2015 Wrench Credit Agreement appears on its declarations and signature page, where it is stated:

> "The customer has had his/her attention drawn to the provisions of clause 10 overleaf."

The 2015 Wrench Terms and Conditions are not "overleaf" but in a separate accompanying document not signed by Mr Wrench. Clause 10 has nothing to do with commission.

27. FirstRand paid Fast Lane a commission of £179.85, which was not disclosed to Mr Wrench, other than in the Commissions Clause. This was calculated as 3% of the amount of the credit.

(3) Wrench (2)

28. In March 2017 Mr Wrench decided to buy another car, a second-hand BMW 3 series, which he found offered by TT Sports and Prestige Ltd of Derby ("TT Sports") for £9,750. Mr Wrench had £1,000 cash available but required finance for the rest of the price. Once again (according to Mr Wrench's evidence, unchallenged in this regard) he was told that the dealership (this time TT Sports) would get him the best terms.

29. TT Sports offered him a finance package, again from FirstRand, on the following terms, contained in the hire purchase agreement which he signed on 11 March 2017 ("the 2017 Wrench Credit Agreement"):

> (1) Credit of £8,750 was provided on top of Mr Wrench's deposit of £1,000.
>
> (2) Interest charges were £1,578.84 at a fixed rate of 4.32%. This was chosen from a discretionary range within which TT Sports had authority to set the rate, of between 3.25% and 8.25%.
>
> (3) The APR was 10.2%.
>
> (4) The term was 49 months, with 47 payments of £219.33 and a final payment of £418.33.
>
> (5) TT Sports was named as the credit intermediary.

30. The 2017 Wrench Credit Agreement was accompanied by a terms and conditions document ("the 2017 Wrench Terms and Conditions") in substantially the same form as the 2015 Wrench Terms and Conditions, with the same cross-referencing to the Credit Agreement, and the same Commissions Clause, save that it was numbered 13.6. Mr Wrench did not sign the 2017 Wrench Terms and Conditions.

31. FirstRand paid TT Sports commission of £408.98. Apart from the Commissions Clause, that commission was not disclosed. The amount was made up from a two-element formula in FirstRand's then standard dealer terms. The first part, of £299.60, was derived in part from the difference between the minimum interest rate in the range referred to above, and the rate actually set by TT Sports. The second part, of £109.38, was described as a "revenue share of advance" and calculated as 1.25% of the total amount of credit.

Commission based upon differences in interest rates set by the dealer were banned by the FCA from use in motor finance from 2021.

32. Mr Wrench repaid both the 2015 and 2017 agreements early, in 2017 and 2019 respectively, receiving an interest rebate in each case.

33. FirstRand's standard terms and conditions issued to dealers (including Fast Lane and TT Sports) contained exhortations to dealers to treat customers fairly and to pay due regard to their interests similar to those of Close Brothers, described above. In addition, Clause 1.15 of the General Terms issued to dealers provided that:

> "You agree to disclose to the customer early in the sales process in relation to each regulated finance agreement that commission may be payable to you for acting as a credit broker and/or credit intermediary. If requested to do so by the customer you will inform the customer of the amount of any commission and or other benefits payable by us to you in relation to the prospective or actual regulated finance agreement."

We will call that "the Wrench Disclosure Requirement".

34. Mr Wrench issued a single claim in the County Court Money Claims Centre in July 2022, claiming that both commissions were bribes, so that he was at liberty to rescind both his credit agreements. He also made claims to re-open both credit agreements under the CCA on the ground of unfair relationship.

35. The claim was tried by DDJ Harrop in July 2023. He found that:

(1) Mr Wrench received no oral information about the credit package proffered by either dealer, and had no direct contact with FirstRand.

(2) That although the Commissions Clause featured in the documents provided to Mr Wrench on both occasions, on neither was it drawn to his attention.

(3) That Mr Wrench had not been told the amount of either commission.

36. DDJ Harrop concluded that both dealers owed Mr Wrench a disinterested duty, sufficient to engage the tort of bribery, and that both commissions had been secret because neither Commissions Clause had been expressly drawn to his attention, or the commissions otherwise disclosed. He therefore held that Mr Wrench succeeded in relation to both credit agreements, although he left remedies to be determined after any appeal on liability, and did not determine the CCA claim.

37. FirstRand's appeal was heard in the County Court at Birmingham on 15 November 2023 and allowed by HHJ Worster in a reserved judgment given on 31 January 2024. He held that neither dealer had owed Mr Wrench a fiduciary or disinterested duty sufficient to engage the tort of bribery, and that the Commissions Clause was sufficient in both cases to disclose the possibility of a commission to Mr Wrench, with the consequence that there was not the element of secrecy required for bribery. He remitted the CCA claim to the District Judge for reconsideration.

38. Mr Wrench appealed Judge Worster's order to the Court of Appeal, where it was conjoined with those of the Hopcrafts and Mr Johnson.

(4) Johnson

39. Mr Johnson was a factory supervisor, looking for his first car in mid-2017. He had already obtained a credit package before he visited the premises of a dealer in Cardiff called The Trade Centre Wales Group Ltd ("The Trade Centre Wales") in late July. Having looked at various cars, he identified a second-hand Suzuki Swift, on offer for £6,499, to secure which he paid a three day holding deposit of £100. The transaction was completed on 29 July.

40. Mr Johnson was told that his finance package would not be sufficient to enable him to buy the Suzuki. Instead he was offered a combined hire purchase and personal loan package from FirstRand, for the purposes of which he completed and signed a Finance Proposal Form in which he included basic personal, employment and financial details. The combined package was required because FirstRand only provided hire purchase finance up to 100% of the Glass's Guide valuation of a car, and the Glass's Guide valuation of the Suzuki was less than the purchase price by just under £1,600. Accordingly Mr Johnson borrowed £4,803.69 on hire purchase terms and £1,595.31 by way of personal loan ("the Johnson Credit Agreement"). These, together with his cash deposit, made up the purchase price of £6,499.

41. The standard terms of the hire purchase part of the package were similar to those obtained by Mr Wrench from FirstRand, and therefore included the Commissions Clause. The particular terms were as follows:

(1) As noted, the hire purchase credit was £4,803.69 and the personal loan credit was £1,595.31.

(2) The combined interest charge was £2,635.20 and the fixed interest rate was 8%.

(3) The APR for the hire purchase was 18.1% and for the personal loan 15.1%.

(4) The term for both parts of the package was 60 months, requiring aggregate monthly payments of £153.72 and a final payment of £352.72.

(5) The Trade Centre Wales was named as the credit intermediary.

42. Also on 29 July Mr Johnson signed, but did not read, a Suitability Document prepared by The Trade Centre Wales. This stated that The Trade Centre Wales was authorised and regulated by the FCA and permitted to advise on and arrange consumer credit contracts. Under the heading "Credit Brokerage" it stated:

> "We will undertake an assessment of your Demands and Needs for Consumer Finance and provide an illustration of the Consumer finance product that best meets your individual requirements based upon the answers you provide.
>
> We do not charge a fee for handling your application for Consumer Credit, but we may receive a commission from the product provider.
>
> We do not offer a whole market option for Consumer Credit we offer products from a select panel of lenders, details of which can be seen below: Panel of lenders: …"

There followed a heavily redacted list of 22 potential lenders, including FirstRand. The Suitability Document further stated that:

> "Within our organisation [ie The Trade Centre Wales] there are a number of finance options we are able to provide. Based on our discussions and your responses to our questions we will have narrowed down this selection to the one that may be most

appropriate given your personal circumstances and requirements."

43. The Trade Centre Wales and FirstRand had at the material time a Rates and Terms Agreement in force between them, included in a letter dated 18 July 2017, under which the dealer had discretion as to the interest rate between 8% and 13%. Commission was payable in two elements. First, commission of 80% of the difference between the minimum discretionary interest rate and the rate actually charged. Secondly, a revenue share of advance commission at 25.8% of the total amount of credit. Since the interest rate chosen for Mr Johnson was the minimum 8%, the first commission element was nil. But the second element amounted to £1,650.95, and this was the commission actually paid by FirstRand to The Trade Centre Wales.

44. The Rates and Terms Agreement between FirstRand and The Trade Centre Wales included a commercial tie under which The Trade Centre Wales was required to offer all its business to FirstRand, which had first refusal. That tie was not disclosed to Mr Johnson.

45. Mr Johnson repaid all his borrowings from FirstRand 21 months early, receiving the usual rebate of interest charges for early settlement.

46. Mr Johnson issued his claim against FirstRand in the County Court Money Claims Centre in January 2022. His claim was based upon (1) bribery, (2) dishonest assistance in the dealer's breach of fiduciary duty and (3) an unfair relationship under the CCA.

47. The claim was tried remotely by DDJ Sandercock on 29-30 November 2022. On 18 January 2023 he gave judgment dismissing the claim. He found that:

(1) There was no pleading or evidence that the price of the Suzuki was affected by the amount of the commission paid.

(2) Mr Johnson's evidence that, had he known of the amount of the commission he would have looked for a car elsewhere, was based upon his mistaken assumption that the commission affected the price of the car.

(3) Mr Johnson did not rely upon the dealer for information, nor was he interested in the detailed terms of the transaction, beyond the headline figures.

(4) Mr Johnson displayed an almost wilful disregard of the pre-contract information supplied to him. He deliberately chose not to read the documents placed before him. Had he done so he would have seen the Commissions Clause.

(5) There was no evidence that Mr Johnson agreed to pay more money than he needed in order to secure the car.

48. The District Judge concluded that (1) there was no secrecy or even "half-secrecy" about the commission, (2) The Trade Centre Wales owed Mr Johnson no fiduciary duty, and (3) the relationship between Mr Johnson and FirstRand was not unfair for the purposes of the CCA. Therefore he dismissed the claim. It does not appear that any reference was made to the Suitability Document in evidence, in submissions or in the judgment, although it was included in the trial bundle.

49. Mr Johnson's appeal was heard by HHJ Jarman KC in June 2023. During the appeal Mr Johnson abandoned his bribery claim. In his judgment given on 6 July 2023 Judge Jarman confirmed the District Judge's conclusion that there was no fiduciary duty owed by the dealer to Mr Johnson, so that his dishonest assistance claim against FirstRand failed. But he allowed the appeal on the CCA claim, directing that it be re-heard by DDJ Sandercock. That re-hearing was overtaken by Mr Johnson's appeal to the Court of Appeal and remains undetermined.

(5) The Court of Appeal

50. The Court of Appeal (Andrews, Birss and Edis LJJ) heard the three appeals together over three days from 2 to 4 July 2024. They delivered a reserved judgment of the court on 25 October 2024. It will be necessary to consider in more detail aspects of the reasoning of the court in due course, but the following summary will suffice for the purpose of explaining the issues before this court.

51. By the time of the hearing in the Court of Appeal there remained live:

(1) Bribery claims by the Hopcrafts and Mr Wrench.

(2) Equitable claims in dishonest assistance (in the dealers' breach of fiduciary duty) by the Hopcrafts and Mr Johnson.

(3) An unfair relationship claim under the CCA by Mr Johnson.

The Court of Appeal provided, at paras 18–20, a helpful summary of their decision. By way of even more compressed summary, they concluded:

> (4) That in providing a credit brokerage service to each appellant, the dealers incurred both a disinterested duty and a fiduciary duty to their customers because, even though they were selling the cars, they undertook to search for and provide to their customers a finance package from among their panel of lenders which was both competitive and suitable for their customers' needs.
>
> (5) That in neither the Hopcrafts' nor Mr Wrench's transactions was there any (in the former case) or any sufficient (in the latter case) disclosure of the commissions, sufficient to avoid them being secret for the purposes of the tort of bribery.
>
> (6) Based upon his concession in the court below, there was sufficient partial disclosure of the commission in Mr Johnson's case to avoid the commission being a bribe, but insufficient disclosure to obtain his informed consent to the commission, which was therefore an unauthorised profit made by the dealer in breach of its fiduciary duty, in which FirstRand dishonestly assisted.
>
> (7) Mr Johnson's relationship with FirstRand was so clearly unfair for the purposes of the CCA that, in the interests of proportionality, that aspect of his claim should be upheld rather than remitted, as had been ordered by Judge Jarman.

52. On their way to those conclusions the Court of Appeal declined the appellants' invitation to treat the existence of a disinterested duty (rather than a full fiduciary duty) as sufficient to trigger a liability in equity of the dealer for breach of fiduciary duty, with a corresponding accessory liability of the lender in dishonest assistance, where a bribery claim was defeated by partial disclosure of the commission. That was the only point on which the appellants failed before the Court of Appeal, who regarded themselves as bound in that regard by *Hurstanger Ltd v Wilson* [2007] 1 WLR 2351 ("*Hurstanger*") and *Wood v Commercial First Business Ltd* [2022] Ch 123 ("*Wood*").

53. The result was that the three customers were all successful in their appeals to the Court of Appeal, leaving the lenders Close Brothers and FirstRand to appeal to this court. Their grounds of appeal, together with the points raised by the customers in their Respondents' Notice, sufficiently appear from the summary of the issues before this court which follows.

54. The decision of the Court of Appeal came as a shock to the car finance industry. The decision was based not on very specific or unusual facts about the four transactions under review, but upon common features very likely to be widely replicated across the industry as a whole, and with potentially wider implications for credit brokerage provided by sellers in other fields. Furthermore it conflicted with what had until then been the contrary assumption made by the FCA as regulator, namely that those common features did not, without more, give rise either to a disinterested or fiduciary duty sufficient to enable either a bribery claim or an equitable claim in dishonest assistance.

55. For those reasons we permitted the FCA to intervene to make brief written and oral submissions, directed to the regulatory context of the issues for decision. Although no dealer had been joined as party to the cases under appeal, the profound consequences for car dealers generally led us to permit the National Franchised Dealers Association also to intervene to make brief written and oral submissions. The court is grateful for the assistance which both interveners provided.

56. The court also received, but rejected, a request to intervene from HM Treasury. Although the draft submissions clearly expressed the apprehension within Government as to the national economic consequences of the Court of Appeal's decision, it provided nothing of substance either as to the relevant law or context.

3. The issues before this court

57. We have already described the main issue which we regard as decisive of these appeals (save for Mr Johnson's CCA claim). That is whether the continuing status of the dealer as seller of the car in the three-cornered transaction between dealer, lender and customer is fatal to the recognition of any fiduciary duty owed by dealer to customer in connection with providing a finance package as credit broker sufficient to ground a claim in dishonest assistance by the lender, or any lesser "disinterested" duty (whether as agent or otherwise) to avoid being affected by personal interest, sufficient to found a claim against the lender in bribery.

58. But the issues potentially for decision (depending upon the outcome of the main issue) go much wider than that, and wider in some respects than those canvassed before the Court of Appeal. This is in part because most of the relevant authorities come from the Court of Appeal or below, by none of which is this court bound. We were not invited to depart from the fully argued ratio of any prior decision of this court, or of the House of Lords or the Judicial Committee of the Privy Council, for which an enlarged panel might have been appropriate.

(1) Bribery

59. Perhaps the most potentially wide-ranging of the additional issues raised by the appellant lenders is whether the common law does, or should continue to, recognise a distinct tort of bribery at all. The submission, advanced primarily by Mr Laurence Rabinowitz KC for Close Brothers, was that for most purposes the older equitable claim based upon breach of fiduciary duty was sufficient to deal with the evils of bribery, with such assistance from established common law claims such as deceit, misrepresentation and money had and received (or restitution) as might be required to fill any gaps.

60. The next issue, if a tort of bribery is to be recognised, is what duty relationship engages the tort of bribery and in particular whether any duty relationship (here between dealer and customer) less than a full fiduciary duty of single-minded loyalty is sufficient to engage the tort. In particular, is what has come to be known as a "disinterested" duty, although falling short of a fiduciary duty, sufficient for that purpose? The submission that it is sufficient comes from the Court of Appeal authorities of *Wood* and *Hurstanger*, supported by the customer respondents. In the lenders' submission, nothing short of a full fiduciary duty will do.

61. Next, still within the context of bribery, there is an issue as to the meaning of the requirement for secrecy. The lenders submit, following the decision in *Hurstanger*, that if the customer is told that a commission *may* be paid by lender to dealer or broker, then if it is subsequently paid, without further disclosure, that payment cannot be secret. The customers say that nothing short of the full disclosure necessary to obtain a beneficiary's informed consent in a trust or fiduciary context will do.

62. There follow issues about remedies, if bribery be established. The first is whether the customer has an automatic remedy against the payer of the bribe (here the lender) for the full amount of the bribe and, if so, on what conceptual basis, and with what, if any, requirements as to proof? Is it a form of damages, in which loss at least equivalent to the bribe is to be presumed, irrebuttably or otherwise? Or is it a claim in unjust enrichment, or a claim for restitution for a wrong? The second is whether the customer has both a common law and an equitable right to rescind in cases of bribery.

(2) The claim in equity

63. There are a reduced number of issues under this heading. The first, rejected by the Court of Appeal but renewed by the respondents, is whether a disinterested duty is sufficient to give rise to the equitable claim or whether, as the appellants maintain, only a full fiduciary duty will do. This issue was somewhat obscured during submissions by the apparent agreement of counsel that the two duties are really the same, the "disinterested" duty just being the common law analogue of the fiduciary duty, with no

separate characteristics. As will appear, the parties proposed this supposed common ground for their own separate and opposed purposes, but we reject it.

64. The second issue is about the now well-established requirement for accessory liability of a person who assists in a breach of fiduciary duty, namely that the assistance be dishonest. As will appear, our resolution of the logically anterior issues about fiduciary duty make that an unprofitable issue to address on these appeals, other than at a very high level of generality.

(3) The CCA claim

65. All three customers initially claimed to re-open their hire purchase agreements under section 140A of the CCA on the basis that they gave rise to an unfair relationship between customer and lender. The only one of those CCA claims which has survived for determination on these appeals is that brought by Mr Johnson.

66. The issues arising in relation to Mr Johnson's CCA claim are discrete from the other issues on these appeals and may be summarised as follows.

> (1) The central issue is whether the relationship between the customer and the lender arising out of the Johnson Credit Agreement (which comprised a hire purchase agreement and a personal loan agreement) was unfair to the customer because of one or more of the matters set out in section 140A(1) of the CCA.
>
> (2) It is conceded that antecedent negotiations with the customer were deemed by section 56(2) of the CCA to be conducted by the dealer as agent of the lender as well as in its actual capacity.
>
> (3) It is alleged that the existence and amount of a commission paid by the lender to the dealer were not disclosed to the customer and made the customer/lender relationship unfair.
>
> (4) It is alleged that the existence of a commercial tie between the dealer and the lender under which the dealer was required to offer all its business to the lender which had first refusal, which tie was not disclosed to the customer, made the customer/lender relationship unfair. It is alleged that the dealer/lender relationship was falsified and actively concealed by the dealer acting as agent for the lender.

(5) It is alleged that breaches by the lender and the dealer of their regulatory obligations contained in CONC made the customer/lender relationship unfair and were actionable under section 138D of FSMA.

(6) A further issue in relation to unfairness of the customer/lender relationship is the failure of the customer to read the documents provided to him by the dealer.

(7) Finally in this regard, if the customer/lender relationship is held to be unfair, there arises the issue of remedies under section 140B of the CCA.

4. The law

67. In this section we will describe in more detail the two non-statutory means whereby the law provides a response to the matters complained of, namely the claim in equity and the common law tort of bribery, and then conclude with an analysis of the limited effect upon those principles of the statutory intervention wrought by the CCA, and the regulatory framework now administered by the FCA. We will begin with the equitable claim because of its greater antiquity, and because aspects of the claim in tort at least arguably owe their origin to pre-existing equitable principles.

(1) The claim in equity

(i) The no profit and no conflict rules

68. At the heart of equity's response to objectionable payments to fiduciaries lies what is usually called the no profit rule (or, by some, the profit rule). It amounts to a general and strictly enforced prohibition on fiduciaries making any profit for themselves out of their fiduciary position without the fully informed consent of their principals. The no profit rule is imposed upon all those who undertake fiduciary duties of single-minded loyalty in order to protect them from succumbing to the temptation to allow their personal interest to undermine the performance of their duty. It is the twin sister of the conflict (or no conflict) rule which, equally strictly and for the same purpose, prohibits a fiduciary from getting into a position where his personal interest may conflict with his duty to his principal.

69. The no profit rule has been settled in its scope and effect since at least the early 18th century, the best-known leading authority for it being *Keech v Sandford* (1726) Sel Cas Ch 61; 25 ER 223. It is the subject of numerous decisions of the House of Lords, including *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134 (Note) ("*Regal v Gulliver*")

and *Boardman v Phipps* [1967] 2 AC 46, and was very recently reviewed and affirmed by this court in *Rukhadze v Recovery Partners GP Ltd* [2025] UKSC 10; [2025] 2 WLR 529 ("*Rukhadze*") and again in *Stevens v Hotel Portfolio II UK Ltd* [2025] UKSC 28 ("*Hotel Portfolio*").

70. The no profit rule originated in the relationship between trustees and beneficiaries, but it has long since been extended to all those who are in a fiduciary relationship, such as directors and their companies, solicitors and clients, and many types of agents and their principals. The consequences of breach are, deliberately, draconian. Any unauthorised profit (ie a profit to the making of which the principal has not given their fully informed consent) is held upon receipt by the fiduciary upon an immediate institutional constructive trust for the principal, so that it becomes from the moment of receipt beneficially owned by the principal as the beneficiary of that constructive trust. The principal therefore has all the proprietary rights and remedies against the property constituted by the profit arising from that beneficial ownership. The fiduciary is personally liable to account to the principal for the profit and is also personally liable to the principal for any loss caused to it by the breach of duty consisting of its having been made and received: see generally *Hotel Portfolio*.

71. There was until recently a long-standing uncertainty in English law as to how far the receipt of a bribe or secret commission by a fiduciary was to be assimilated with the law about unauthorised profits. The question was whether the recipient of the bribe held it upon constructive trust for the principal. In *Lister & Co v Stubbs* (1890) 45 Ch D 1 the English Court of Appeal held that it was not, but in *Attorney General for Hong Kong v Reid* [1994] 1 AC 324, the Privy Council, applying the equivalent law of Hong Kong, held that it was. This uncertainty was finally resolved by this court in *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45; [2015] AC 250 ("*FHR*"), which held that it was. Since then it has become appropriate to regard bribes and secret commissions paid to fiduciaries as a subset of unauthorised profits: see *Hotel Portfolio*.

72. That classification is made all the easier when unauthorised profits are, as they frequently are by trust lawyers, labelled "secret profits", but it is not (and never has been) a condition of the fiduciary's liability that a profit made from his fiduciary position be concealed from his principal. The fiduciary's only defence is that the principal gave its fully informed consent to the fiduciary keeping it for himself: see *Boardman v Phipps* per Lord Guest at p 117, affirmed in *Rukhadze* at para 40.

73. The no profit rule is, as already noted, primarily intended and therefore designed to act as a support for the conscientious discharge of the duty of single-minded loyalty undertaken by a trustee or other fiduciary to his beneficiary or principal. It treats the primary liabilities arising from any breach as those of the fiduciary. Anyone involved in assisting the fiduciary in that breach is treated as incurring only a secondary or accessory liability. In this respect the relevant equitable principles differ significantly from those

which affect the payer of a bribe under the common law tort of bribery. As will appear, the payer of a bribe is treated as a primary wrongdoer, and the remedies against him are very different.

74. The only basis which equity recognises for the imposition of accessory liability for a breach of fiduciary duty, including the breach of the no profit rule occasioned by the receipt of a bribe, is that which is now labelled "dishonest assistance". It used to be called "knowing assistance in a dishonest breach of trust", but the more recent label better summarises the essential conditions for accessory liability. This means that the claimant beneficiary or principal must show that the defendant materially assisted the fiduciary in his breach of duty, and that the defendant's conduct was dishonest, applying the two-stage semi-objective test now generally regarded as finally settled (after acute controversy) by the Privy Council in *Barlow Clowes International Ltd v Eurotrust International Ltd* [2005] UKPC 37; [2006] 1 WLR 1476. The requirement to prove dishonesty is no mean forensic task. There are many hard-fought reported cases where the failure to prove dishonesty was fatal to the claim, and there will no doubt be very many others where the perceived difficulty in surmounting that hurdle meant that the claim was never brought against the assistant at all.

75. The remedies available against the dishonest assistant are limited. The assistant will generally have no vulnerability to any proprietary claim by the principal, unless he has received some part of the profit or its traceable proceeds. Critically, the dishonest assistant is not liable jointly (or at all) to account for the fiduciary's unauthorised profit, but only for his own, if any: see *Novoship (UK) Ltd v Mikhaylyuk* [2014] EWCA Civ 908; [2015] QB 499, affirmed by this court in *Hotel Portfolio* at para 37. Thus in stark contrast with the position at common law under the tort of bribery, the dishonest assistant who pays a bribe to a fiduciary is not liable in equity to pay an amount equivalent to the bribe to the principal.

76. The dishonest assistant is jointly liable with the fiduciary to compensate the principal for any loss occasioned by the breach of duty. But as against both of them, equity requires that loss to be proved. No presumptions, rebuttable or irrebuttable, come to the principal's rescue in what may be a difficult and expensive forensic task. And in many cases of secret commissions or bribes, the principal may have suffered no loss.

77. Finally in relation to remedies, equitable rescission is, in sharp contrast to the parallel remedy at common law, neither automatic, nor available by way of self-help. It is a discretionary form of relief available only at trial. Nonetheless the much more flexible and pragmatic approach taken by equity to the need for restitutio in integrum makes it generally more useful than its common law sister.

78. This general description of the claim in equity may fairly be said thus far to have skirted round the main question raised by this appeal, namely to what relationships does it apply, under the general label "fiduciary"? Most of the relationships to which the main authorities on the no profit rule relate are those to which the fiduciary label has become attached beyond question. They include trustee and beneficiary (*Keech v Sandford*), director and company (*Regal v Gulliver*, *Rukhadze* and *Hotel Portfolio*), solicitor and client (*Boardman v Phipps* and *Target Holdings Ltd v Redferns* [1996] AC 421), and fiduciary agent and principal (*FHR)*. In none of them was there any dispute that a fiduciary relationship existed. In all of them there was present what has come to be regarded as the hallmark of a fiduciary relationship, namely a duty of single-minded or undivided loyalty, in the performance of which the fiduciary's personal interest is not allowed to play any part.

79. It was common ground between counsel that a de facto fiduciary relationship may arise outside the settled categories mentioned above, where the particular facts about the relationship justify that conclusion. For the respondents Mr Robert Weir KC submitted that equity imposes a fiduciary duty wherever the dealer provides the customer with a product or service (here the finance package) from a lender on the basis of a judgmental choice as to its suitability for the customer, or its competitiveness, and the customer relies upon that choice. The dealer has offered or agreed to play a role in the customer's decision-making about the relevant transaction and is therefore required by equity to act with single-minded loyalty to the customer, to the exclusion of the dealer's own interests.

80. The appellants submitted that this approach was wrong. First, equity does not impose a duty of undivided loyalty. That duty is recognised only where it is undertaken, expressly or impliedly, by the alleged fiduciary. Then equity imposes the no profit and no conflict rules as a means of ensuring that the duty of single-minded loyalty is adhered to. Secondly, there are numerous instances in ordinary business and commerce where a seller or trader makes choices as to what to recommend to a customer by way of products or services without anyone thinking that the seller is undertaking any duty of loyalty, let alone single-minded loyalty, to the customer. Examples were given of the shopkeeper who tells the customer; "I've got just the right item for you. It's the best your money can buy", or the wine waiter in a restaurant who recommends a particular wine from his stock as "a perfect accompaniment" to the food chosen by the customer. They each play a role in the customer's decision-making process without undertaking a duty of single-minded loyalty to the customer, and without undertaking, or being required, to put their own interests on one side.

81. Dicta may be extracted from well-known authorities which, read in isolation and out of context, might be said to support either of these very different approaches. We consider that the question needs to be addressed from first principles, which we do in the next section of this judgment.

(ii) What brings a fiduciary duty into being?

82. In discussing the law of fiduciary duties in this part of the judgment we use the term "fiduciary duty" in the sense adopted by Millett LJ in *Bristol and West Building Society v Mothew* [1998] Ch 1, 16 ("*Mothew*") and approved by Lord Walker in *Hilton v Barker Booth & Eastwood* [2005] UKHL 8; [2005] 1 WLR 567, para 29, to refer to the duties which are peculiar to a fiduciary, and the breach of which attracts legal consequences differing from those consequent upon the breach of other duties. Thus, as Millett LJ stated in *Mothew* at p 18 the duties which are special to fiduciaries "attract those remedies which are peculiar to the equitable jurisdiction and are primarily restitutionary or restorative rather than compensatory".

83. The law has not created a precise definition of when a person undertakes, or is treated as having undertaken, fiduciary duties in relation to another: see, for example, *Lloyds Bank Ltd v Bundy* [1975] QB 326, 341 per Sir Eric Sachs; *Hospital Products Ltd v United States Surgical Corpn* (1984) 156 CLR 41 ("*Hospital Products*"), 68 per Gibbs CJ, 96 per Mason J, 141-142 per Dawson J; *Breen v Williams* (1996) 186 CLR 71, 92 per Dawson and Toohey JJ. The categories of fiduciary relationships are not closed. This should not surprise as fiduciary duties in English law are the creation of equity and judges have developed the rules of equity over time: *In re Hallett's Estate* (1880) 13 Ch D 696, 710 per Sir George Jessel MR. In a commercial setting the task is to find in a particular context the boundary between normal (self-interested) arm's length activity and the circumstances in which equity recognises fiduciary duties of one of the commercial parties requiring that party to put aside his or her own interests and act altruistically in the interests of another.

84. The paradigm of a fiduciary is a trustee acting under an express trust. In its simplest form an owner of property, A, empowers and directs the trustee, B, to hold and administer property for the benefit of the cestui que trust, or trust beneficiary, C, in accordance with the terms of the trust which A sets out in the trust deed. B holds and administers the property only for those purposes and for the benefit of C. B has no beneficial interest in the trust property. The no conflict rule and the no profit rule, which we have described, apply to regulate B's behaviour. Thus, for example, it has long been established that a trustee is not entitled to remuneration for his or her service without authorisation: *Lewin on Trusts*, 20th ed (2020), para 20.001.

85. Judges have not developed an all-embracing conceptual basis for the recognition of fiduciary duties. Instead, they have often identified the incidence of fiduciary duties in the commercial sphere by drawing analogies with the obligations of a trustee under an express trust. Thus, by analogy, company directors have been treated as fiduciaries of their company: *Fraser v Whalley* (1864) 2 Hem & M 10 (71 ER 361); *Aberdeen Railway Co v Blaikie Brothers* (1854) 1 Macq 461; *In re Lands Allotment Co* [1894] 1 Ch 616. Partners are treated as fiduciaries of their partners in relation to partnership property: *Aas*

v Benham [1891] 2 Ch 244 (see also the Partnership Act 1890, section 20). The fiduciary duties arise out of roles which a person undertakes in the office of director or as a partner in a partnership. Similarly, a solicitor is the fiduciary of his or her client to the extent of the solicitor's retainer and in relation to the client's funds or property which the solicitor handles: *Nocton v Lord Ashburton* [1914] AC 932, 956-957 per Viscount Haldane LC. The obligations attached to those roles are well known, at least in general terms. Thus a person who voluntarily assumes a well-known type of role which is generally assumed to be fiduciary will have undertaken a fiduciary obligation.

86. The relationship between principal and agent is another well-known example of a relationship which may give rise to fiduciary obligations where the agent has undertaken to act on behalf of a principal in circumstances which bring into being a relationship of trust and confidence: *Mothew*, p 18; *FHR*, para 5. But, as explained in paras 101-104 below, the scope of any fiduciary obligations will be ascertained by having regard to the nature of the parties' contract or the fiduciary's undertaking and the context of the particular relationship of agency.

87. Fiduciary duties may also arise outside such established relationships on an ad hoc basis where a person so acts as to bring himself or herself under such obligations. In *Soar v Ashwell* [1893] 2 QB 390 the Court of Appeal recognised that where a person takes on a role or exercises a power which, if exercised by a trustee or agent, would carry with it fiduciary obligations, the person's so acting causes him or her to undertake ad hoc fiduciary duties. Lord Esher MR stated at p 394:

> "where a person has assumed, either with or without consent, to act as a trustee of money or other property, ie, to act in a fiduciary relation with regard to it, and has in consequence been in possession of or has exercised command or control over such money or property, a Court of Equity will impose upon him all the liabilities of an express trustee, and will class him with and will call him an express trustee of an express trust."

Bowen LJ in the same case put the matter pithily: "a man who assumes without excuse to be a trustee ought not to be in a better position than if he were what he pretends" (p 396). We consider that, where Lord Esher spoke of equity "imposing" a duty, he was saying no more than that the defendant had deliberately chosen to exercise a trust power and equity recognised the nature of that power as fiduciary. If persons, although not appointed as trustees, take upon themselves the custody and administration of property on behalf of others, they are de facto trustees and are subject to fiduciary obligations: *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48; [2003] 2 AC 366, para 138 per Lord Millett.

88. Equity has adopted a similar approach to self-appointed agents. Thus, where a person purported to act as the agent of the unascertained heirs of a landowner in the management of land, he fell to be treated as having undertaken fiduciary duties: *Lyell v Kennedy* (1889) 14 App Cas 437, 463 per Lord MacNaghten. See also *English v Dedham Vale Properties Ltd* [1978] 1 WLR 93 in which Slade J held that a prospective purchaser of land who applied for planning permission in respect of that land in the name of the vendors and without their knowledge or consent owed fiduciary obligations to the vendors which required the disclosure to them of the application before the contract of sale was concluded. Again, the defendant had chosen to exercise and exercised a power which was that of an agent of the vendors and which equity recognised as fiduciary. Self-appointed corporate directors are treated as taking on the fiduciary obligations of de jure directors: *In re Canadian Land Reclaiming and Colonizing Co* [1880] 14 Ch D 660, 670 per James LJ; and *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch), paras 1254-1257 per Lewison J.

89. Millett LJ in *Mothew*, p 18 gave a classic description of a fiduciary in his often-quoted dictum in which he stated:

> "A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary."

He then gave a non-exhaustive list of the facets of this "core liability", by stating:

> "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."

He described these duties as the defining characteristics of the fiduciary and endorsed the statement in Dr Paul Finn's classic work, *Fiduciary Obligations* (1977), p 2 that the fiduciary is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to those duties that he is a fiduciary.

90. The key principle is therefore that a fiduciary acts for and only for another. He owes a duty of single-minded loyalty to his principal, meaning that he cannot exercise any power in relation to matters covered by his fiduciary duty so as to benefit himself. Accordingly, if a person is a fiduciary then he must not put himself into a position where

his interest and that of the beneficiary might conflict (the no conflict rule), subject to the principal's informed consent. In addition, or perhaps in consequence, he must not receive a personal benefit from his fiduciary position (the no profit rule), subject again to the principal's informed consent.

91. The description of the duty of loyalty as single-minded should not be misunderstood. It is possible that a fiduciary's principals may have competing interests among themselves, and that the fiduciary may have to exercise a power or discretion in a way which will benefit some of them over others. The fiduciary will nevertheless fulfil his duty of loyalty if he exercises the power or discretion disinterestedly. By doing so, he fulfils the trust and confidence placed in him. A familiar example of such a situation is where the fiduciary is the trustee of a discretionary trust, and has to decide which of the beneficiaries should benefit from the trust fund. The trustee is undoubtedly a fiduciary, notwithstanding that the beneficiaries have competing interests. He fulfils his duty of loyalty to each of them if he exercises his powers with complete impartiality as between them, and without any interest of his own.

92. What then are the indicators which the court relies upon when addressing whether fiduciary duties arise in circumstances which fall outside the relationships in which it is well-established that fiduciary duties arise?

93. Fiduciary duties are recognised by equity. An objective test is applied, and a person may be treated as having undertaken fiduciary duties when that person has never applied his or her mind to such an undertaking. Thus, in *F & C Alternative Investments (Holdings) Ltd v Barthelemy (No 2)* [2012] Ch 613, 652 ("*F & C*") Sales J stated:

> "Fiduciary duties are obligations imposed by law as a reaction to particular circumstances of responsibility assumed by one person in respect of the conduct of the affairs of another."

Because the courts have not delimited the circumstances in which fiduciary duties may arise, judges have used different formulae, which have in common a high level of abstraction, to describe such circumstances.

94. Thus, it is said that an undertaking to act in the interest of, or for, another person can create fiduciary obligations where the undertaking gives rise to a relationship of trust and confidence: see, for example, *Mothew* at p 18*; FHR* at para 5. This can occur where a person agrees to act on behalf of another person and exercises a discretion which can affect the interests of that other person: *Hospital Products* at pp 96-97 per Mason J. It is worth setting out Mason J's influential statement more fully:

> "The critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position. The expressions 'for', 'on behalf of', and 'in the interests of' signify that the fiduciary acts in a 'representative' character in the exercise of his responsibility, to adopt an expression used by the Court of Appeal."

95. In *Arklow Investments Ltd v Maclean* [2000] 1 WLR 594, 600 the Judicial Committee of the Privy Council in an appeal from New Zealand treated a relationship of trust and confidence as something that would arise out of an undertaking by the supposed fiduciary of an obligation of loyalty. In that case Arklow had turned down the offer of the defendant merchant bankers to act on its behalf and the bankers undertook no obligation, either expressly or impliedly, to act on Arklow's behalf. The claim for breach of fiduciary duty therefore failed.

96. It is consistent with the court's practice of recognising fiduciary duties by analogy to well-established categories of fiduciary that fiduciary duties arise where a person consciously assumes (or undertakes) responsibility in relation to the management of the property or affairs of another, in circumstances where he or she knows or ought to appreciate that this carries with it the expectation that he or she will act with loyalty to that other in that regard. The person undertaking that task does not have to have a subjective awareness of the duty of loyalty and the specific legal duties that that entails. "Loyalty" here is used in the strong sense of requiring an attitude of altruism as referred to in para 83 above.

97. The existence, in a commercial context, of trust and confidence between parties to a transaction is not of itself sufficient for equity to impose fiduciary duties on one of the parties towards the other. As Leggatt LJ pointed out in *Al Nehayan v Kent* [2018] EWHC 333 (Comm); [2018] 1 CLC 216 ("*Al Nehayan*"), paras 163-165, trust and confidence arise in arm's length commercial relationships in which there is no suggestion of one party owing the other any fiduciary obligations. By contrast, the trust and confidence characteristic of a fiduciary relationship is (para 165):

> "founded on the acceptance by one party of a role which requires exercising judgment and making discretionary decisions on behalf of another and constitutes *trust and confidence in the loyalty of the decision-maker to put aside his*

> *or her own interests and act solely in the interests of the principal.*" (Emphasis added.)

It is the acceptance of the role which gives rise to the objectively assessed undertaking.

98. In *Mothew* Millett LJ emphasised the role of the undertaking by the fiduciary to act in the interests of another person (and therefore not in his own interest) as the source of the duties. So did Mason J in the passage from *Hospital Products* which we have quoted in para 94 above. The approach of focussing on the undertaking by the fiduciary readily fits the circumstance of a trustee under an express trust, as the trustee in accepting office as trustee undertakes to hold and administer the property for the beneficiaries which the settlor has established. Similarly, if a person takes on the office of director of a company or enters into partnership with another or others, that person takes on well-known or at least readily ascertainable legal responsibilities, which, through the operation of equity, carry with them those fiduciary obligations.

99. In other circumstances, such as those in *Soar v Ashwell*, in which the exercise of a power, which would require a properly appointed trustee or agent to act in a fiduciary capacity, brings with it the obligations of a fiduciary, one can perhaps speak about equity imposing the obligations, as Sales J did in *F & C*.

100. There must be the assumption of responsibility by the fiduciary to act exclusively on behalf of the other in the conduct of the other's affairs. This can arise where the fiduciary has expressly undertaken to exclude his or her own interest and those of third parties when so acting. That is what loyalty means and requires in this context. It can also arise where the objectively assessed circumstances enable equity to identify such an undertaking in the acts of the fiduciary.

101. Fiduciary duties can arise in the context of commercial relations in many different circumstances. One must consider with care the terms of any contract between the parties or unilateral undertaking, the wider transaction, and the commercial context of the relationship between the parties in order to ascertain whether and to what extent a person is to be taken to have undertaken such obligations. Thus in *New Zealand Netherlands Society "Oranje" Inc v Kuys* [1973] 1 WLR 1126 Lord Wilberforce spoke of the need to mould the precise scope of a fiduciary duty such as the no profit rule according to the nature of the relationship between the principal and its alleged fiduciary. In discussing the position of an employee of an incorporated non-profit society he stated (p 1130): "A person in his position may be in a fiduciary position quoad a part of his activities and not quoad other parts: each transaction, or group of transactions, must be looked at." He quoted as a principle of general application the dicta of Dixon J in an appeal concerning partnership, *Birtchnell v Equity Trustees, Executors and Agency Co Ltd* (1929) 42 CLR 384, 408:

> "The subject matter over which the fiduciary obligations extend is determined by the character of the venture or undertaking for which the partnership exists, and this is to be ascertained, not merely from the express agreement of the parties … but also from the course of dealing actually pursued by the firm."

102. It is important not to distort the commercial bargain between the parties to a contract by too readily implying fiduciary obligations into the commercial relationship. As Sales J stated in *F & C*, 650:

> "The touchstone is to ask what obligations of a fiduciary character may reasonably be expected to apply in the particular context, where the contract between the parties will usually provide the major part of the contextual framework in which that question arises."

103. Similarly, in *Hospital Products*, at p 97, in a statement which the Privy Council adopted in *Kelly v Cooper* [1993] AC 205, 215, Mason J stated that where a contractual relationship provides the foundation for the erection of a fiduciary relationship:

> "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."

See also *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145, 206 per Lord Browne-Wilkinson. It is hard to think of circumstances in which a fiduciary would not be subject to the no profit rule or no conflict rule and any such instances will be very rare (see eg *Edge v Pensions Ombudsman* [1998] Ch 512, 538-541, per Sir Richard Scott VC, and [2000] Ch 602 on appeal). Nonetheless, a contractual provision may be so precise in its regulation of what a party may do so as to remove any scope for the creation of a fiduciary duty: *Breen v Williams*, per Gummow J at pp 132-133.

104. Furthermore, as Sales J recognised in *F & C*, and as Viscount Haldane LC made clear in *Nocton v Lord Ashburton* at pp 956-957, the contract between the parties is not the totality of the context. The wider commercial context of the transaction must be borne in mind. Thus, in the Privy Council case of *Kelly v Cooper*, it was held that an estate agent, whose business it was to act for several principals at the same time, was entitled to act for competing principals in selling competing properties and to keep confidential the information obtained from each of his principals. Similarly, in the Australian case of

Walker v Corboy (1990) 19 NSWLR 382 the Court of Appeal of New South Wales addressed the question whether a farm produce agent, licensed under statute, who sold farm produce at market for a number of principals, held the proceeds of the sales as trustee specifically for each principal. The court concluded that he did not and that the relationship between the agent and the principals was one of debtor and creditor. In reaching that conclusion each of the Justices of Appeal (Priestley, Clarke and Meagher JJA) attached weight to the terms of the statute and the practicalities of operating an agency for sale business selling the produce of many producers.

105. Attempts have been made to argue that the existence of a relationship, in which one party, A, is in a position of power over another, B, and B is dependent on A, is sufficient to give rise to fiduciary obligations. In *Galambos v Perez* [2009] 3 SCR 247, the Supreme Court of Canada rejected the contention that such a power-dependency relationship was sufficient on its own to do so. Cromwell J stated (para 75) that "what is required in all cases is an undertaking by the fiduciary, express or implied, to act in accordance with the duty of loyalty reposed on him or her". He continued (para 76):

> "Thus, what is required in all cases of ad hoc fiduciary obligations is that there be an undertaking on the part of the fiduciary to exercise a discretionary power in the interests of that other party. To repeat what was said by McLachlin J in *Norberg* [*Norberg v Wynrib* [1992] 2 SCR 226], 'fiduciary relationships … are always dependent on the fiduciary's undertaking to act in the beneficiary's interests' (p 273). As Dickson J put it in *Guerin* [*Guerin v The Queen* [1984] 2 SCR 335], fiduciary duties may arise where 'by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another' (p 384)."

He clarified this statement in the following paragraph (para 77) and stated:

> "The critical point is that in both per se and ad hoc fiduciary relationships, there will be *some undertaking on the part of the fiduciary to act with loyalty*." (Emphasis added.)

Such an undertaking (to act only in the interests of the other) need not be express but could be implied in the particular circumstances of the parties' relationship (paras 79 and 80). More recently the High Court of Australia in *Naaman v Jaken Properties Australia Pty Ltd* [2025] HCA 1, in the judgment of Gageler CJ and Gleeson, Jagot and Beech-Jones JJ stated that vulnerability is not the touchstone of a fiduciary relationship (para 43):

> "Vulnerability is relevant to the existence of a fiduciary relationship only to the extent that the vulnerability in question is suggestive of a responsibility on the part of the putative fiduciary to act in the interests of the vulnerable party to the exclusion of the interests of the putative fiduciary."

106. Mr Weir for the respondents argues that the reasoning in *Galambos* is not consistent with English law. We disagree. In *Nocton v Lord Ashburton*, for example, at pp 956-957, Viscount Haldane LC explained that the fact that a person has assumed responsibilities giving rise to duties in contract or tort to act to protect the interests of another is not sufficient in itself to give rise to a fiduciary duty. More is needed.

107. Dr Paul Finn and Professor Matthew Conaglen have suggested that equity will recognise the existence of fiduciary obligations where it is reasonable to expect that the person who is said to be a fiduciary will act in the other's interest and to the exclusion of his or her own interest. See Dr Finn in T G Youdan (ed) *Equity, Fiduciaries and Trusts* (Carswell, 1989), Ch 1, p 54 and Professor Conaglen in *Fiduciary Loyalty* (Hart Publishing) 2010, Ch 9. That may be so, but such an expectation arises because the putative fiduciary has, or is treated as having, undertaken to act with the loyalty of which Millett LJ spoke in *Mothew*. See Paul Finn in his capacity as Finn J in a joint judgment with Stone and Perram JJ in *Grimaldi v Chameleon Mining NL (No 2)* [2012] FCAFC 6; (2012) 200 FCR 296, para 177; and *Children's Investment Fund Foundation (UK) v Attorney General* [2020] UKSC 33; [2022] AC 155, paras 47 and 48 per Lady Arden.

108. As we have said, fiduciary obligations are the creation of equity. That does not mean that the existence and scope of equitable obligations are not influenced by the common law: see paras 101-104 above. Nonetheless, equity rather than the common law recognises the fiduciary duty. Equity analyses objectively the relationship between the parties to ascertain whether it involves a relationship of trust and confidence *because* a party has, or is treated as having, undertaken to act with the loyalty of which Millett LJ spoke in *Mothew*. The relationship of trust and confidence is the consequence, and not the cause, of a fiduciary duty. The fiduciary duty exists because the fiduciary has undertaken not to pursue his own interests. As Lord Woolf MR said in *Attorney General v Blake* [1998] Ch 439, 454, "the relationship of trust and confidence … arises whenever one party undertakes to act in the interests of another or places himself in a position where he is obliged to act in the interests of another". Similarly, the vulnerability which is the typical characteristic of a person to whom a fiduciary duty is owed, is a consequence and not a cause of a fiduciary relationship. It is because the fiduciary has undertaken to act solely in the best interests of the principal, and the latter trusts the fiduciary to do so, in a situation where it is usually possible for the fiduciary to act in a self-interested way, that the vulnerability typically arises.

109. As the courts have for good reasons eschewed any attempt to give a precise definition of when a person is to be treated as having undertaken fiduciary duties towards another, there are no bright lines when addressing whether ad hoc fiduciary duties arise. But there are clear indicators. The courts have extended the application of fiduciary duties by analogy with established fiduciary relationships. A fiduciary may expressly or impliedly undertake to act solely in the interests of another, which is the norm that Cromwell J wrote about in *Galambos*; or equity, in an objective assessment of the parties' arrangements or a party's unilateral acts (viz *Soar v Ashwell* and the other cases in paras 87 and 88 above), may treat a party as if he or she had so undertaken and for that reason recognise a fiduciary duty of loyalty and impose the no profit and no conflict rules which protect it. In the latter case, there must be circumstances in the relationship between the parties, and in particular arising out of the conduct of the supposed fiduciary, which make it appropriate for equity to treat the parties as if such an undertaking had been given.

110. As a general rule, outside well-established fiduciary relationships, such as company director, partner, or agent, in a commercial context "it is normally inappropriate to expect a commercial party to subordinate its own interests to those of another commercial party": *Snell's Equity*, 35th ed (2025), para 7-007. We are not concerned here with one person's subjective trust and confidence in another in the other's performance of a contractual obligation; one may trust a plumber to do a job properly without the plumber becoming a fiduciary. The sales assistant in advising a customer on the attractiveness of a garment, or the wine waiter in advising the diner on the suitability of a wine with a meal, addresses the interests of the customer or diner without taking on a duty to act exclusively in the other's interests. He or she provides a commercial service in the interests of his or her employer, who may thereby come under contractual obligations and may incur vicarious liability for its employee's tortious acts. No obligation of loyalty, of which Millett LJ spoke in *Mothew*, arises. Such a commercial transaction or arrangement, in which one party has a personal financial interest, known or apparent to the other party, in bringing the transaction into fruition, is not one in which an undertaking of undivided loyalty and altruism can readily be implied into a contract or such a duty recognised by equity. It is against this background that we will assess the contention that the dealers owed fiduciary duties to their customers.

(2) The tort of bribery

(i) Introduction

111. A generally accepted definition of a bribe is that stated by Slade J in *Industries & General Mortgage Co Ltd v Lewis* [1949] 2 All ER 573 ("*Industries & General*") at p 575:

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

112. This definition has been frequently cited and applied – see, for example, *Armagas Ltd v Mundogas SA (The Ocean Frost)* [1985] 1 Lloyd's Rep 1, 18 per Staughton J; *Petrotrade Inc v Smith* [2000] 1 Lloyd's Rep 486, para 16; *Fiona Trust & Holding Corpn v Privalov* [2010] EWHC 3199 (Comm) ("*Fiona Trust*"), para 70; *Novoship (UK) Ltd v Mikhaylyuk* [2012] EWHC 3586 (Comm) ("*Novoship*"), para 104 and *Conway v Eze* [2018] EWHC 29 (Ch), para 127.

(ii) The historical development of the tort

113. Bribery has been recognised as giving rise to a liability at common law and to common law rights and remedies since a trilogy of cases at the end of the 19th century: *Salford Corpn v Lever* [1891] 1 QB 168 ("*Salford*"); *Grant v Gold Exploration and Development Syndicate Ltd* [1900] 1 QB 233 ("*Grant*"); and *Hovenden & Sons v Millhoff* [1900-03] All ER Rep 848 ("*Hovenden*"). There are in addition two significant cases from the early and later parts of the 20th century: *In re A Debtor (No 229 of 1927)* [1927] 2 Ch 367 ("*In re A Debtor*") and *Mahesan v Malaysia Government Officers' Co-operative Housing Society Ltd* [1979] AC 374 ("*Mahesan*").

114. In *Salford*, the plaintiffs (Salford) were proprietors of gasworks. It was the duty of their manager (Hunter) to examine and advise on tenders for the supply of coal. The defendant coal merchant (Lever) agreed to pay Hunter 1 shilling per ton in respect of tenders recommended by him to and accepted by Salford. The tender prices were increased by that amount from the prices which would otherwise have been asked. Hunter advised Salford to accept the tenders, which they did. On discovery of the secret commission or bribe paid to Hunter, Salford brought claims against him which were settled in return for his assistance in relation to actions brought against suppliers, including Lever.

115. Salford then brought a claim against Lever, put alternatively on the basis of (1) damages for fraud or (2) payment of the amount of the bribes as money had and received by Lever to Salford's use. Lord Esher MR accepted that there had been fraud, which he described as follows (p 175):

> "The fraud was this, that the defendant allowed and assisted the agent of the corporation to put down a false figure as the price of the coals in order to cheat the corporation out of a shilling a ton, which was to be paid to their own agent … The damage to the corporation is clearly the 1s per ton out of which they have been cheated, neither more nor less ... they are entitled to sue the defendant for the 1s a ton in one form of action or another, although he has parted with the money, and has handed it over to his confederate Hunter, because it was once in his hands, and he is liable for the fraud to which he was thus a party."

In those circumstances, Lord Esher MR considered that the form of the action was immaterial: Salford was "entitled to sue the defendant for the 1s a ton in one form of action or another" (p 175). Lindley LJ considered it "obvious that in some form of action the corporation have a right to recover this shilling a ton from the coal merchants. Under the old practice I think they could have recovered it by an action for money had and received; probably they could have recovered it in more ways than one" (p 179). He went on to refer to Lever's "liability to account to the corporation for the money received by him", and described the claim as being "an action by the defrauded principals against the man who has defrauded them, and bribed their agent, to recover for themselves what they can of the money of which they have been defrauded" (p 180). Lopes LJ described the claim against the briber as being "to recover the excess of price which he obtained through his fraud" (p 181). He expressed his agreement with the judgment below of Charles and Denman JJ, who held that the plaintiffs were entitled to recover the excess price which the defendant had received over the market price, "either as damages for the fraud he had committed … or … as money received for the plaintiffs' use": [1890] 25 QBD 363, 372.

116. The Court of Appeal also expressed the opinion that Salford's claim against Lever would not be reduced by the recovery of the bribe from Hunter. As it was summarised in the headnote:

> "Where an agent, who has been bribed so to do, induces his principal to enter into a contract with the person who has paid the bribe, and the contract is disadvantageous to the principal, the principal has two distinct and cumulative remedies: he may recover from the agent the amount of the bribe which he has received, and he may also recover from the agent and the person who has paid the bribe, jointly or severally, damages for any loss which he has sustained by reason of his having entered into the contract, *without allowing any deduction in respect of what he has recovered from the agent under the former head,* and it is immaterial whether the principal sues the agent or the third person first." (Emphasis added.)

117. In *Grant*, the plaintiff (Grant) was the owner of a mine and agreed to pay a 10% commission to Govan if he could find a purchaser for the mine. Govan found a purchaser ("the Syndicate"). He was the managing director of the Syndicate, a fact known to Grant before the purchase was concluded. The court held that the Syndicate was entitled to recover the amount of the commission from Grant. A L Smith LJ held that this could be recovered as "damages for deceit" but added that he was "by no means prepared to hold that an action for money had and received would not lie" (p 245). Collins LJ held that Grant was liable "for money had and received" and said that "possibly he could not be made liable in an action of deceit" (p 249). He stated:

> "The facts are, then, that the vendor and the buyers' agent, known to the vendor to be such, agree upon a price to be paid by the purchaser, one-tenth of which is to go into the pocket of the buyers' agent. To put it in plain language, it is a bribe, and the purchase-money is made large enough to include it …
>
> …
>
> … where the buyer … can … point to a specific sum over and above what must be taken as between the parties to be the real price, which has found its way into the vendor's pocket as a result of a sale so effected, he is entitled to recover it back. When the sum is thus liquidated, and in the hands of the vendor, I think it would be clearly contra aequum et bonum that he should retain it … he is in possession of a sum which, whether the bargain stands or is rescinded, never ought to have been paid by the buyer, or found its way into the pocket of the seller. He is responsible as for money had and received to the use of the buyer … ." (pp 247, 249)

Vaughan Williams LJ held that the commission could be recovered in an action for damages and doubted that an action for money had and received would lie (p 256).

118. In *Hovenden*, the plaintiff ("Hovenden") had for many years purchased cigars and cigarettes from the defendant (Millhoff). These purchases, totalling £28,000, had been made on the recommendation of the plaintiff's buyers. It was discovered that the defendant had been paying 2.5% of the invoice price to the buyers in respect of the purchases, totalling £700. The plaintiff brought a claim for payment of the amount of all fraudulent overcharges, and for damages. At trial, the jury found that the prices paid for the purchases were not excessive, and damages were assessed at one farthing. On appeal, it was held that this secret commission or bribe could be recovered from the defendant as money had and received.

119. A L Smith LJ held that:

> "It seems to me clear from the judgments in *Salford Corpn v Lever* and in *Grant v Gold Exploration and Development Syndicate, Ltd* that, inasmuch as the amount of the bribes has been quantified, it can be recovered as money had and received … If a vendor bribes a purchaser's agent, of course the purchase money is loaded by the amount of the bribe. It cannot be denied. In this case the purchase money was 28,000 pounds, in which was included the 700 pounds given to the purchasers' agents. Of course the vendor would have sold the goods for 28,000 pounds less 700 pounds; therefore, he has in his pocket 700 pounds, money of the purchasers. That 700 pounds he must disgorge. That is the cause of action here … When it was proved at the trial that the bribes had been paid, the direction to the jury ought to have been that the amount which could be recovered as money had and received was the amount of the bribes." (p 850)

120. Vaughan Williams LJ agreed, and observed that he "used to think that the action against the briber was an action of fraud sounding in damages", but that the judges in *Salford* "did not hold out much encouragement to me in that view" and that Collins LJ in *Grant* had taken the other view (p 850). He held that the amount in issue was quantified and concluded that "the same amount is recoverable whether the action is on an indebitatus count or in damages" (p 851): that is to say, whether the action was based on an obligation to make restitution of the amount which the briber had received as a result of his wrongful act, or was based on an obligation to compensate the principal for the loss he had suffered as a result of the briber's wrongful act.

121. Romer LJ did not address the nature of the cause of action, although he contemplated that an action for damages could be brought against the briber and stated that if it is alleged that there is loss and damage beyond the bribe, it must be proved. He stated that the following constitutes a bribe (at p 851):

> "If a gift be made to a confidential agent with the view of inducing the agent to act in favour of the donor in relation to transactions between the donor and the agent's principal and that gift is secret as between the donor and the agent – that is to say, without the knowledge and consent of the principal – then the gift is a bribe in the view of the law."

122. Romer LJ went on to say that if a bribe is proved then the following rules applied "in the interests of morality with the view of discouraging the practice of bribery" (p 851):

> "First, the court will not inquire into the donor's motive in giving the bribe, nor allow evidence to be gone into as to the motive. Secondly, the court will presume in favour of the principal and as against the briber and the agent bribed, that the agent was influenced by the bribe; and this presumption is irrebuttable. Thirdly, if the agent be a confidential buyer of goods for his principal from the briber, the court will assume as against the briber that the true price of the goods as between him and the purchaser must be taken to be less than the price paid to, or charged by, the vendor by, at any rate, the amount or value of the bribe. If the purchaser alleges loss or damage beyond this, he must prove it. As to the above assumption, we need not determine now whether it could in any case be rebutted. As at present advised, I think that, in the interests of morality, the assumption should be held an irrebuttable one; but we need not finally decide this, because in the present case there is nothing to rebut the presumption."

123. Although Romer LJ cited no authority for these rules, each of them was supported by earlier decisions. Several earlier authorities made clear that the court was unwilling to inquire into the briber's motives, and that secret payments to the agent of the other party to a transaction are in any event objectionable not because of the motive with which they are given but because of their objective effect on the agent. In *Panama and South Pacific Telegraph Co v India Rubber, Gutta Percha and Telegraph Works Co* (1875) LR 10 Ch App 515 ("*Panama*") James LJ said at p 527 that "in this court a surreptitious sub-contract with the agent is regarded as a bribe to him for violating or neglecting his duty". He added that this was "a plain principle of equity which is to be enforced without regard to the particular circumstances of the case … you must act on general principles, without regard to the particular facts or the particular conduct or misconduct of the parties in a particular case. You must act upon the general principle from the impossibility which the court finds itself in of ever ascertaining the real truth of the circumstances". In *Barry v Stoney Point Canning Co* (1917) 36 DLR 326, 343, Anglin J observed: "Moreover, by whatever sophistry the person who promises the secret benefit may endeavour to persuade himself to the contrary, the instances are rare indeed in which in his inmost heart he does not hope to derive some advantage from it, direct or indirect, which from the nature of the case must involve a dereliction of duty by the agent to his own principal."

124. As to the irrelevance of an inquiry into the actual effect of the bribe upon the agent's behaviour, the courts have long proceeded on the basis that the agreement between the briber and the agent "is a corrupt one, and is not enforcible at law, whatever the actual effect produced on the mind of the person bribed may be. The tendency of such an

agreement as this must be to bias the mind of the agent or other person employed, and to lead him to act disloyally to his principal": *Harrington v Victoria Graving Dock Co* (1878) 3 QBD 549, 551 per Cockburn CJ. Mellor J observed in the same case at pp 551-552 that "[i]t would be most fatal if it were open to a person, who had entered into an agreement that he knew was designed to induce him to act unfaithfully to his employers, to allege that it had not in fact had that effect". The same reasoning was applied in relation to the briber in *Shipway v Broadwood* [1899] 1 QB 369, where the Court of Appeal rejected an argument that it was necessary to inquire whether the agent's mind had been influenced by the bribe. Chitty LJ stated at p 373:

> "Directly it is established that money was paid or promised to the agent of the other party, it is quite unnecessary to go further and see what effect that had on the mind of the person to whom it was paid or to be paid … I wish to state again emphatically that in such a case as this it is an immaterial inquiry to what extent the bribe or the offer of it influenced the person to whom it was given or offered. A contrary doctrine would be most dangerous, for it would be almost impossible to ascertain what had been the effect of the bribe."

125. In relation to the third rule, namely the assumption that the price paid by the principal was inflated by the value of the bribe, Romer LJ's approach was consistent with *Salford* and *Grant*.

126. As was noted in *Industries & General* at pp 576-577, the implication of the first of Romer LJ's rules is that motive does not have to be established in order for a payment to be regarded as a bribe, contrary to the impression which might otherwise have been conveyed by Romer LJ's definition of a bribe: "a gift … made to a confidential agent with the view of inducing the agent to act in favour of the donor in relation to transactions between the donor and the agent's principal … without the knowledge and consent of the principal". The essential elements of a bribe, as laid down in Romer LJ's judgment, are accordingly that it is a payment made by a person to the agent of the other party to a transaction, without that party's knowledge and consent. Although not mentioned by Romer LJ, it is also necessary that the briber should know that the recipient of the payment is acting on behalf of that other party, as appears from the judgments of A L Smith and Collins LJJ in *Grant* at pp 240-241 and 246-247 respectively, and, more recently, the judgment of Slade J in *Industries and General* at p 575 (cited at para 111 above), and that of Millett J in *Logicrose Ltd v Southend United Football Club Ltd* [1988] 1 WLR 1256 ("*Logicrose*"), at p 1261.

127. We should add that, although both Romer LJ in *Hovenden* and Slade J in *Industries and General* couched their definitions of bribery in the language of agency, some of the leading cases in this area of the law were not concerned with agents, as will appear, but

with other kinds of fiduciary. Accordingly, it should not be thought that a relationship of agent and principal is an essential element.

128. The case of *In re A Debtor* is also of some importance. The debtor employed an agent to negotiate a loan with a moneylender. The moneylender agreed to lend money to the debtor, and paid the agent a commission which was not revealed to the debtor. The moneylender subsequently obtained judgment against the debtor for the amount of the loan, and presented a petition for his bankruptcy. On the hearing of the petition the debtor learned about the commission. The Court of Appeal held that the debtor "had a right to set aside the contract as voidable" (per Lord Hanworth MR at p 374), with the consequence that the moneylender could not prove the debt on which his petition was founded. Lord Hanworth MR rejected a submission based on the absence of evidence as to the motive with which the commission was paid, or the effect which it had on the agent's behaviour, stating (p 373) that "it seems to me, following *Shipway v Broadwood,* that if a sum is offered by the money-lender to the borrower's agent, it can only be accepted with the knowledge and assent of the borrower".

129. In the leading Privy Council case of *Mahesan* Lord Diplock examined the case law in its historical setting. In relation to *Salford*, Lord Diplock disapproved the opinions expressed in that case that the amount recoverable from the briber was not diminished by the recovery of the bribe from the bribee, encapsulated in the passage in the headnote which was placed in italics in para 116 above. Lord Diplock stated that "fraud is a tort for which the damages are limited to the actual loss sustained; and if the principal has recovered the bribe from the bribed agent the actual loss he has sustained in consequence of entering into the contract is reduced by that amount" (p 381). Since the claim was for damages the amount recoverable depended on the actual loss suffered: "Damage is the gist of an action in fraud and any loss proved to have been sustained by the principal in consequence of entering into the contract in respect of which the bribe was given might be less or greater than the amount of the bribe" (p 382).

130. In relation to *Hovenden*, Lord Diplock stated that the judgment of Romer LJ in that case laid down three rules which "have the effect of making bribery a wrong committed by the principal which is sui generis and defies classification" (p 383). These were that (1) "the motive of the briber in giving the bribe is not relevant"; (2) "there is an irrebuttable presumption that the agent was influenced by the bribe"; and (3) as against the briber loss up to the amount of the bribe is to be irrebuttably presumed (p 383). It is to be noted that although Romer LJ favoured there being such an irrebuttable presumption, he did not so determine.

131. Lord Diplock said that these rules are "merely another way of saying that they form no part of the definition of bribery as a legal wrong" (p 383) and that:

> "Upon analysis, what these rules really describe is the right of a plaintiff who has alternative remedies against the briber (1) to recover from him the amount of the bribe as money had and received, or (2) to recover, as damages for tort, the actual loss which he has sustained as a result of entering into the transaction in respect of which the bribe was given; but in accordance with the decision of the House of Lords in *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1 he need not elect between these alternatives before the time has come for judgment to be entered in his favour in one or other of them." (p 383)

In relation to the latter part of that dictum, it should be noted that *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1 establishes that a claimant does not have to "elect" between alternative remedies, for money had and received and for damages, in the same sense in which it is necessary to elect between inconsistent rights (eg to affirm a contract induced by fraud or to avoid it): see, for example, per Lord Atkin at pp 29-30. The alternative remedies can be sought together, as they were in the *Salford* and *Hovenden* cases, but judgment can be obtained only for one or the other.

132. Lord Diplock observed that this "extension to the briber of liability to account to the principal for the amount of the bribe as money had and received" raised "conceptual difficulties" but that it "is now, and was by 1956 [the relevant date for the purpose of forming part of the law of Malaysia], too well established in English law to be questioned" (p 383). We will return at a later point to the question whether there are conceptual difficulties. He concluded (ibid):

> "So both as against the briber and the agent bribed the principal has these alternative remedies: (1) for money had and received under which he can recover the amount of the bribe as money had and received or, (2) for damages for fraud, under which he can recover the amount of the actual loss sustained in consequence of his entering into the transaction in respect of which the bribe was given, but he cannot recover both."

133. The Privy Council's decision accordingly confirmed that (1) bribery is a civil wrong; (2) it is subject to three rules which make it sui generis; and (3) the principal has alternative remedies against the briber and the agent bribed (a) for recovery of the amount of the bribe as money had and received or (b) for damages in tort for the actual loss sustained. Lord Diplock also noted that, where the bribe was given in connection with a contract between the principal and the briber, the principal has an "equitable right" to rescission of the contract on the basis that the giving of the bribe is treated in equity as constructive fraud (p 380). This had been long established – see, for example, *Panama*.

134. Since *Mahesan* the civil wrong of bribery has been recognised in a number of cases. Notable examples, in addition to those referred to in para 112 above, include *Armagas Ltd v Mundogas SA (The Ocean Frost)* [1986] AC 717 ("*Armagas*"), where Robert Goff LJ stated at p 743 that "[i]t is now established that the claim against the briber for damages … should be regarded as a claim in damages in tort"; *Logicrose*; *Anangel Atlas Cia Naviera SA v Ishikawajima-Harima Heavy Industries Co Ltd* [1990] 1 Lloyd's Rep 167 ("*Ananagel*"); *Arab Monetary Fund v Hashim* [1993] 1 Lloyd's Rep 543; *Fyffes Group Ltd v Templeman* [2000] 2 Lloyd's Rep 643; *Daraydan Holdings Ltd v Solland International Ltd* [2004] EWHC 622 (Ch); [2005] Ch 119 ("*Daraydan*"); *Hurstanger*; *Ross River Ltd v Cambridge City Football Club Ltd* [2007] EWHC 2115 (Ch); [2008] 1 All ER 1004; *Otkritie International Investment Management Ltd v Urumov* [2014] EWHC 191 (Comm); *Al Nehayan*; *Conway v Eze* [2019] EWCA Civ 88; and *Wood*. In the decision of this court in *Republic of Mozambique v Privinvest Shipbuilding SAL (Holding)* [2023] UKSC 32; [2024] 1 All ER 763 ("*Mozambique*") Lord Hodge set out the "components of a claim for bribery", drawing on the summary provided by Christopher Clarke J in *Novoship* at paras 104-111.

135. In recent times the civil wrong of bribery has been described as a tort. This language was apparently first used in *Fiona Trust* and is now commonly adopted. Both parties so referred to it in this case. In *Clerk and Lindsell on Torts*, 24th ed (2023), paras 17-63 to 17-64, bribery is described as giving rise to a "tortious liability". In Thomas Grant and David Mumford eds, *Civil Fraud* (2018) it is described and discussed as a "freestanding tort" at paras 7-013 to 7-015. Referring to bribery as a distinct civil wrong is helpful in two respects. First, although bribery has been treated in many of the authorities as a type of fraud, it differs from other types of fraud in that there need not be any representation made to the principal by either the payer of the bribe or its recipient, or any reliance on such a representation by the principal. Secondly, there is no requirement to prove dishonesty on the part of either the payer or the recipient of the bribe.

136. English law has long recognised the need to adopt a strict and deterrent approach to bribery. In *Parker v McKenna* (1874) LR 10 Ch App 96, 125 James LJ described the prevention of bribery as vital "for the safety of mankind". In *Boston Deep Sea Fishing and Ice Co v Ansell* (1888) 39 Ch D 339 ("*Ansell*") Bowen LJ stated at p 362:

> "This is an age, I may say, when a large portion of the commercial world makes its livelihood by earning, and by earning honestly, agency commission on sales or other transactions, but it is also a time when a large portion of those who move within the ambit of the commercial world, earn, I am afraid, commission dishonestly by taking commissions not merely from their masters, but from the other parties with whom their master is negotiating, and with whom they are dealing on behalf of their master, and taking such commissions

> without the knowledge of their master or principal. There never, therefore, was a time in the history of our law when it was more essential that Courts of Justice should draw with precision and firmness the line of demarcation which prevails between commissions which may be honestly received and kept, and commissions taken behind the master's back, and in fraud of the master.”

In *Hovenden* Romer LJ observed at p 851:

> “The courts of law of this country have always strongly condemned and, when they could, punished the bribing of agents, and have taken a strong view as to what constitutes a bribe. I believe the mercantile community as a whole appreciate and approve of the court’s views on the subject.”

137. This remains equally true today. Lord Templeman, giving the decision of the Privy Council in *Attorney General for Hong Kong v Reid*, stated at p 330 that “[b]ribery is an evil practice which threatens the foundations of any civilised society”. Lord Neuberger in *FHR* said at para 42:

> “Secret commissions are also objectionable as they inevitably tend to undermine trust in the commercial world. That has always been true, but concern about bribery and corruption generally has never been greater than it is now: see for instance, internationally, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1999 and the United Nations Convention against Corruption 2003, and, nationally, the Bribery Acts 2010 and 2012. Accordingly, one would expect the law to be particularly stringent in relation to a claim against an agent who has received a bribe or secret commission.”

138. More recently still, in *Wood* David Richards LJ observed at para 42:

> “The law, reflecting the views of society, has for a very long time set its face against bribery as a corrosive practice, which undermines the country’s social, economic and commercial values and well-being.”

(iii) Should the tort of bribery be abolished?

139. Mr Rabinowitz developed an interesting, if bold, argument that the development of the tort of bribery involved the law taking a wrong turn and that it should be abolished. In summary, he submitted as follows:

> (1) The common law claim for recovery of a bribe from a bribed agent is for money had and received – see *Morison v Thompson* (1874) LR 9 QB 480 and *Ansell*. This involved treating the recipient of the bribe as (or as analogous to) a trustee in respect of the money on the footing that they were obliged immediately to pay it over to the principal. It is based on the fiduciary no profit rule. This demonstrates that the existence of a fiduciary duty of loyalty is fundamental to the claim.
>
> (2) The common law claim for recovery of a bribe from the briber is also for money had and received – see *Mahesan*. Lord Diplock rightly recognised that this raises "conceptual difficulties". These include the absence of any recognised unjust factor and that the claim is only available if the contract is affirmed, which is contrary to the basic principle that payments made under a contract cannot constitute unjust enrichment unless the contract is set aside.
>
> (3) The common law right to rescission for bribery is founded on the procurement of a breach of the no conflict rule. "A principal is entitled to the disinterested advice of his agent free from the potentially corrupting influence of an interest of his own. Any such private interest, whether actual or contemplated, which is not known and consented to by his principal, disqualifies him … The principal, having been deprived by the other party to the transaction of the disinterested advice of his agent, is entitled to a further opportunity to consider whether it is in his interests to affirm it" – per Millett J in *Logicrose* at pp 1260-1261. Again, the existence of a fiduciary duty of loyalty is fundamental to the claim.
>
> (4) There is no tort of procuring a breach of fiduciary duty. It is unprincipled that tortious liability should arise where such a breach is procured by one particular mechanism (a bribe) but not otherwise.
>
> (5) It is anomalous and unprincipled for there to be tortious liability without the need to prove improper motive, inducement or actual loss (ie the three rules stated by Romer LJ in *Hovenden* and accepted in *Mahesan*).

(6) The strict rules of equity and its armoury of remedies provide all necessary protection. The payer of the bribe will almost invariably be liable for dishonest assistance. The recipient of the bribe will be liable on a personal and proprietary basis to the principal. There is a right to rescind in equity.

(7) The common law of bribery grew out of equitable rules and is rooted in the existence of fiduciary duties. It serves similar purposes to those equitable rules. Equitable remedies meet those purposes. There is no need for this anomalous, unprincipled and conceptually confused tort.

140. We reject Mr Rabinowitz's argument for a number of reasons.

141. First, although it has only recently been described as a tort, common law liability and remedies for the civil wrong of bribery are long established. They date back to the trilogy of Court of Appeal cases at the end of the 19th century. In 1979 *Mahesan* confirmed the law as there stated. Lord Diplock said that by 1956 the law was "too well established … to be questioned". That is all the more so now, nearly seventy years on from 1956.

142. Secondly, since *Mahesan* the common law wrong of bribery has become even more established not merely by the passage of time but also by the large number of cases in which it has been recognised and applied, as illustrated by the authorities referred to in paras 112 and 134 above.

143. Thirdly, the common law wrong of bribery was recognised by the House of Lords in *Reading v Attorney General* [1951] AC 507 and by the Supreme Court in *Mozambique*.

144. Fourthly, the argument in favour of abolition is largely based on the grounds that the tort is unprincipled and anomalous. In general, the circumstances in which it will be appropriate for this court to depart from long-established law are similar to those in which it will depart from a previous House of Lords or Supreme Court decision under the 1966 Practice Statement. This is usually only where the proper development of the law has been impeded or where the existing law has led to results which are unjust or contrary to public policy. There is no such suggestion in this case.

145. Fifthly, the reasons for the law's strict approach to bribery are as relevant today as they were at the end of the 19th century, if not more so – see, for example, Lord Neuberger's comments in *FHR* cited in para 137 above.

146. Sixthly, the strict approach of the law is reinforced by the stricter remedies available at law, including, in particular, a right to rescind without the need for an order of the court and the right to recover the amount of the bribe without the need to prove loss.

147. Seventhly, the law recognises the fundamental role of the briber in a way that equity does not. At law the briber is a primary wrongdoer. In equity, the briber can only be made liable as a dishonest accessory – see paras 74-76 above.

148. We do not in any event accept every aspect of the analysis on which Mr Rabinowitz's submissions were based. As to his first point, although the principal's claim against the agent for the recovery of the bribe is commonly based on the agent's duty to account for it in equity as an aspect of the fiduciary no profit rule, it can also be based on the law of restitution at common law, as is recognised by Mr Rabinowitz in relation to his second point. As Bowen LJ explained in *Ansell* at pp 367-368, "there is an implied contract, if you put it as a legal proposition – there is an equitable right, if you treat it as a matter of equity – as between the principal and agent that the agent should pay it over, which renders the agent liable to be sued for money had and received" (the reference to implied contract reflecting the way in which restitutionary claims were understood at that time). The same point was made in *Reading v Attorney General*, as explained at para 175 below.

149. As to Mr Rabinowitz's second point, the principal's claim against the briber in restitution is based on the fact that the briber is presumed to have inflated the price paid by the principal by the amount of the bribe, and is not entitled to retain this overpayment. This was explained, for example by Lord Esher MR in *Salford* at p 177 ("The third person was bound to pay back the extra price which he had received"); by Collins LJ in *Grant* at p 249 ("where the buyer elects not to rescind the sale, but can nevertheless point to a specific sum over and above what must be taken as between the parties to be the real price, which has found its way into the vendor's pocket as a result of a sale so effected, he is entitled to recover it back"); and by all the members of the Court of Appeal in *Hovenden*. A L Smith LJ said in that case at p 850, "[i]f a vendor bribes a purchaser's agent, of course the purchase money is loaded by the amount of the bribe". In the words of Romer LJ at p 851, "the court will assume as against the briber that the true price of the goods as between him and the purchaser must be taken to be less than the price paid to, or charged by, the vendor by, at any rate, the amount or value of the bribe".

150. The presumption that the briber inflated the price paid by the principal by the amount of the bribe is a special aspect of the law relating to bribery, but the legal basis of the principal's claim to recover the overpayment is conventional. As Lord Atkin explained in *United Australia Ltd v Barclays Bank Ltd* at pp 26-28, a claim to restitution has long lain in cases where the defendant has received money of the claimant to which he is not entitled, such as cases where the claimant has been deceived into paying money

to the defendant. In cases where the money has been received as the result of a tortious wrong, the claimant has two alternative remedies available: one, for the recovery of the money in the possession of the defendant; and the other, for damages for the relevant tort. The cases discussed earlier, from *Salford* to *Mahesan*, have applied that established approach in the context of bribery. Hence Lord Diplock's statement in the latter case at p 383 that the principal has two alternative remedies against the briber: (1) to recover the amount of the bribe, as an amount which the defendant is presumed to have wrongfully received from him, and (2) for damages for tort, under which he can recover the actual loss which he has sustained. There is no need in this context to establish an "unjust factor" such as mistake of law or failure of consideration, as in the cases on which Mr Rabinowitz relied. The claim in restitution lies because the briber obtained the value of the bribe from the principal by committing a wrong.

151. As to Mr Rabinowitz's third and fourth points, the right to rescission at common law in cases of bribery is founded on fraud, as has been understood since at least *Smith v Sorby* (1875) 3 QBD 552 (Note), the decision in which is summarised in the headnote:

> "Where a secret gratuity is given to an agent with the intention of influencing his mind in favour of the giver of the gratuity, and the agent, on subsequently entering into a contract with such giver on behalf of his principal, is actually influenced by the gratuity in assenting to stipulations prejudicial to the interests of his principal, although the gratuity was not given directly with relation to such particular contract, the transaction is fraudulent as against the principal, and the contract is voidable at his option."

152. As we have explained, subsequent decisions, such as *Harrington v Victoria Graving Dock Co* (para 124 above) and *Hovenden* have established that it is unnecessary to establish either the intention with which the payment was made or the effect which it had on the mind of the agent. The inference that the resulting transaction was induced by fraud, with the consequence that it is therefore voidable at the option of the principal, is supported by the reasoning in such cases as *Salford*, where all the members of the Court of Appeal described the claim by the principal against the briber as being founded on fraud (see per Lord Esher MR at p 174, per Lindley LJ at p 180 and per Lopes LJ at p 181) and *Grant*, where A L Smith LJ also referred to fraud at pp 242, 244. In *In re A Debtor* Scrutton LJ explained at pp 376-377 that it is on the basis of a presumption of fraud that the transaction between the principal and the briber is voidable at common law, and the principal is therefore entitled to rescind it:

> "A man who is the agent of A in a transaction between A and B, and who also acts secretly for B in the same transaction, is presumed to act corruptly. Common law authorities require the

> court to hold that that is a corrupt practice, and, in my opinion, the court ought to presume fraud in such circumstances … What then is the effect of that? It was argued that … the contract was wholly void … but I cannot agree with that contention. If the contract is voidable only it gives the innocent party a right to rescind."

153. As to Mr Rabinowitz's fifth point, the rules applied in this context are neither anomalous nor unprincipled. Their background in long-established authority has been explained. Their practical justification is the need to deter bribery. The consequences of making an undisclosed payment to the agent of the other party to a transaction are designedly draconian, so as to deter behaviour which is destructive of commercial relations.

154. As to the irrelevance of motive, the principle was most clearly explained by Anglin J in *Barry v Stoney Point Canning Co* at p 342:

> "The result to the agent's principal is the same whatever the motive which induced the other principal to promise the commission. The former is deprived of the services of an agent free from the bias of an influence conflicting with his duty, for which he had contracted and to which he was entitled."

155. As to the presumption that the value of the bribe is reflected in the consideration received by the briber, the bribe is evidently a cost borne by the briber, which he can generally be expected to recover through the prices which he charges, as was explained in *Hovenden.* The practical justification for the presumption is that it enables the principal to recover in a situation in which it might be difficult for him to prove any loss. The law can be expected to operate more effectively in achieving the objective of deterring bribery if the presumption laid down by Romer LJ is applied.

156. As to Mr Rabinowitz's sixth and seventh points, we refer to paras 146-147 above.

(iv) What duty relationship engages the tort of bribery?

(a) Introduction

157. The Court of Appeal proceeded in this case on the basis that it was unnecessary, in order for liability for bribery to arise at common law, that the recipient of the payment should owe a fiduciary duty to the claimant. The decision in *Wood* was treated as having

established a less demanding requirement, namely that the recipient must owe the claimant a duty to provide information, advice or recommendations on a disinterested basis. Where that test was satisfied, and there had been no disclosure of the payment, common law remedies were available. Where, however, there had been partial disclosure of the payment, then following *Hurstanger* no remedy would lie at common law. Equitable remedies were available in principle where disclosure of the payment had been less than complete, but only if the recipient had been under a fiduciary duty: the duty to act disinterestedly would not suffice.

158. The result of the Court of Appeal's analysis, therefore, is that the common law and equity impose different requirements in order for remedies to be available in respect of bribery, both in terms of the nature of the duty owed by the recipient of the payment, and in terms of the disclosure required in order to avoid liability. In this section of our judgment we will consider the first of these matters: the nature of the duty required in order for liability for bribery to arise under the common law. In the next section we will consider the question of disclosure.

159. On this appeal, it is argued on behalf of the appellants that as a matter of principle, history, and authority, liability for bribery cannot arise unless the recipient of the benefit owed a fiduciary duty of loyalty to the claimant. The remedies for bribery, it is submitted, can be rationalised only as a response to that duty of loyalty and the no profit and no conflict rules inherent in it. The Court of Appeal was wrong to conclude otherwise, treating its decision in *Wood* as having recognised a novel "disinterested duty" as the basis for liability as distinct from a fiduciary duty. Properly understood, it is argued, that is not the effect of *Wood*; but, if it is, then *Wood* was wrongly reasoned.

160. On behalf of the respondents, it is submitted that for the purpose of the tort of bribery, where a person adopts a role in the decision-making of another, the court imposes on that person the "disinterested duty" described in *Wood* at para 102: that is to say, "a duty to be impartial and to give disinterested advice, information or recommendations". This is the common law analogue of the equitable fiduciary duty. The duty is imposed, it is argued, where a person performs a role in another person's decision-making process by exercising judgement or discretion in relation to the interests and affairs of that other person, as explained by Christopher Clarke J in *Novoship*, para 108.

(b) Fiduciary relationships

161. There is nothing inherently objectionable about paying commission, or about seeking to influence people's behaviour by giving them benefits of one kind or another. The position is different where the recipient is a fiduciary and the payment breaches the no conflict rule, as Dr Finn explained in *Fiduciary Obligations* (40^{th} Anniversary Republication, 2016), para 505:

> "The second quality of a bribe is that it be given to a person in a fiduciary position … The reason for this requirement of a fiduciary relationship in this context is not hard to find. The payment of money or money's worth to a person to secure influence or the showing of favour is not necessarily improper per se. Where, however, the recipient of the payment has undertaken to act for another and the payment is made to him in that capacity, it can create an interest antagonistic to the proper performance of that undertaking. It is the creation of an antagonistic interest – an interest which could tempt the fiduciary to act otherwise than in good faith with his beneficiary – that is at the root of the second characteristic of a bribe."

162. That analysis is supported by a body of authority. We have already cited some of the older authorities, such as *Panama, Shipway v Broadwood* and *Grant*. More recently, Lord Templeman, giving the judgment of the Board in *Attorney General for Hong Kong v Reid* (a case concerned with a Crown prosecutor), treated the breach of the no conflict rule applicable to fiduciaries as a defining characteristic of a bribe (p 330):

> "A bribe is a gift accepted by a fiduciary as an inducement to him to betray his trust."

The same point was also made by Millett J in *Logicrose*, when discussing the equitable right to rescission of a contract where the claimant's agent has obtained a bribe (p 1260):

> "The remedy is not confined to cases where the agent has taken a bribe or secret commission in the strictest sense. It is available whenever, without his principal's knowledge and consent, the agent has put himself in a position where his interest and duty may conflict. A principal is entitled to the disinterested advice of his agent free from the potentially corrupting influence of an interest of his own. Any such private interest, whether actual or contemplated, which is not known and consented to by his principal, disqualifies him … The principal, having been deprived by the other party to the transaction of the disinterested advice of his agent, is entitled to a further opportunity to consider whether it is in his interests to affirm it."

Similarly, in *Daraydan* Lawrence Collins J said (para 52):

> "An agent should not put himself in a position where his duty and interest may conflict, and if bribes are taken by an agent, the principal is deprived of the disinterested advice of the agent, to which the principal is entitled."

As the judge had made clear in the preceding paragraph, his remarks applied to other fiduciaries as well as to agents.

163. More recent authorities are consistent with this view. In *UBS AG v Kommunale Wasserwerke Leipzig GmbH* [2017] EWCA Civ 1567 ("*UBS*") Lord Briggs and Hamblen LJ, after discussing some of the leading cases on bribery, including *Panama*, *Shipway v Broadwood* and *Grant*, continued (para 112):

> "The mischief which the principle is aimed at preventing is the secret deprivation of the principal of the disinterested advice which he is entitled to expect from his fiduciary. The principal thinks he is getting the loyal and disinterested advice of his fiduciary when in truth he is not. This abuse may be achieved by a secret payment to the fiduciary by the other party to the contemplated transaction, but this is not the only way in which it can be achieved. The fiduciary may be disabled from giving disinterested advice by a multitude of surreptitious means."

164. A point which clearly emerges from *Logicrose*, *Daraydan* and *UBS* is that a fiduciary relationship can exist where the fiduciary is under a duty to give disinterested advice. Such a duty is compatible with the duty of loyalty described by Millett LJ in *Mothew* as the distinguishing obligation of a fiduciary, and by Lord Briggs in *Rukhadze* (para 2) as characteristic of a fiduciary relationship.

(c) The equitable origins of the common law of bribery

165. In our earlier discussion of the tort of bribery, we focused on the development of the common law from the late 19th century. However, the origins of the common law of bribery lie in equity, as Lord Diplock explained in *Mahesan* at p 380 and Robert Goff LJ noted in *Armagas* at p 743 (and as is discussed in detail in D Whayman, "Liability for Bribes and Secret Commissions at Common Law" (2022) 86 Conv 184, 186-191). The receipt of a bribe was objectionable in equity as a breach of the no conflict rule, as we have explained, and therefore as an equitable fraud, giving rise to an equitable right to rescission (and to other equitable remedies).

166. As Lord Diplock explained in *Mahesan* at p 381, the common law liability of the briber to the principal for the value of the bribe is a rational development from the principal's right in equity to rescission of the transaction entered into between them. If rescission were possible, the purchase price – presumed to be inflated by the value of the bribe, as we have explained – would be returned, enabling the principal to buy the goods or services in the market, and leaving the principal with the value of the bribe (and possibly more). This is the amount which the principal can recover from the briber at common law, together with any consequential losses.

(d) The authorities prior to Wood

167. We turn next to some of the authorities through which the tort of bribery has developed. Most of them, such as *Grant* and *Mahesan*, have concerned well-established categories of fiduciary relationship, such as agent and principal, or director and company. However, a fiduciary obligation can also arise outside those categories, as we have explained. It is necessary to focus here particularly on the cases considered in *Wood*.

168. We will begin with *Panama*. The plaintiffs had engaged an engineer to inspect the cables laid for them by the defendants, and to certify that they had been laid in accordance with the contract between the parties. The defendants' right to payment under the contract depended on the issue of the certificates by the engineer. They then provided the engineer with a benefit in the form of a lucrative sub-contract. The plaintiffs successfully brought proceedings in equity for the rescission or termination of their contract with the defendants, and the recovery of the secret profits received by the engineer.

169. As to the nature of the relationship between the engineer and the plaintiffs, the report records that he was named in their prospectus as their engineer, and that he later resigned his position. The plaintiffs were described in the judgment of Malins VC at first instance as his "employers". He was described in the judgment of James LJ at p 526 as an agent, and at p 527 as a servant. He does not appear to have been authorised to enter into contracts on behalf of the plaintiffs, but his actions in issuing certificates altered their legal position in relation to the defendants, by satisfying the condition on which the defendants' contractual right to payment depended. He therefore satisfied the definition of an agent set out in *Bowstead and Reynolds on Agency*, 23rd ed (2024), para 1-001:

> "Agency is the fiduciary relationship which exists between two persons, one of whom expressly or impliedly manifests assent that the other should act on his behalf so as to affect his legal relations with third parties, and the other of whom similarly manifests assent so to act or so acts pursuant to the manifestation."

170. Perhaps more significantly, the engineer was acting in a capacity which involved his being trusted by the plaintiffs to carry out the inspection and certification of the defendants' work on their behalf, and being enabled by them to affect the course of business between them and the defendants. Mellish LJ stated that the defendants "must have known that the plaintiffs required honest and disinterested advice" and that it was "difficult to see any position more confidential" (p 528). He went on to say that the plaintiffs were "entirely at the mercy of their engineer" and "must entirely depend on the skill and disinterested advice of their engineer" (p 529). The relationship between the engineer and the plaintiffs had all the characteristics mentioned by Mason J in *Hospital Products* (para 94 above): the engineer undertook or agreed to act for or on behalf of or in the interests of the plaintiffs in the exercise of a power or discretion which would affect their interests in a legal or practical sense. Accordingly, the engineer was placed in a situation where equity recognised a fiduciary duty arising from his contractual obligations, and he could not place himself in a position where his duty and his interest might conflict. The engineer's acceptance of an undisclosed benefit from the defendants was objectionable because it created a conflict between his duty and his interest.

171. In *Shipway v Broadwood* a payment was made by the plaintiff to a veterinary surgeon who had been engaged by the defendant to inspect a pair of horses which the defendant had agreed to purchase from the plaintiff, subject to their being certified by the veterinary surgeon as sound. The facts were therefore analogous to those of the *Panama* case. The veterinary surgeon was described by Chitty and Collins LJJ at pp 372 and 373-374 respectively as an agent, and he satisfied the definition of agency given in *Bowstead and Reynolds* (para 169 above). As in *Panama*, he was acting in a capacity which enabled him to affect the course of business between his employer and the donor of a secret payment, and which involved his undertaking to his employer to perform his duty of inspection and certification on a disinterested basis. In those circumstances, equity recognised a fiduciary obligation arising from his contractual duties. His acceptance of an undisclosed payment from the plaintiff created a conflict between his duty and his interest, as Chitty LJ explained at p 373.

172. Turning next to the cases concerned with the common law, the facts of the *Salford* case were explained at para 114 above. The purchasing manager who accepted the payments from the defendant was described as the plaintiff's agent, per Lord Esher MR at pp 174-177, per Lindley LJ at p 180 and per Lopes LJ at p 181. It is not apparent from the report that he was an agent in a strict sense of the term, since he had no authority to alter the plaintiff's legal relations with third parties; and it may be that the term was being used in the sense that he was an employee. Nevertheless, as purchasing manager he was employed in a capacity which involved his advising the plaintiff in relation to tenders in its best interests, to the exclusion of his own interests. His situation was analogous to that of the engineer in *Panama* and the veterinary surgeon in *Shipway v Broadwood*. His acceptance of undisclosed payments from a tenderer created a conflict between his duty and his interest.

173. The facts of the *Grant* case were explained at para 117 above. The managing director who accepted the payment from the plaintiff was acting on behalf of the defendant in relation to the purchase, and was therefore its agent as well as its director. He was described as an agent, per A L Smith LJ at pp 239-240 and 242-243, per Collins LJ at pp 246-252 and per Vaughan Williams LJ at pp 252-255. He was plainly a fiduciary, as the court recognised. Collins LJ stated that the plaintiff dealt with "a person who was to stand in a fiduciary relation to the intended buyer, and who as such was debarred from receiving a commission from the vendor without disclosing the fact to such buyer" (p 246).

174. The facts of the *Hovenden* case were explained at para 118 above. The payments were made by the defendant to the buyers employed by the plaintiff to select and order products which it required. The position was accordingly similar to that in the *Salford* case, except that the buyers actually placed the orders on their employer's behalf, and were therefore agents in the strictest sense. The buyers were described as agents by A L Smith LJ at pp 849-850, Vaughan Williams LJ at p 850 and Romer LJ at p 851. They were clearly fiduciaries.

175. The case of *Attorney General v Goddard* (1929) 98 LJ (KB) 743 concerned a police officer whose duty was to keep premises suspected of being used for unlawful purposes under observation. In return for bribes, he submitted false reports to his superiors. Proceedings were then brought against him by the Crown to recover the bribes. Rowlatt J considered that the officer's employment "seems to me to be properly described as creating a fiduciary relationship, not because he received into his hands any property of his employers or did not, but because he was under an obligation to use the information which he got for the purpose of his employer, certainly not to use it for his own profit" (p 745). The Crown was held to have an equitable right to recover the bribes. As the Court of Appeal explained in *Reading v Attorney General* (reported as *Reading v The King*) [1949] 2 KB 232, 237, it also had a common law right to do so.

176. In *Reading v Attorney General* the plaintiff, a sergeant in the British Army, was paid bribes as a reward for sitting in his uniform in the front seat of lorries being used to transport contraband goods through Cairo during the Second World War, so that they avoided being inspected by the Egyptian police. The Crown was held to have a right to restitution of the amount of the bribes.

177. In the Court of Appeal, Asquith LJ said at pp 236-237:

> "But the term 'fiduciary relation' in this connexion is used in a very loose, or at all events a very comprehensive, sense. A consideration of the authorities suggests that for the present purpose a 'fiduciary relation' exists (a) whenever the plaintiff

> entrusts to the defendant property, including intangible property as, for instance, confidential information, and relies on the defendant to deal with such property for the benefit of the plaintiff or for purposes authorized by him, and not otherwise (for instance, *Shallcross v Oldham* (1862) 2 J & H 609, 616 [70 ER 1202, 1205] and *Attorney General v Goddard* [(1929)] 98 LJ (KB) 743) and (b) whenever the plaintiff entrusts to the defendant a job to be performed, for instance, the negotiation of a contract on his behalf or for his benefit, and relies on the defendant to procure for the plaintiff the best terms available (for instance, *Lister* & *Co v Stubbs* [1905] 1 KB 11 and *Powell Thomas v Even Jones* (1890) 45 Ch D 1).
>
> In such cases the defendant may accept a secret profit from a third person in consideration, for instance, of hiring out the plaintiff's chattel, or giving away the plaintiff's secret, or awarding the plaintiff's contract, to such a third person … If he does so, he is bringing his duty to the plaintiff and his own interest into conflict, in derogation of the fiduciary bond … ."

178. Asquith LJ's description (after "(a)") of the first type of circumstance in which a fiduciary relation exists is "whenever the plaintiff entrusts to the defendant property, including intangible property as, for instance, confidential information, and relies on the defendant to deal with such property for the benefit of the plaintiff or for purposes authorized by him, and not otherwise". That is a description of a trust: a well-established category of fiduciary relationship. It covers the facts in *Reading v Attorney General* itself insofar as the sergeant was entrusted with property – the uniform – for the purposes of the Crown, and not for other purposes of his own. Asquith LJ's description also covers Rowlatt J's reasoning in *Attorney General v Goddard*, where the police officer was held to have made improper use of confidential information which he was obliged to use only for the purposes of his employer.

179. Asquith LJ referred to a loose or at least comprehensive usage of the term "fiduciary relation"; but it might be said, as it is in *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies*, 5th ed (2014), para 5-150, that it is not altogether easy to see why that disclaimer was necessary. The explanation of his comment, and of the similar remark by Lord Porter in the House of Lords (mentioned below), may be that one would not think of every member of the armed forces, or every police officer, as being a fiduciary. It is perhaps helpful to remember Fletcher Moulton LJ's dictum in *In re Coomber* [1911] 1 Ch 723, 728:

> "Fiduciary relations are of many different types; they extend from the relation of myself to an errand boy who is bound to

> bring me back my change up to the most intimate and confidential relations which can possibly exist between one party and another where the one is wholly in the hands of the other because of his infinite trust in him."

The example of the errand boy is a useful reminder that circumstances may arise which place a party to a relationship in the position of a fiduciary in a specific respect, without the full range of fiduciary obligations being engaged, or the person's being a fiduciary in relation to other aspects of his functions. We refer to our earlier discussion of these matters at paras 101-104 above.

180. Asquith LJ's description (after "(b)") of the second type of circumstance in which a fiduciary relation exists is "whenever the plaintiff entrusts to the defendant a job to be performed, for instance, the negotiation of a contract on his behalf or for his benefit, and relies on the defendant to procure for the plaintiff the best terms available". As Gibbs CJ commented in *Hospital Products* (p 71), this is too widely stated: the fact that there is a job to be performed for a person's benefit, and reliance on the person engaged to perform it, does not necessarily create a fiduciary obligation. Many ordinary commercial contracts would fall within that description, and do not involve a fiduciary relationship. However, if expressed much more narrowly, that description covers the facts of cases such as *Salford* and *Hovenden*, where the circumstances giving rise to a fiduciary obligation were not merely reliance by one person on another to perform a job, but the employment of a person in a capacity which placed him in a situation, in relation to his employer, in which equity recognised a fiduciary duty arising from his contractual obligations.

181. When *Reading v Attorney General* went on appeal to the House of Lords, Lord Porter said that he agreed with Asquith LJ "in thinking that the words 'fiduciary relationship' in this setting are used in a wide and loose sense and include, inter alia, a case where the servant gains from his employment a position of authority which enables him to obtain the sum which he receives" (p 516). That would indeed be a loose use of the term "fiduciary relationship"; and, as we have explained, the decision that Sergeant Reading was a fiduciary can be justified on a narrower basis.

182. In *Mahesan* the defendant was a director and employee of the plaintiff company, whose duties including advising the plaintiff on the suitability of land for it to purchase. Having identified suitable land which was available for purchase, the defendant then entered into an arrangement with a third party under which, in return for a bribe, the third party acquired the land and resold it to the plaintiff at a higher price. The defendant was plainly in a fiduciary relationship with the plaintiff.

183. Turning to the more recent case law, the circumstances in which the law of bribery applies were considered succinctly by Christopher Clarke J in *Novoship*. After referring

to some of the leading authorities concerned with the bribery of agents by their principal's counterparty (which was the context of the case before the judge), he continued (para 108):

> "The recipient of the bribe (or the person at whose order the bribe is paid) must be someone with a role in the decision-making process in relation to the transaction in question eg as agent, or otherwise someone who is in a position to influence or affect the decision taken by the principal."

That dictum is interpreted by the respondents in the present appeal as meaning that it is sufficient, in order for a person to be under a duty to give disinterested advice (and, therefore, for the civil law of bribery to apply), that that person performs a role in another person's decision-making process in relation to a transaction and is in a position to influence or affect the decision taken by that person.

184. In our view, that is both a misreading of the judgment and an erroneous view of the law. The judge was envisaging that the recipient of the benefit was an agent or other fiduciary. Such a person is clearly subject to the fiduciary duty of loyalty. If he has a role, acting in that capacity, in relation to a transaction entered into by his principal, or is in a position to influence or affect the decision taken by the principal, then he is under a duty to give disinterested advice. That duty flows from the fiduciary capacity in which the person is acting. It would not flow from the mere fact that he was in a position to influence or affect another person's decision. If that were the law, a duty to act disinterestedly, and remedies for the breach of that duty, would attach to a very wide range of individuals and organisations who provide information or advice without any undertaking to subordinate their interests to those of the recipient of the information or advice. Examples range from the shop assistant or wine waiter advising a customer to the search engine which influences decisions through the order in which it displays the results of a search for a product or service.

185. A similar argument to that advanced by the respondents on this appeal, also based on the passage which we have cited from *Novoship*, was considered by the Court of Appeal, and rejected, in *Conway v Eze*. Asplin LJ (with whose judgment Peter Jackson LJ agreed) concluded that it was "clear from the authorities that in order for the law of bribery and secret commissions to be engaged there must be a relationship of trust and confidence between the recipient of the benefit or the promise of a benefit and his principal (used in the loosest of senses) which puts the recipient in a real position of potential conflict between his interest and his duty" (para 39). She went on to say (para 43):

> “The real question, therefore, is whether the person receiving the benefit or the promise of a benefit was acting in a capacity which involved the repose of trust and confidence in relation to the specific duties performed rather than on some general basis and whether the payment to him in that capacity was such that a real position of potential conflict between his interest and his duty arose … .”

186. Accordingly, in each of the civil bribery cases which we have discussed thus far, the receipt of an undisclosed payment was objectionable because it created a conflict between the recipient’s personal interests and his fiduciary duty of loyalty to his principal. As Anglin J said in *Barry v Stoney Point Canning Co* at p 342:

> “The fundamental principle in all these cases is that one contracting party shall not be allowed to put the agent of the other in a position which gives him an interest against his duty.”

The same point was made over 200 years ago by Lord Ellenborough CJ in *Thompson v Havelock* (1808) 1 Camp 527, 528; 170 ER 1045, 1046, in a dictum cited by Chitty LJ in *Shipway v Broadwood* at p 373:

> “No man should be allowed to have an interest against his duty.”

187. In every case we have cited in which a claim based on bribery was upheld, the recipient of the benefit was someone who owed a fiduciary obligation, and the receipt of the benefit resulted in a breach of the no conflict rule. That is consistent with the authorities discussed at paras 162-164 above. As we explained, in *Attorney General for Hong Kong v Reid* the breach of the no conflict rule applicable to fiduciaries was treated as a defining characteristic of a bribe. Essentially the same point was made in *Logicrose* and *Daraydan*, expressed in terms of the agent putting himself in a position where his interest and his duty might conflict, and in *UBS*, expressed in terms of the fiduciary being disabled from giving disinterested advice. It was repeated in *Conway v Eze*. Asplin LJ emphasised “the central criterion that the recipient owes fiduciary duties to the principal in relation to the transaction in question” (para 43). That was also made clear by Longmore LJ. Referring to *Grant*, he said (para 63):

> “What emerges from this decision is that for the law about secret commissions to be engaged, the status of the alleged agent has to be a fiduciary one in relation to his principal.”

188. The conclusion that liability for bribery, at common law as well as in equity, is dependent on the recipient of the bribe being a fiduciary, means that the law avoids a problem which would otherwise arise. It has been established by the decision in *FHR* that every bribe received by an agent is held on trust for the principal, so that the principal has a proprietary remedy as well as personal remedies. If, however, payments to non-fiduciaries could also constitute a bribe, as the Court of Appeal held in the present proceedings, then no constructive trust would arise, and no proprietary remedy would lie. The remedies available in a case of bribery would therefore vary, depending on whether or not the recipient of the bribe was a fiduciary. There is no trace of such a distinction ever having been drawn, either in this jurisdiction or in any other, although bribery has featured in the law reports for more than 200 years. Nor is there any discernible reason why the availability of a proprietary remedy should vary from one case of bribery to another, according to whether the recipient owed a fiduciary duty or a lesser "disinterested duty". Against that background, we turn to the reasoning in *Wood,* which appears to suggest that the application of the civil law of bribery does not depend on the existence of a fiduciary duty, despite the fact that the Court of Appeal had re-affirmed "the central criterion that the recipient owes fiduciary duties to the principal in relation to the transaction in question" in *Conway v Eze* (para 187 above) only two years earlier.

(e) Wood

189. The case of *Wood* concerned two appeals which were heard together. In each case, a borrower sought the rescission of a mortgage agreement arranged through a broker, on the ground that the broker had received an undisclosed commission from the lender. In each case, the broker had undertaken that it would "work from a panel of lenders to enable you to select the appropriate lender and mortgage product to meet your individual circumstances and needs and we will therefore be acting on your behalf". The High Court ordered rescission in each case, together with payment by the lender of the amount of the commission, but the judges disagreed in their analysis of the requirements of the civil law of bribery: in particular, as to whether a fiduciary relationship was an essential requirement, and whether fiduciary duties could exist outside a fiduciary relationship. They agreed, however, that a fiduciary duty was essential, and that such a duty had existed and had been breached by the acceptance of the undisclosed commission. The Court of Appeal dismissed the appeals.

190. As a preliminary point, it is to be noted that orders that the lender should pay the claimants the amount of the commission, in addition to the rescission of the agreements, will result in double recovery in the common circumstance where the borrower pays for the commission through the interest rate charged on the loan. This point, recognised in the earlier authorities (eg *Grant* per Collins LJ at p 249, cited with approval in *Hovenden* at p 850; see also *Logicrose* at p 1263) was not raised on the appeal.

191. In *Wood*, the lender advanced two arguments in the Court of Appeal. The first was that the civil law of bribery only applied where there was a fiduciary relationship. The second, advanced in the alternative, was that there must exist a duty of loyalty, such that the agent must not allow personal interests to conflict with his duty to give disinterested advice. This submission was supported by the citation of *Panama*, *Grant*, *Hovenden*, *Mahesan*, *Logicrose* and *Novoship*: all cases concerned with fiduciaries, as we have explained. We should say at once that both submissions were correct. David Richards LJ, with whom Males and Elisabeth Laing LJJ agreed, rejected the first argument but accepted the second (para 50). He held that the courts below had been right to hold that the broker was "under a duty to make a disinterested selection of mortgage product", and that, "[t]o the extent that it is necessary", they were also correct to hold that the broker "owed a fiduciary duty of loyalty" to the borrowers (para 110).

192. David Richards LJ relied on a number of authorities which he considered to be inconsistent with the contention that a fiduciary relationship is a precondition of civil liability for bribery. However, on analysis they were all cases in which a fiduciary relationship existed, even if, in some of the cases, it arose on an ad hoc and highly fact-specific basis, rather than from a particular status such as trustee or company director.

193. The first authority was *Panama*. David Richards LJ appears to have considered it important that the engineer was an independent contractor, and not a director or employee of the company on whose behalf he was acting (para 60). We have explained that the engineer was described in the judgments as an agent or employee of the company (para 169 above). Even if he was an independent contractor, that is not inconsistent with his having owed the company a fiduciary duty of loyalty, and having been in an ad hoc fiduciary relationship with the company. We have explained at para 170 above why such a relationship existed.

194. The second case was *Shipway v Broadwood*. David Richards LJ noted that the veterinary surgeon had been described by Chitty and Collins LJJ as the defendant's agent, but questioned in what sense he could be so described (para 66). As we have explained, the role of the veterinary surgeon in relation to the transaction in question satisfied the standard definition of agency (para 171 above). Furthermore, since the case was expressly decided on the basis that he was an agent, it was therefore decided on the basis that he was subject to the no conflict rule applicable to fiduciaries (there being no suggestion in the law at that time that some agents might not owe a fiduciary duty, as suggested by Asplin LJ in *Conway v Eze*, at para 39).

195. The third, hypothetical, case was that of a barrister instructed to advise a client. David Richards LJ considered that the barrister would owe a duty to give his client disinterested advice, but would not normally be considered to be in a fiduciary relationship with the client. Whether a barrister might owe his client a fiduciary duty would appear to us to depend on the particular facts: there can undoubtedly be

circumstances in which a barrister owes his client a fiduciary duty of loyalty (as the House of Lords held on the facts of *Carter v Palmer* (1842) 8 Cl & F 657; 8 ER 256).

196. David Richards LJ attached significance to the references by Asquith LJ and Lord Porter in *Reading v Attorney General* to the use of the term "fiduciary" in a wide or loose sense, which we have discussed at paras 179 and 181 above. As we explained, Sergeant Reading was under a fiduciary obligation to the Crown in relation to the use which he made of his uniform, like the police sergeant in *Attorney General v Goddard* in relation to the confidential information which he received in the course of his duties, the Crown prosecutor in *Attorney General of Hong Kong v Reid*, and the member of the secret intelligence service in *Attorney General v Blake*. That is not to say that these individuals were fiduciaries in relation to all aspects of their service, or owed the full range of fiduciary obligations, any more than Fletcher Moulton LJ's errand boy.

197. David Richards LJ also derived assistance from the distinction drawn in *Hurstanger*, in relation to the requirements as to disclosure of a commission, between the receipt of a secret commission as a breach of fiduciary duty and as an actionable wrong. *Hurstanger* was the first case to suggest that the common law cause of action arose in different circumstances from equitable remedies. It will be necessary to return to that case in the next section of this judgment.

198. Having considered these and other authorities, all of which concerned fiduciaries (a company director in *Logicrose*, agents in *Anangel* and *Hurstanger*, and a chief executive in *Ross River Ltd v Cambridge City Football Club Ltd* [2007] EWHC 2115 (Ch); [2008] 1 All ER 1004), David Richards LJ rejected the first argument, that a fiduciary relationship was a precondition of civil liability for bribery. He observed that the term "fiduciary relationship" was most commonly used with respect to well-established categories of relationship, such as trustee and beneficiary or director and company (para 37). The cases before the court did not concern relationships of that kind, which without more clearly qualified as fiduciary. The precise scope of the duties of the brokers required examination by reference to their terms of engagement (para 47).

199. We accept that the civil law of bribery is not confined to the established categories of fiduciary relationships. However, it was in our view a mistake to hold that a fiduciary relationship was unnecessary. As we have explained, a relationship is properly described as fiduciary where one party to the relationship owes a fiduciary duty of loyalty to the other, even if the relationship does not fall within one of the established categories or involve the full range of fiduciary duties. Since the civil law of bribery is concerned with the breach of a fiduciary duty of loyalty, as we have explained, it follows that a fiduciary relationship is indeed an essential requirement. The authorities provide no support for a contrary view.

200. In relation to the second argument, David Richards LJ said that the question the court should ask and focus on was: "did the 'agent' owe a duty to be impartial and to give disinterested advice, information or recommendations?" (para 102). He continued (ibid):

> "Courts have, principally in recent cases, characterised this as a fiduciary duty of loyalty. While this may be accurate, it does not mean that in such cases courts need involve themselves in complex analyses of the nature of a fiduciary relationship or the duties which may be associated with a fiduciary relationship. It would be better to avoid doing so. It is enough just to ask the straightforward question stated above."

201. We understand why the Court of Appeal wished to encourage courts to focus on identifying whether the relevant obligation exists, rather than undertaking the sort of elaborate discussion of fiduciary relationships which had occupied the lower courts in the cases before it. It is also true to say that the expression "fiduciary duty of loyalty" is of relatively recent coinage, although the duty which it describes – to act in the principal's interests to the exclusion of one's own – has long been recognised. Furthermore, if David Richards LJ was accepting that what he called "a duty to be impartial and to give disinterested advice, information or recommendations" was another way of describing a fiduciary duty of loyalty ("this may be accurate"), then no error was involved. As Professor Lionel Smith has commented, this "approximates to a holding that an animal has all the characteristics of an elephant, even while we do not have to decide that it is an elephant": *The Law of Loyalty* (2023), p 49, footnote 170. However, it needs to be understood that what is critical in this context is the existence of a fiduciary duty of loyalty. It can be described as a duty to act disinterestedly, if by that is meant a duty to act in the interests of the person to whom the duty is owed to the exclusion of one's own interests. But it needs to be borne in mind that a purely contractual duty to give disinterested advice is different in its legal nature and consequences from a fiduciary duty of loyalty. Although it may be difficult to conceive of circumstances in which such a contractual duty might arise without there being a concurrent fiduciary duty, the focus of the civil law of bribery is on the latter and not the former, and is therefore on the question which we identified earlier: whether the putative fiduciary has undertaken or agreed to act in the interests of another person to the exclusion of his personal interests.

202. For these reasons, we disagree with a number of passages in David Richards LJ's judgment which suggest that it is a mistake to ask whether the person in question was under a fiduciary duty of loyalty (eg at paras 44-50, 79 and 92). For example, at para 48, David Richards LJ said:

> "To ask in cases of this kind whether there is a fiduciary relationship as a pre-condition for civil liability in respect of bribery or secret commissions is, in my judgment, an

> unnecessarily elaborate, and perhaps inaccurate, question. The question, I consider, is the altogether simpler one of whether the payee was under a duty to provide information, advice or recommendation on an impartial or disinterested basis. If the payee was under such a duty, the payment of bribes or secret commissions exposes the payer and the payee to the applicable civil remedies. No further enquiry as to the legal nature of their relationship is required."

He added, at para 50:

> "While it may sometimes be appropriate to describe a duty to give disinterested advice or information as 'fiduciary', it is not necessary to do so. It is the content of the duty, not the label attached to it, that matters."

203. We do not underestimate the importance of analysing the substance of obligations. However, to describe a duty as fiduciary is not merely to attach a label to it. In the first place, the proper classification of legal obligations is more than labelling. It is important in understanding the functions which they serve, which mark them out from other categories of obligation and explain their attracting a different name. Consequently, it is also important in identifying and understanding the legal doctrines which apply to them. In addition, in a common law system based on an incremental and iterative process of judicial development of the law, the ability to analyse obligations by reference to an established legal framework is essential to the resolution of disputes. Accordingly, the different names given to different types of legal obligation are not merely labels.

204. Fiduciary obligations are no exception. There is no authority prior to *Wood* which could be understood as implying that a purely contractual duty (or, it might be, a duty in tort, or in public law) to give disinterested advice is sufficient in itself to engage the civil law of bribery, as distinct from other torts such as fraud, conspiracy, causing loss by unlawful means or inducing a breach of contract. It would risk introducing confusion into commercial relationships if purely contractual duties were thought to have the same consequences as fiduciary duties, without any fiduciary obligation being established. As Lord Mustill said in *In re Goldcorp Exchange Ltd* [1995] 1 AC 74, 98:

> "No doubt the fact that one person is placed in a particular position vis-à-vis another through the medium of a contract does not necessarily mean that he does not also owe fiduciary duties to that other by virtue of being in that position. But the essence of a fiduciary relationship is that it creates obligations

> of a different character from those deriving from the contract itself."

205. The authorities which we have discussed also demonstrate that although the law of bribery is often concerned with situations in which a person is under a duty to give disinterested advice or information, it is not confined to such cases: see, for example, *Hovenden* (the placing of orders), *Attorney General v Goddard* (the misuse of confidential information) and *Reading v Attorney General* (the misuse of property). It would therefore be a mistake to regard a duty to give disinterested advice or information as essential to engage the civil law of bribery.

206. We should add that there need be no concern that confining the civil law of bribery to situations where a fiduciary duty of loyalty was owed will result in a lacuna in the law. If, for example, a non-fiduciary were to be bribed, as that word is used in ordinary speech – an example might be a non-fiduciary employee being paid by a competitor of his employer to sabotage an industrial process – the law would not be powerless. Cases of non-fiduciary bribery, if we can use that expression, would fall within the scope of a range of other torts, such as deceit, conspiracy, inducement of breach of contract and causing loss by unlawful means. Trying to fit such cases within a tort which has developed specifically to address the procurement of breaches of fiduciary duty would be liable to result in confusion. Retaining the fiduciary requirement has caused no serious difficulties during the past century and a half.

(f) Conclusion on the duty requirement

207. We conclude that the Court of Appeal was mistaken, in the present case, to proceed on the basis that it was unnecessary, in order for liability for bribery to arise at common law, that the recipient of the payment should owe a fiduciary duty of loyalty to the claimant. Civil liability for bribery cannot arise unless such a duty was owed. Such a duty may arise in circumstances where one person has performed a role in another person's decision-making process by exercising judgement or discretion in relation to the interests and affairs of that other person. However, whether it does so will depend on a number of factors, including whether the person undertook or agreed to act in that person's interests to the exclusion of any interest of their own.

(vi) The negation of secrecy

208. In the case law a bribe is often referred to as being synonymous with a secret commission: see paras 111-112 above. For example, in *Industries & General* at p 575, Slade J noted the various use of the words "secret commission", "surreptitious payment" and "bribe". In *Mozambique* the Supreme Court referred to a bribe as being "a secret payment or other inducement" (para 86).

209. Secrecy is important because, as Chitty LJ pointed out in *Shipway v Broadwood* (p 373), it is possible for the consequences of an agent's receiving a benefit from his principal's counterparty to be avoided if the benefit is disclosed to the principal. Disclosure places the principal in a position where he can take an informed decision whether to affirm the transaction in question or to seek its rescission. It is in that sense that Chitty LJ's statement in that case, that the "real evil" of bribery is "not the payment of money, but the secrecy attending it", should be understood. As we have explained, and as Chitty LJ's judgment considered as a whole makes plain, the real evil of bribery is that it creates an interest in a fiduciary which is antagonistic to his performance of his duty of loyalty: that is to say, his duty to act in the interests of his principal to the exclusion of his own interests. As Chitty LJ said in that case, the "great principle" is that "no man should be allowed to have an interest against his duty" (p 373).

210. As explained earlier, the payment of bribes and secret commissions to a fiduciary is objectionable not only as a breach of the no conflict rule, entitling the principal to equitable rescission of the resultant transaction, but also as a breach of the no profit rule. It is not a condition of a fiduciary's equitable liability to disgorge such profits, or of the principal's equitable proprietary remedies, that a profit be secret. However, the fiduciary's liability to disgorge the profit can be avoided if the profit is disclosed and the principal gives his consent to its retention.

211. It is well established that the consent which is required in order to avoid the equitable liabilities which flow from a breach of the no conflict and no profit rules must be fully informed. The burden is on the payer of the commission or its recipient, as the case may be, to prove that full disclosure was made, which means all material facts, and it is not enough to place the principal on inquiry.

212. The leading authority to that effect is *Dunne v English* (1874) LR 18 Eq 524, cited with approval in *FHR* at para 5. The case concerned the equitable rescission of a contract of sale entered into by the plaintiff and defendant as partners, on the ground that the defendant, who acted as the agent of the partnership in negotiating the sale, had failed to disclose to the plaintiff that he was in fact the ultimate purchaser, or had a share in the purchase. The plaintiff also sought the disgorgement of the defendant's profit on a resale. It was said in defence that the defendant had disclosed the fact that he was to be one of the purchasers. Sir George Jessel MR held, following earlier authorities, that "[i]t is not enough for an agent to tell the principal that he is going to have an interest in the purchase … He must tell him all the material facts" (p 533). The Master of the Rolls went on to say that "[i]t must be a full disclosure of all he knows; that, of course, means everything material which he knows" (p 534). It was not sufficient for the defendant to say that he had an interest, or to put the principal on inquiry (p 535).

213. One of the authorities relied on by the Master of the Rolls was the decision of the House of Lords in *Imperial Mercantile Credit Association v Coleman* (1873) LR 6 HL

189 ("*Imperial Mercantile*"), a case concerned with the payment of a commission to a director of a company in connection with the placing of debentures with it. His fellow directors knew that he was a stockbroker, and he told them that he was receiving a commission, but not the amount, which was much larger than the usual stockbroker's commission. The company sought the disgorgement of the commission. Lord Chelmsford noted that the magnitude and nature of the transaction lay beyond the ordinary business of stockbrokers, and beyond the scope of the usual stockbroker's commission, with the consequence that the disclosure which had been made "afforded very scanty information" as to the nature of the director's interest (p 202). As the decision illustrates, what amounts to the disclosure of all material facts can depend on the circumstances. It seems that the disclosure made in that case might have sufficed if the commission received had been the usual stockbroker's commission, as the information which had been disclosed would then have been sufficient to enable the directors to form an accurate idea of their fellow director's interest in the transaction. As it was, however, the information which was disclosed did not enable them to do so.

214. Consistently with the approach taken in these cases, a number of other authorities through which the law of bribery developed refer to the need for the fiduciary to obtain his principal's "knowledge and consent". Examples include *Parker v McKenna* per James LJ at p 124 (referring to "the general principle that … no agent in the course of his agency, in the matter of his agency, can be allowed to make any profit without the knowledge and consent of his principal"); *Shipway v Broadwood* per Chitty LJ at p 373 ("It was the plaintiff's duty to inform the defendant of the promise made to [the agent] if he wished to escape the consequences of having made it"); *Grant* per A L Smith LJ at p 242 (referring to the agent's having received the commission "without the knowledge or assent" of the purchaser); *Hovenden*, where Romer LJ's description of a bribe at p 851 included that the gift was made "without the knowledge and consent of the principal"; *In re A Debtor*, where Lord Hanworth MR referred at p 373 to the need for consent; and *Reading v Attorney General*, where Lord Oaksey referred at p 518 to the need for "knowledge and consent". The same phrase was employed by Millett J in *Logicrose* at p 1260. None of those cases raised a question as to what exactly was meant by "knowledge and consent", in the context of an allegation of bribery. However, none of them indicated any departure from the approach laid down in in *Imperial Mercantile* and *Dunne v English*; and as we have explained, the reasoning in the latter case was approved by this court in *FHR*.

215. One modern authority in which the issue received some consideration is *Anangel*. The case concerned a naval architect who was engaged by shipowners to negotiate on their behalf the purchase of ships which they knew he had designed, from the shipbuilders who had constructed the ships. The architect received royalties from the shipbuilders for the licensing of his designs, and payments for the promotion of the sale of the ships. The shipowners then sought to recover the amount of those payments from the shipbuilders, on the basis that the architect had been acting as their agent in relation to the purchases, and they had not known about the payments. The claim failed, on the basis that the shipowners had known all the material facts about the payments and consented to them.

216. In the course of his judgment, Leggatt J cited authorities establishing the need for fully informed consent, and recorded that it was "not disputed that knowledge of and consent to the fact of payment is sufficient to legitimate it, without it being necessary to prove that the principal knew the exact amounts paid, provided that they were reasonable" (p 171). He went on to find that although the shipowners never knew the amount of the payments, they knew that the shipbuilders were making payments to the architect for design and promotion on a per ship basis. The amounts paid were unexceptional, and did not affect the price paid by the shipbuilders. In those circumstances, Leggatt J concluded that the information which had not been disclosed, as to the precise amount of the payments, was "not material, so far as the plaintiffs were concerned" (p 176). The decision is a modern illustration of a point which could be inferred from the earlier authorities, notably *Imperial Mercantile*, namely that what amounts to disclosure of all material facts depends on the circumstances of the particular case: not every fact which could be disclosed is necessarily material in a particular context. The significance of the payments being "reasonable" was that the disclosure of their existence gave the shipowners, in the circumstances of that case, all the information they required in order to understand the nature and extent of the architect's interest.

217. We turn next to the case of *Hurstanger*, which concerned a regulated consumer credit agreement for a loan of £8000, which had been arranged by a broker acting on behalf of the borrowers for a substantial fee. Before entering into the agreement, the borrowers signed a pre-contractual document issued by the lenders, which contained the statement: "In certain circumstances this company does pay commission to brokers". When the borrowers fell into arrears, and the lenders brought proceedings for possession, the borrowers sought rescission of the agreement on the ground that the broker had received a commission from the lenders of £240, which had not been disclosed.

218. The leading judgment was given by Tuckey LJ, with whom Jacob and Waller LJJ agreed. He acknowledged that the broker was a fiduciary who owed a duty of loyalty to the borrowers, and that the receipt of the commission created a conflict of interest. He accepted that equitable remedies would therefore lie unless full disclosure had been made. He also noted that what amounted to full disclosure depended on the circumstances. In the context of a consumer credit agreement of the kind with which the case was concerned, where the borrowers were likely to be vulnerable and unsophisticated, a statement of the amount which their broker was to receive from the lenders was, he thought, necessary to bring home to such borrowers the potential conflict of interest (para 36). Since no such disclosure had been made, it followed that there had therefore been a breach of fiduciary duty and that equitable remedies were in principle available.

219. Tuckey LJ then turned to the common law, stating (para 39):

> "But 'the real evil [of bribery] is not the payment of money, but the secrecy attending it': Chitty LJ in the leading case of

> *Shipway v Broadwood* [1899] 1 QB 369, 373. Is there a half-way house between the situation where there has been sufficient disclosure to negate secrecy, but nevertheless the principal's informed consent has not been obtained? Logically I can see no objection to this. Where there has only been partial or inadequate disclosure but it is sufficient to negate secrecy, it would be unfair to visit the agent and any third party involved with a finding of fraud and the other consequences to which I have referred, or, conversely, to acquit them altogether for their involvement in what would still be breach of fiduciary duty unless informed consent had been obtained."

220. That it was sufficient, in order to exclude common law (but not equitable) remedies, to disclose that commission might be paid rather than the fact of its payment, was explained as follows (para 43):

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

221. It was further held that disclosure was sufficiently made to exclude common law remedies because the borrowers had signed the pre-contractual document which stated that commission might be paid, and "must be taken to have understood what it said" (para 42). On the other hand, the borrower's informed consent had not been obtained, with the result that equitable relief was in principle available against the lender for procuring the broker's breach of fiduciary duty. Accordingly, the lender "did not pay the broker a secret commission but procured the broker's breach of fiduciary duty" (para 45). The court went on to withhold equitable rescission on the ground that the remedy was discretionary (para 47), and to rescind the transaction would be unfair and disproportionate (para 50). Instead, the lender was ordered to pay equitable compensation equivalent to the amount of the commission.

222. Accordingly, in this case the Court of Appeal held, for the first time, that a lesser requirement of disclosure applied for the purposes of the common law of bribery than in equity. In its view, it was sufficient to exclude liability at common law that there be disclosure of the possibility that a commission might be paid. Where that possibility had been disclosed, the payment could not be regarded as secret, so as to engage common law liability; but there would not be fully informed consent, so that equitable remedies remained available.

223. The appellants contended that *Hurstanger* should be followed. They submitted that in circumstances where English law equates bribery with fraud, it is important to ensure that serious findings of bribery are not visited upon honest defendants. In that context it is appropriate that (in addition to the payer's knowledge of the agency) there should be a distinctive standard of secrecy. That is particularly so in circumstances where (1) obtaining the principal's fully informed consent is unlikely to be in the payer's control; yet (2) the payer can take steps to ensure that the payment is not secret from the principal, in particular by requiring the payee to disclose commissions to the principal.

224. The respondents contended that *Hurstanger* was wrongly decided and should be overruled. Nothing less than fully informed consent will do. They submitted that it is the commission itself that risks the corruption of the agent and constitutes the breach of the disinterested or fiduciary duty. It is inconsistent with the strong stance taken against bribery, and the policy reasons in support of it, for the payer of a bribe to be afforded a defence despite the underlying transaction being tainted by a commission to which the principal did not give his informed consent. The Court of Appeal was wrong in *Hurstanger* to identify a separate category of case concerning partially disclosed commissions.

225. We are unable to agree with the reasoning in *Hurstanger* in relation to disclosure. We have explained that the law of bribery, both at common law and in equity, reflects the same concern: to ensure that an agent acts free from any conflict of interest. The common law action for bribery has equitable origins, and derives from the right to rescission in equity. The remedies of restitution and damages are the logical corollary of the right to rescission, as was explained by Collins LJ in *Grant* and by Lord Diplock in *Mahesan* (paras 149 and 166 above). The purpose of requiring disclosure, as a condition for excluding the law's remedial response, is also the same at common law and in equity: to negative what would otherwise be a breach of fiduciary duty. Since the need for disclosure arises for a common reason, it is incoherent for it to be governed by diverging rules.

226. The reasoning in *Hurstanger* in relation to this matter is based on a misunderstanding. Chitty LJ's remark that "the real evil" of bribery is secrecy should not be taken out of context or applied literally: see para 209 above. The real evil of bribery is the breach of the no conflict rule incumbent upon a fiduciary, as Chitty LJ clearly recognised in his judgment, when it is read in the round. In order to negative such a breach, what is required is full disclosure of all material facts, as authorities from *Imperial Mercantile* to *FHR* have repeatedly made clear. Partial disclosure has never been enough, as Tuckey LJ recognised in dealing with the question of equitable relief. That is not to say that disclosure of every fact is needed: as *Imperial Mercantile* and *Anangel* illustrate, what amount to material facts will depend on the circumstances of the particular case.

(vii) Remedies

(a) Recovery of the amount of the bribe from the briber without proof of loss or gain

227. If the appellants' case that the tort of bribery should be abolished is rejected, their fallback position was that there should be no automatic right to recovery of the bribe. They raised this point with some diffidence, as they recognised that cases decided at the highest level, namely *Mahesan* and *Mozambique*, have proceeded on the basis that such a right exists.

228. Three submissions were advanced in support of the appellant's case: (1) the automatic common law entitlement is contrary to basic principles; (2) it has its origins in the trilogy of late 19th century cases, *Salford*, *Grant* and *Hovenden*, which on analysis do not support it; and (3) neither the passage of time nor the endorsement of the rule in *Mahesan* and *Mozambique* is a reason to retain it.

229. As to (1), as *Mahesan* and cases following it make clear, the basis of the common law entitlement is money had and received or what would now be termed restitution. As explained at para 150 above, the remedy is an example of restitution for wrongs. As Sir Jack Beatson stated in *FM Capital Partners Ltd v Marino* [2020] EWCA Civ 245; [2021] QB 1, para 48:

> "While, over the years there have been a number of ways of conceptualising the obligation of persons to make restitution of bribes, today it is generally regarded as an example of restitution for wrongs where the cause of action is the wrong and not unjust enrichment. In such a case the claimant seeks a restitutionary remedy for a tort or equitable wrong … ."

230. As to (2), although some doubt was expressed in *Grant* as to whether a claim lay against the briber for money had and received, in *Hovenden* A L Smith LJ clearly upheld such a claim, and Vaughan Williams LJ also confirmed that such a claim would lie. This was later affirmed in *Mahesan* and this approach has been followed in subsequent cases.

231. The appellants contended that *Whaley Bridge Calico Printing Co v Green* (1879) 5 QBD 109 ("*Whaley Bridge*") is authority, by implication, that there was no common law claim to recover the amount of the bribe from the briber before *Salford.* They further pointed out that this case was not cited in *Salford* or *Hovenden* and was not discussed in *Grant*. *Whaley Bridge* does not, however, address the question of whether there was a primary liability of a briber at common law for the bribe paid. It was concerned with the different question whether the principal could enforce the contract which the briber had

made with the principal's agent for the payment of the bribe, on the basis that the agent must be taken to have been acting on the principal's behalf (the briber being unable to plead that the contract was fraudulent). It was the trilogy of cases which developed that common law remedy. As such, it is not surprising that it should not be referred to in earlier authorities and neither *Whaley Bridge*, nor any other case we were shown, is authority against there being such a claim.

232. It is correct that none of the trilogy of cases decide that there is an irrebuttable presumption of enrichment up to the value of the bribe and that, in each of them, it was clear on the facts that the briber was in fact enriched in (at least) that amount because it was possible to identify the amount by which the contract price had been inflated as a result of the bribe. Romer LJ, however, stated a clear preference for the presumption being irrebuttable and this was confirmed to be the law in *Mahesan*. As there stated, this is better analysed in terms of the ingredients of the wrong rather than in terms of a presumption.

233. The justification for this lies in the law's strict approach to bribery and the need for deterrence. There is a clear deterrent effect if any would-be briber knows that he or she is to be automatically liable for the amount of any bribe paid. Conversely, if liability depends on identifying and proving precisely how the bribe has been factored into the briber's gain, the difficulty and expense of establishing this would seriously undermine such deterrence.

234. As to (3), the reasons why it would not be appropriate to overturn the long-established law that bribery is a common law wrong equally apply to this established aspect of that law. Again, there is no suggestion that the proper development of the law has been impeded or that this aspect of the existing law has led to results which are unjust or contrary to public policy.

235. Further, this feature of the law was recently confirmed by this court in *Mozambique*. As explained in the judgment of Lord Hodge: "[t]he law assumes that the price of the goods and services purchased by or on behalf of the principal was increased by at least the amount of the bribe" (para 87), citing with approval Lawrence Collins J in *Daraydan* at para 53.

236. For all these reasons we do not consider that it would be appropriate to dispense with this established feature of the common law of bribery.

(b) Rescission

237. The appellants contended that there was no right to rescind at common law because there is or should be no tort of bribery. It was not, however, disputed that if there is a tort of bribery then a common law right to rescission would lie.

238. The significance of there being a common law right to rescind is that it is a self-help remedy that does not depend on there being an order of the court or on any discretionary considerations. Its usefulness as a remedy is, however, limited by the strict common law requirements as to counter-restitution. If it is too late to rescind, there remains a right to bring the transaction to an end for the future – see *Logicrose* per Millett J at p 1260 and *Armagas* per Robert Goff LJ at p 744.

239. As to the equitable right to rescind in cases of bribery, both parties endorsed the analysis of Dixon CJ, Webb, Kitto and Taylor JJ in the High Court of Australia judgment in *Alati v Kruger* (1955) 94 CLR 216, 223-224 which was approved by the Court of Appeal in *O'Sullivan v Management Agency and Music Ltd* [1985] QB 428, 457 per Dunn LJ. There is a concurrent jurisdiction to rescind in equity in a case of bribery, and equity's more flexible approach to counter-restitution means that rescission may be ordered even if it is no longer an available remedy at common law – see generally, O'Sullivan, Elliott and Zakrzewski, *The Law of Rescission*, 3rd ed (2023), paras 10.04 and 10.44 to 10.45.

(c) Double recovery

240. The appellants criticised the Court of Appeal for seemingly ordering both a monetary remedy in the amount of the commission and rescission, as this would allow for double recovery. The respondents accepted, however, that this is not permissible. They pointed out that the consequences of rescission are yet to be determined. If, however, it was necessary to prevent double recovery, credit would be given for the commission payment provided for in the Court of Appeal's order as part of counter-restitution.

(3) Statutory intervention

241. Part of the context in which the obligations of the car dealers are to be assessed is the statutory and regulatory regimes to which they were and are subject.

242. The existence of statutory controls is not a reason for cutting down rights conferred by the common law: *United Utilities Water Ltd v Manchester Ship Canal Co Ltd* [2024] UKSC 22; [2025] AC 761, para 14 per Lord Reed and Lord Hodge. But the courts when

developing the common law strive to make it coherent with a statutory regime in its field of application. There are many examples of the court showing restraint in the development of the common law or declining to develop it if it would be inconsistent with a statutory regime: see, for example, *Johnson v Unisys Ltd* [2001] UKHL 13; [2003] 1 AC 518, paras 56-59 per Lord Hoffmann, para 80 per Lord Millett. In addition, the courts do not have the institutional competence to make regulatory rules: *Philipp v Barclays Bank UK plc* [2023] UKSC 25; [2024] AC 346, paras 22-24 per Lord Leggatt. The historical role of equity in restraining the unconscionable exercise of common law rights or making up for deficiencies in the common law where it operated unfairly does not give the courts such institutional competence. The statutory and regulatory rules which govern the behaviour of the car dealers and finance companies are an important part of the context in which equity operates, and in which the question whether equity should recognise any undertaking to act selflessly needs to be addressed.

243. The first statutory regulation of hire purchase transactions was contained in the Hire-Purchase Act 1938 ("the 1938 Act"), which was later amended and extended by the Hire Purchase Act 1964 ("the 1964 Act"). So far as is relevant to the questions on this appeal, from the outset of this statutory regulation the person who let goods to the hirer ("the owner") had to state in writing to the prospective hirer the cash price at which the goods might be purchased (section 2 of the 1938 Act). The 1938 Act also imposed duties on the owners and sellers to supply documents and information to the hirer about the sums paid and remaining payable by the hirer (section 6). The 1964 Act conferred on the hirer a right of cancellation of the hire purchase contract to be exercised shortly after the contract was finalised (section 4) and deemed the dealer to be the agent of the owner or seller in relation to representations made to the hirer with respect to the goods in the course of the pre-contractual negotiation of the hire purchase contract (section 10). We discuss section 10(2) of the 1964 Act below.

244. Hire purchase legislation was consolidated in the Hire-Purchase Act 1965 which was in turn repealed by the CCA, which introduced a new regulatory framework for consumer credit agreements. The tripartite arrangements between the customer, the lender and the dealer are a form of restricted-use credit agreement and a debtor-creditor-supplier agreement under sections 11(1)(a) and 12(a), and are a sub-set of credit agreements under the CCA: see section 8. We discuss the deemed agency of the dealer in section 56 of the CCA in paras 248-250 below.

245. Part IX of the CCA provides for judicial control and confers on the court powers to grant remedies in relation to unfair relationships between debtors and creditors arising out of a credit agreement. We discuss the claim by Mr Johnson under sections 140A-140C of the CCA at paras 291-338 below.

(i) The statutory agency under the CCA

246. In its Tenth Report (on Innocent Misrepresentation) (Cmnd 1782) published in July 1962, the Law Reform Committee had occasion to consider hire purchase contracts introduced to customers by dealers to finance the acquisition of consumer products. At paras 19-20 the Committee recommended (so as to give effective remedies to customers for misrepresentation) that statute should provide that where negotiations for a hire purchase contract are in fact conducted by a dealer he shall, notwithstanding any agreement to the contrary, be deemed to be the agent of the finance company for the purpose of any representations in respect of the goods which are the subject-matter of the contract. In so recommending the Committee regarded such an agency as not only "right", but "in accordance with the realities of the situation".

247. Parliament responded with section 10 of the 1964 Act, which provided as follows:

> "(1) Where a person (in this section referred to as 'the owner or seller') lets goods under a hire-purchase agreement to which the principal Act applies, or sells goods under a credit-sale agreement to which that Act applies, any representations with respect to the goods to which the agreement relates which were made, either orally or in writing, to the hirer or buyer by a person other than the owner or seller in the course of any antecedent negotiations conducted by that other person shall be deemed to have been made by him as agent of the owner or seller.
>
> (2) Nothing in this section shall exonerate any person from any liability (whether criminal or civil) to which he would be subject apart from this section.
>
> … "

248. Section 10 of the 1964 Act was in due course replaced by section 56 of the CCA. It provides (so far as is relevant) that:

> "(1) In this Act 'antecedent negotiations' means any negotiations with the debtor or hirer—
>
> > (a) conducted by the creditor or owner in relation to the making of any regulated agreement, or

> (b) conducted by a credit-broker in relation to goods sold or proposed to be sold by the credit-broker to the creditor before forming the subject-matter of a debtor-creditor-supplier agreement within section 12(a), or
>
> (c) conducted by the supplier in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement within section 12(b) or (c),
>
> and 'negotiator' means the person by whom negotiations are so conducted with the debtor or hirer.
>
> (2) Negotiations with the debtor in a case falling within subsection (1)(b) or (c) shall be deemed to be conducted by the negotiator in the capacity of agent of the creditor as well as in his actual capacity.
>
> (3) An agreement is void if, and to the extent that, it purports in relation to an actual or prospective regulated agreement—
>
> (a) to provide that a person acting as, or on behalf of, a negotiator is to be treated as the agent of the debtor or hirer, or
>
> (b) to relieve a person from liability for acts or omissions of any person acting as, or on behalf of, a negotiator."

249. It was submitted for the lenders that a deemed statutory agency of the dealer for the lender sat uneasily with the respondent customers' case that, in obtaining a finance package for customers, dealers were acting as their fiduciary (or disinterested) agents. In our view this initially attractive submission fails to account for the wording in subsection (2) of the CCA "as well as in his actual capacity". We consider that, as was made even clearer in section 10(2) of the 1964 Act, this statutory deemed agency was enacted to augment consumers' rights in relation to pre-contractual misrepresentations and questions of the fairness of the credit relationship under section 140A (*R (Clydesdale Financial Services Ltd) v Financial Ombudsman Service Ltd* [2024] EWHC 3237 (Admin); [2025] Bus LR 1323 ("*Clydesdale*"), paras 314-369 per Kerr J) but not to detract in any way from such rights as they might have under the general law as the result of an ad hoc fiduciary duty for the purposes of the equitable claim, or for the purpose of the tort of bribery.

250. Nonetheless the view of the Law Reform Committee that such an agency did no more than reflect the realities of the situation, to which the successive statutory provisions were plainly designed to give effect, does at least suggest that, to distinguished observers in 1962, the realities of the typical dealer-lender-customer hire purchase negotiation did not place the dealer in the position of undertaking a duty of single-minded loyalty to the customer, in relation to the obtaining of a suitable finance package.

(ii) The regulatory context

251. The other statutory and regulatory regimes which provide the context in which the obligations of the dealers fall to be assessed are the relevant provisions of the CCA and the regulatory regime created by FSMA. Since 1 April 2013 the FCA, which is an intervener in this appeal, has been the relevant regulator under FSMA; its predecessor was the Financial Services Authority ("FSA"). Before 1 April 2014 the regulator responsible for consumer credit under the CCA was the OFT. The OFT issued guidance, including "Irresponsible lending - OFT guidance for creditors" (March 2010, updated in February 2011) ("the ILG"), and the "Credit brokers and intermediaries" guidance (November 2011) ("the CBG"), giving its views on the standards which it expected of lenders and credit brokers. Those two guidance documents, which are discussed in the *Clydesdale* judgment, are, so far as relevant, not materially different in their substance from the rules and guidance of the FCA. In its consultation paper of March 2013 on "High-level proposals for an FCA regime for consumer credit" the FSA explained that it intended to replicate the substance of the OFT guidance (para 7.4) with the implication that firms that already complied with it would be unlikely to need to change their behaviour. Therefore, while the OFT guidance is relevant to the claim of Ms Hopcraft, whose transaction predated the involvement of the FCA, we concentrate for the sake of brevity on the FCA's rules and guidance, which are relevant to the claims by Mr Johnson and Mr Wrench, and cross-refer to the OFT provisions in that discussion.

252. On 1 April 2014, the FCA assumed responsibility over consumer credit, and consumer credit activities were included as regulated activities by amending the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 ("the 2001 Order").

253. Hire purchase agreements and conditional sale agreements are regulated credit agreements: see article 60B of the 2001 Order, which makes entering into a regulated credit agreement as lender a regulated activity and defines a credit agreement as "an agreement between an individual or relevant recipient of credit ('A') and any other person ('B') under which B provides A with credit of any amount". Article 36A(1)(a) of the 2001 Order makes credit broking a regulated activity and includes within credit broking "effecting an introduction of an individual or relevant recipient of credit who wishes to enter into a credit agreement to a person ('P') with a view to P entering into by way of business as lender a regulated credit agreement …". As a result, lenders and dealer brokers fall within the FCA's regulatory regime.

254. Section 1B of FSMA gives the FCA the strategic objective of ensuring that the relevant markets function well and sets out three operational objectives: (1) the consumer protection objective, (2) the integrity objective, and (3) the competition objective. On this appeal we are concerned with the consumer protection objective, which is set out in section 1C. That section provides so far as relevant:

> "(1) The consumer protection objective is: securing an appropriate degree of protection for consumers.
>
> (2) In considering what degree of protection for consumers may be appropriate, the FCA must have regard to –
>
>> (a) the differing degrees of risk involved in different kinds of investment or other transaction;
>>
>> (b) the differing degrees of experience and expertise that different consumers may have;
>>
>> (c) the needs that consumers may have for the timely provision of information and advice that is accurate and fit for purpose;
>>
>> (d) the general principle that consumers should take responsibility for their decisions;
>>
>> (e) the general principle that those providing regulated financial services should be expected to provide consumers with a level of care that is appropriate having regard to the degree of risk involved in relation to the investment or other transaction and the capabilities of the consumers in question;
>>
>> …
>>
>> (h) any information which the scheme operator of the ombudsman scheme has provided to the FCA pursuant to section 232A."

255. Section 137A of FSMA empowers the FCA to make general rules which apply to authorised persons with respect to their carrying on of both regulated activities and activities that are not regulated. These general rules may make provision applying to authorised persons even though there is no relationship between them and the persons whose interests are protected by the rules: section 137A(3). Section 139A of FSMA empowers the FCA to give guidance. The FCA's rules and guidance are published in the FCA Handbook, in which rules are set out with the suffix "R" and guidance with the suffix "G". Most of the rules create binding obligations, the breach of which can lead to enforcement action and an action for damages.

256. Among the rules are the "Principles for Businesses" which set out standards at a high level of generality and provide the framework for the FCA's more specific rules. Three principles in PRIN 2.1.1R are relevant to this appeal. They are:

> "6. A firm must pay due regard to the interests of its customers and treat them fairly.
>
> 7. A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair, and not misleading.
>
> 8. A firm must manage conflicts of interest fairly, both between itself and its customers..."

Those principles, which are rules, do not mirror the more rigorous duties of a fiduciary in relation to the exclusion of self-interest, the disclosure of information and the avoidance of conflicts of interest. While it is not relevant to the claims with which this appeal is concerned, on 31 July 2023 a new consumer duty (Principle 12) was introduced which requires firms to deliver good outcomes for retail customers. To the extent that Principle 12 now applies, Principles 6 and 7 do not: PRIN 2A.1.3G.

257. Part of the FCA Handbook is the Consumer Credit Sourcebook (defined above as "CONC") which applies to a firm carrying on credit-related regulated activities. As discussed below in para 262, certain parts of the CONC rules and guidance were changed on 28 January 2021. The provisions set out in paragraphs 258-260 below applied at the times relevant to these appeals.

258. CONC 1.2.2R provides that a firm must ensure that its employees and agents comply with CONC and take reasonable steps to ensure that other persons acting on its behalf do so. Chapter 2 of CONC is entitled "Conduct of business standards: general" and includes in CONC 2.5.3R the obligation on a firm to explain the key features of a

regulated credit agreement to enable the customer to make an informed choice, to take reasonable steps to satisfy itself that a product is not unsuitable for the customer's needs and circumstances, and to advise the customer to read and allow sufficient opportunity to consider the terms of a credit agreement.

259. Chapter 3 of CONC addresses a firm's communications with its customers. Of particular relevance is CONC 3.3.1R which provides that a firm's communications to customers must be "clear, fair and not misleading", "balanced", "presented in a way that is likely to be understood" and "does not disguise, omit, diminish or obscure important information, statements or warnings". In its guidance in CONC 3.7.4G the FCA Handbook provided at the relevant time (1) that a credit broking firm should "make clear, to the extent an average customer of the firm would understand, the nature of the service that the firm provides", (2) indicate in a prominent way the existence of any financial arrangements with the lender that might impact upon the firm's impartiality in promoting a credit product, (3) only describe itself as independent if it is able to provide access to a representative range of credit products, and (4) ensure that any disclosure about the extent of its independence is prominent, clear and easily comprehensible.

260. Most directly relevant to these appeals are the pre-contractual requirements set out in Chapter 4. We quote two rules in full. First CONC 4.5.3R, headed "Commissions: credit brokers" stated:

> "A credit broker must disclose to a customer in good time before a credit agreement or a consumer hire agreement is entered into, the existence of any commission or fee or other remuneration payable to the credit broker by the lender or owner or a third party in relation to a credit agreement or a consumer hire agreement, where knowledge of the existence or amount of the commission could actually or potentially:
>
> (1) affect the impartiality of the credit broker in recommending a particular product; or
>
> (2) have a material impact on the customer's transactional decision.
>
> [Note: paragraph 3.7i (box) and 3.7j of *CBG* and 5.5 (box) of *ILG*]"

(This is substantially the same as the OFT's guidance in CBG at para 3.7. See also, in relation to lenders, ILG at para 5.5 and footnote 26.)

CONC 4.5.4R stated:

> "At the request of the customer, a credit broker must disclose to the customer, in good time before a regulated credit agreement or a regulated consumer hire agreement is entered into, the amount (or if the precise amount is not known, the likely amount) of any commission or fee or other remuneration payable to the credit broker by the lender or owner or a third party.
>
> [Note: paragraph 3.7i (box) of CBG]"

(This is substantially the same as the guidance in the OFT's CBG at para 3.7 and in relation to lenders in ILG at para 5.5 and footnote 26.)

261. It is clear that the regulatory regime differed from the obligations of disclosure of a fiduciary. CONC 4.5.3R required the disclosure of the existence of a commission or fee or other remuneration paid to the broker only where the remuneration had the potential to affect the broker's recommendation or would have a material impact on the customer's decision whether to transact. The focus was on enabling the customer to make an informed decision. Similarly, CONC 4.5.4R required the disclosure of the amount of the remuneration only if the customer requested.

262. The FCA explained in its intervention that concern about high levels of non-compliance with its provisions for the disclosure of commissions prompted it to conduct a review of the motor finance sector and to amend the rules as from 28 January 2021. It explained that the changes made to CONC 3.7.4G and CONC 4.5.3R were intended to be clarification rather than changes in substance. Among the changes made were that in both CONC 3.7.4G and CONC 4.5.3R disclosure of the "existence" of remuneration was replaced by disclosure of the "existence and nature" of the remuneration. The wording of CONC 3.7.4G was also expanded to require the disclosure of the existence and nature of any financial arrangements with the lender not only (as before) when it might affect the firm's impartiality but also when it might "if disclosed by the firm to the customer, affect the customer's transactional decision in relation to the credit product". The obligation of disclosure in CONC 4.5.3R was also amended to require "prominent" disclosure. At the same time the FCA banned discretionary commission arrangements which linked the broker's commission to the interest rate under the credit agreement and gave the broker discretion to set or adjust the interest rate, as this gave an incentive to the broker to increase the customer's interest rate. See now CONC 4.5.6 R and 4.5.7G.

263. The obligations of disclosure under the current regulatory regime remain essentially the same as those which applied at the time of the transactions which are the

subject of these appeals. Those obligations continue to differ materially from those of a fiduciary. In particular, the provisions of CONC do not mandate the disclosure of the amount of a broker's remuneration in all cases, in contrast with the no profit rule, which requires a fiduciary to obtain the informed consent of his or her principal to the receipt of remuneration.

264. The FCA also explained that it did not treat a customer as vulnerable merely because he or she required car finance. As section 1C(2)(a)-(d) of FSMA, which we have set out in para 254 above, shows, Parliament has provided that the FCA in considering the appropriate degree of consumer protection in its regulation must take into account the different levels of transactional risk, differing degrees of experience and expertise of consumers and the general principle that consumers should take responsibility for their decisions.

265. It is clear therefore that the regulatory regime, which the FCA operates on statutory authority, is not premised on car dealers when acting as credit brokers being subjected to the no profit and no conflict rules and having the obligations of full disclosure of a fiduciary. The regime seeks to provide consumer protection in a nuanced way by requiring the car dealer to disclose information to assist the customer where the information would materially affect his or her decision to enter into the transaction, and to disclose the amount of remuneration received from the finance company *if* the customer requests such information before entering into the transaction.

266. This disclosure regime, and the protection against unfair relationships which we discuss in paras 291-338 below, are the statutory and regulatory framework which is part of the objective context in which contentions that dealers were and are under fiduciary duties need to be assessed.

5. The law applied to the facts

267. We stated at the outset of this judgment that, save in relation to the single surviving claim under the CCA, the outcome of this appeal turns on the question whether, having regard to the typical features of tripartite transactions of this kind, the law recognises a no conflict duty, owed by the dealer to the customer, that is a duty to avoid a conflict between its interest and the interest of the customer in relation to the dealer's role in the obtaining and negotiation of a finance package for the customer, such as would make the receipt of an undisclosed commission from the lender otherwise than with the customer's fully informed consent a bribe at common law, or such a receipt by a fiduciary, a breach of that duty giving rise to equitable remedies.

268. The typical features of the four transactions described in detail at paras 14-44 above, which the parties have put forward as relevant to the determination of this issue,

are as follows. First, each of the three participants in the negotiation of the transaction was separately engaged at arm's length from the other participants in the pursuit of a separate commercial objective of their own. The dealer was seeking to sell a car, at a price (and on any other relevant terms such as warranties) sufficient to make an appropriate contribution to the profitable carrying on of its business. The lender was seeking to deploy loan finance to a reasonably creditworthy customer on terms as to interest and security sufficient to contribute to a profitable lending business. The customer was seeking to acquire the use of a suitable car at an affordable price (in terms of periodic and other payments) which compared attractively with the terms available for the acquisition of other cars, available either from the same or from a different dealer. Inevitably, the pursuit of each of those separate objectives had the propensity to come into conflict with the pursuit of the others. Such a conflict could result in the abandonment of the negotiation at any time before completion of the tripartite transaction, leaving the dealer to have to sell the car to another customer, and the customer to seek to acquire a cheaper or more competitively priced car either from the same or another dealer. Or it could lead to a re-negotiation of the terms for the sale of the same car, such as a reduction of the price, or an adjustment of the balance between the deposit and periodic payments to suit the customer's means, in which each of the three parties would have a separate interest. Neither the parties themselves nor any onlooker could reasonably think that each of the participants to such a negotiation was doing anything other than considering their own interests.

269. Secondly, although, viewed separately, the activity of the dealer as an intermediary between customer and lender in seeking a suitable finance package for the customer from among its panel of lenders might be regarded as a form of credit brokerage, this service was not being provided by the dealer as a distinct and separate service in its own right, as the service was in cases such as *Hurstanger* and *Wood*. It was simply a means whereby the dealer could make use of its knowledge and contacts in the car finance market to oil the wheels of what was for it essentially a sale transaction from start to finish. It was something which was ancillary to the sale of the car, like a delivery service, an extended warranty or some additional equipment sourced from a third party such as a tow bar or a roof rack. It was not a service provided to the customer under any contract or even for a separate reward.

270. Thirdly, at no time in the negotiation of any of these transactions did the dealer give any kind of express undertaking or assurance to the customer that in finding a suitable credit deal for the customer it was putting aside its own commercial interest in the transaction as seller. In the Johnson transaction the dealer did state in writing (in the Suitability Document) that it would seek the most suitable finance package from among its panel of lenders, and a similar statement was made orally to Mr Wrench. But neither of these statements involved the dealer undertaking to exclude consideration of its own continuing commercial interest in the transaction. On the contrary, in three out of the four transactions (ie excluding the Hopcraft transaction) there was disclosure that a commission might be paid by the lender to the dealer, but we do not treat that as typical, or essential to our reasoning. Rather the point is that there was no express undertaking or

assurance by the dealer to put its commercial interest aside in seeking a finance package for the customer. Whether there was any implied undertaking is a matter of law, to which we will return.

271. Fourthly, there was no agency undertaken by the dealer for the customer in the negotiation of the finance package with the lender, in the sense in which agency is a term used in the law (rather than just a loose label where someone agrees to do something for someone else). The dealer did not have the authority of the customer to enter into legal relations with the lender. Those legal relations were entered into by the customer personally signing the hire purchase or other finance agreement. The dealer did obtain confidential information about the customer's financial position to enable the lender to appraise the credit risk of lending to the customer. But this intermediary activity did not require or even point to the dealer assuming the mantle of agent for the customer. It is equally consistent with the dealer being an agent for the lender, or just a pure intermediary with no relationship of agency with either.

272. Furthermore, there were important respects in which the dealer typically intermediated between customer and lender as the agent of the lender in relation to the finance package. We have already noted (at para 246 above) that the view of the Law Reform Committee that the statutory agency for the lender which they recommended should be imposed upon intermediaries like the dealers in the present cases did no more than express the existing reality. That deemed statutory agency does not exclude the possibility that the dealer might be the agent of the customer, but there is force in the underlying assumption by the Law Reform Committee that the real agency is in fact in line with the statutory deeming.

273. More to the point, it appears that in two of the transactions under review (Wrench (2) and Johnson) the dealer had the authority of the lender actually to choose the interest rate which was to be chargeable under the hire purchase agreement being negotiated. But again this does not appear to be a universal feature of this type of transaction, so we place no particular reliance upon it. The point which is typical is that, apart from handing over financial information, the dealer had no authority to bind the customer to legal relations with the lender in relation to the finance package.

274. Fifthly, there may typically be at least an element of dependency upon or vulnerability to the dealer affecting the customer in relation to the finance package. There is typically a large differential in their knowledge of the relevant part of the consumer finance market. We say "an element" advisedly because, as is illustrated by the Johnson transaction, there is nothing to stop customers arranging their own finance packages if they wish to do so, or comparing the package offered by the dealer with the best which they can find online, or by ringing around. But dependency or vulnerability are not, as we have already explained, indicia of a fiduciary relationship, in the absence of an undertaking of loyalty.

275. Finally, we do not doubt the conclusion of the Court of Appeal that the way in which a dealer may proffer the service of finding a suitable finance package for the customer may engender an element of trust and confidence reposed by the customer in the dealer, in the sense that the customer may assume that the dealer will locate the most suitable finance package for the customer's particular needs. But we do not consider that the evidence shows that this typically goes beyond that which may frequently arise between commercial parties negotiating at arm's length, such as that which the customer might repose in advice received from a shop assistant or wine waiter, or in the advice which the dealer might give as to the best roof rack to source from the market and add to the car.

276. We now examine whether those typical features of the transactions under review give rise to a fiduciary duty (and therefore no conflict and no profit duties), sufficient to give rise to liability for bribery either at common law or in equity. In our judgment they do not. The typical features of the transactions are incompatible with the recognition of any obligation of undivided or selfless loyalty by the dealer to the customer when sourcing and recommending a suitable credit package.

277. The assumption by the dealer of the position of intermediary or broker between the customer and the lender is, of itself, neutral as to whether an obligation of undivided loyalty is being undertaken by the dealer. The position of intermediary is not, nor is it analogous with, that of a trustee, company director, partner or agent. But the continuing status of the dealer as an arm's length party to a commercial negotiation pursuing its own separate interests is anything but neutral. It is irreconcilably hostile to the recognition of a fiduciary obligation owed to another party in that negotiation. No reasonable onlooker would think that, by offering to find a suitable finance package to enable the customer to obtain the car, the dealer was thereby giving up, rather than continuing to pursue, its own commercial objective of securing a profitable sale of the car.

278. Mr Weir sought to overcome this apparently insuperable obstacle by submitting that the typical transaction should be viewed as if it had two separate stages. Stage one consisted of the negotiation of a disposal, subject to finance, of the car to the customer at an agreed price, in which the dealer and the customer were at arm's length. Stage two was the subsequent sourcing and entry into the requisite finance package, in which customer and dealer shared exactly the same interests, and stood side by side together in negotiating with the lender. The fiduciary obligation arose only at stage two, with no continuing arm's length commercial negotiation to get in the way.

279. We cannot accept that two-stage analysis. In cases where the customer needed finance to obtain the car (rather than just buying it outright), a finance package on acceptable terms was always going to be an integral part of what had to be negotiated to bring the transaction to fruition, and there could be no agreed disposal of the car to the customer unless and until finance terms acceptable to the customer were hammered out.

Until then the dealer faced the risk that the negotiation would fail, or that it might need to reduce the price to enable it to proceed. The dealer's separate interest (potentially in conflict with the interests of the customer) would persist until completion of the whole transaction.

280. When the court put an example of this to Mr Weir, he submitted that in a case where the proffered finance package proved to be unacceptable (or unaffordable) to the customer, the dealer would be released from its stage two fiduciary obligation of loyalty to the customer, to enable it to resume an arm's length commercial negotiating position. We regard that analysis as commercially and legally unrealistic. In our view the dealer remains a separate player in the negotiation from start to finish, free to pursue its own interests at arm's length from the interests of the customer, subject only to the usual common law constraints (eg against misrepresentation), and to such regulatory constraints as may from time to time be imposed.

281. In three of the transactions under review there was, as already noted, a statement by the dealer to the customer that it would seek the most suitable finance package for the customer's requirements. This does not amount to an undertaking of fiduciary loyalty. An offer to find the best deal is not the same as an offer to act altruistically. If made as part of a contract it might give rise to contractual remedies if not performed. If made with no honest intention to do so, it might perhaps sound in misrepresentation. But it cannot be used as a way of inserting a fiduciary obligation into an arm's length commercial relationship, any more than in the case of the shop assistant or the wine waiter. Furthermore, it was in those same three transactions that the dealer disclosed that it might be taking commission from the selected lender, with no suggestion that it would seek the customer's consent before doing so. That is a factor which points away from the dealer's undertaking a fiduciary duty to the customer: a duty which would be inconsistent with the taking of commission without the customer's fully informed consent.

282. Nor is the role of the dealer in selecting and negotiating a suitable finance package for the customer one in relation to which a fiduciary obligation of loyalty can be implied, with or without such a statement of intent by the dealer. It is not to be implied by law, because the role is not one which the law (or equity) treats as habitually or even usually containing such an obligation (unlike the role of trustee, company director, partner or agent), nor is it analogous with any of those established relationships. It is not to be implied in fact because it is incompatible with the arm's length position of the dealer from start to finish of the negotiation of the transaction.

283. While we accept that a relationship of trust and confidence is frequently a consequence of a fiduciary relationship, it is not, for the reasons already given, an invariable pointer to a fiduciary obligation, still less something which of itself gives rise to a fiduciary duty. Relationships of trust and confidence arise in many circumstances. In some, such as between spouses in connection with the raising of security on co-owned

property, it may give rise to a risk or presumption of undue influence, but not to a fiduciary duty. An element of trust and confidence is a widespread feature of many types of commercial transactions, far removed from any fiduciary content. The particular kind of trust and confidence that may point towards a fiduciary relationship is, as we have already explained, trust and confidence that the alleged fiduciary will act with single-minded loyalty towards the claimant, to the exclusion of his or her own interests. Trust and confidence that the dealer on the other side of an arm's length negotiation will secure the best available finance package for the customer is not of that type.

284. Nor is the existence of an element of dependency or vulnerability such a pointer, for the reasons explained in the *Galambos* and *Naaman* cases.

285. So we conclude that, to the extent that the Court of Appeal's judgment and the respondents' case depends upon the recognition of a fiduciary obligation of undivided loyalty on the part of the dealer when selecting and negotiating a finance package for the customer, they are wrong. In particular, the weight which the Court of Appeal placed upon findings of subjective trust and confidence, and of vulnerability, as indicative of a fiduciary relationship, at paras 90-91, 95, 100 and 103 of its judgment was wrong in law.

286. The outcome might be different in a case where the very nature of the service undertaken can only sensibly be provided by a person who puts their own personal interests aside. Then it would satisfy the necessity test for implication. But it is in our judgment inherent in the arm's length status of the dealer at all times during the negotiation of the typical transaction that it retains its own interest as seller, ie that it continues throughout to pursue its own commercial interests, free of any undertaking, express or implied, to act selflessly in the finding and negotiation of a finance package. The customer is not bound to accept the finance package offered. It is simply something which the dealer proffers in his own self-interested desire to get the whole transaction past the finishing post.

287. The alternative basis of the Court of Appeal's decision was (in relation only to bribery) to recognise the existence of what is in the *Wood* case called a "disinterested" duty on the dealer when selecting and negotiating a finance package for the customer.

288. We have concluded, contrary to the Court of Appeal's analysis, that the tort of bribery is not engaged by anything other than the receipt of a benefit by a person who is subject to a fiduciary duty to which the beneficiary of that duty has not given fully informed consent.

289. For all those reasons the claims of the customers in each of the four transactions in equity and in bribery must fail, and the lenders' appeals on that ground allowed.

290. That outcome makes it unnecessary for us to apply to the facts any of the other of our conclusions on the many issues of law raised by this appeal. Issues as to the adequacy of the disclosures made to the customers about possible commissions, the availability of a restitutionary remedy against the briber and the availability of rescission at law or in equity no longer arise, and any attempt to determine them on the hypothetical basis that there did exist the necessary fiduciary duty would be obiter, and best left to an occasion when they really mattered.

6. Mr Johnson's claim under section 140A of the CCA

291. This ground arises only in relation to the claim by Mr Johnson. We approach this ground on the basis that no breach of fiduciary duty has been established in his case and that FirstRand is under no accessory liability.

292. The facts relating to Mr Johnson's claim against FirstRand are set out in detail at paras 39-44 above. It is convenient to refer to the following matters at this point. In July 2017 Mr Johnson wished to purchase a car and located a second-hand Suzuki Swift at The Trade Centre Wales. The agreed cash price of the vehicle was £6,499. Mr Johnson paid Trade Centre Wales a non-refundable deposit of £100 to secure the vehicle at that price for three days. He required finance to purchase the car. The Trade Centre Wales told him that it could arrange finance from a panel of lenders. On 29 July 2017 Mr Johnson signed a Suitability Document prepared by The Trade Centre Wales. He also completed and signed a Finance Proposal Form and entered into a credit agreement with FirstRand. The credit agreement comprised two elements: a hire purchase agreement and a personal loan agreement ("the Johnson Credit Agreement"). The amount of credit for the hire purchase element was £4,803.69 and that for the personal loan agreement was £1,595.31, totalling £6,399. FirstRand paid The Trade Centre Wales commission of £1,650.95 for the introduction of Mr Johnson.

(2) The statutory provisions

293. It was conceded at the trial of Mr Johnson's claim that, because of the personal loan element of the Johnson Credit Agreement, there were antecedent negotiations within section 56(1)(c) of the CCA and, as a result, negotiations with Mr Johnson were deemed by section 56(2) to be conducted by The Trade Centre Wales in the capacity of agent of FirstRand as well as in its actual capacity.

294. Section 140A of the CCA provides in material part:

> "(1) The court may make an order under section 140B in connection with a credit agreement if it determines that the

> relationship between the creditor and the debtor arising out of the agreement (or the agreement taken with any related agreement) is unfair to the debtor because of one or more of the following—
>
> > (a) any of the terms of the agreement or of any related agreement;
> >
> > (b) the way in which the creditor has exercised or enforced any of his rights under the agreement or any related agreement;
> >
> > (c) any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement).
>
> (2) In deciding whether to make a determination under this section the court shall have regard to all matters it thinks relevant (including matters relating to the creditor and matters relating to the debtor)."

295. Section 140B(9) of the CCA places the burden of proof in relation to unfairness on the creditor:

> "If, in any such proceedings, the debtor or a surety alleges that the relationship between the creditor and the debtor is unfair to the debtor, it is for the creditor to prove to the contrary."

296. Section 140B sets out the available remedies:

> "(1) An order under this section in connection with a credit agreement may do one or more of the following—
>
> > (a) require the creditor, or any associate or former associate of his, to repay (in whole or in part) any sum paid by the debtor or by a surety by virtue of the agreement or any related agreement (whether paid to the creditor, the associate or the former associate or to any other person);

> (b) require the creditor, or any associate or former associate of his, to do or not to do (or to cease doing) anything specified in the order in connection with the agreement or any related agreement;
>
> (c) reduce or discharge any sum payable by the debtor or by a surety by virtue of the agreement or any related agreement;
>
> (d) direct the return to a surety of any property provided by him for the purposes of a security;
>
> (e) otherwise set aside (in whole or in part) any duty imposed on the debtor or on a surety by virtue of the agreement or any related agreement;
>
> (f) alter the terms of the agreement or of any related agreement;
>
> (g) direct accounts to be taken, or (in Scotland) an accounting to be made, between any persons."

297. The test of the unfairness of the relationship of debtor and creditor is stated in general terms which permit courts to take account of a very broad range of factors. The application of the test in each case will, inevitably, be a highly fact-sensitive exercise (see *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61; [2014] 1 WLR 4222 ("*Plevin*"), per Lord Sumption at paras 10 and 29; *Smith v Royal Bank of Scotland plc* [2023] UKSC 34; [2024] AC 955 ("*Smith*"), per Lord Leggatt at para 22).

298. Pursuant to section 137A(1) of FSMA the FCA has the power to make such rules in respect of the carrying on of regulated activities by authorised persons as appear to the FCA to be necessary or expedient for the purpose of advancing one or more of its operational objectives. The rules applicable to consumer credit related activities including credit broking are contained in the Consumer Credit Sourcebook of the FCA (which we have already defined as "CONC"). Reference is made below to the CONC rules in force in July 2017 when Mr Johnson entered into these arrangements.

(2) Mr Johnson's pleaded case in relation to section 140A

299. In his Particulars of Claim dated 18 November 2021 Mr Johnson alleged the following breaches by FirstRand and The Trade Centre Wales of their regulatory obligations under CONC which made the relationship between Mr Johnson and FirstRand unfair under section 140A of the CCA:

(1) FirstRand, in breach of CONC 1.2.2R, failed to ensure that its employees and agents complied with CONC and failed to take reasonable steps to ensure that other persons acting on its behalf complied with CONC.

(2) The Trade Centre Wales, acting as agent for FirstRand, in breach of CONC 2.3.2R, failed to explain key features in such a way as to provide Mr Johnson with an informed choice by failing to explain the existence and/or amount of the Discretionary Interest Commission or Fixed Fee Commission.

(3) The Trade Centre Wales, acting as agent for FirstRand, in breach of CONC 2.5.8(13)R, allowed preference to be given to a particular credit product, with the object of personal gain, rather than in the best interest of Mr Johnson.

(4) The Trade Centre Wales, acting as agent for FirstRand, in breach of CONC 3.3.1R, communicated in an unfair manner by failing to explain the existence and/or amount of the Discretionary Interest Commission or Fixed Fee Commission.

(5) The Trade Centre Wales, acting as agent for FirstRand, in breach of CONC 3.7.4G, failed to indicate to Mr Johnson in a prominent way the existence of any financial arrangements with a lender that might impact upon the firm's impartiality in promoting a credit product to a customer, by failing to explain the existence and/or amount of the Discretionary Interest Commission or Fixed Fee Commission.

(6) FirstRand, in breach of CONC 4.5.2G, failed to ensure that the interest rate ultimately charged and the commission payment were justified based on the extra work of the firm involved in that business.

(7) The Trade Centre Wales, acting as agent for FirstRand, in breach of CONC 4.5.3R, failed to communicate to Mr Johnson in good time (or at

> all), by failing to explain the existence and/or amount of the Discretionary Interest Commission or Fixed Fee Commission, thereby failing to disclose matters which did or could affect the impartiality of The Trade Centre Wales in recommending a particular product, or have a material impact on Mr Johnson's transactional decision.

300. It was alleged that the breaches of CONC rules were actionable under section 138D of FSMA. It was further alleged that Mr Johnson had suffered loss and damage in the form of increased credit charges.

301. Mr Johnson also relied in this regard upon his pleaded case on a secret commission. He alleged an express or implied representation that the Johnson Credit Agreement was competitive and represented the most advantageous terms for Mr Johnson. It was alleged that the existence and amount of the commission payment had not been expressly communicated to Mr Johnson and he was not aware that a commission would or might be paid to The Trade Centre Wales.

302. In addition Mr Johnson relied in this regard on his case of breach of fiduciary duty by The Trade Centre Wales and accessory liability by FirstRand.

303. It was therefore alleged that, by reason of these matters, the relationship between Mr Johnson and FirstRand was unfair pursuant to section 140A of the CCA.

304. Further or in the alternative, it was alleged that:

> "the failure of the Broker and/or Defendant in not communicating the existence or level of commission and/or that there existed a Discretionary Interest Commission or Fixed Fee Commission meant that the Claimant was not placed into an informed position, causing an unfair relationship between the Claimant and Defendant."

(3) The judgments below

(a) Judgment of DDJ Sandercock

305. DDJ Sandercock held that the commission was not a discretionary interest commission or fixed fee commission. He held that, as a result, the pleaded allegations relating to those forms of commission failed. He found that the commission was based on

the capital, not the interest rate, and that the interest rate of 8% was the lowest rate the lender offered for cars up to 5 years old. He went on to hold that there was nothing unfair in the agreement or the surrounding circumstances which would cause the court to consider making an order under section 140B. He made the following findings in relation to fairness, at para 65:

> "a. I find that the claimant displayed an almost wilful disregard of the precontract information and the terms and conditions of the agreement. (…)
>
> b. The claimant persisted in the mistaken assertion that the amount of commission was based on the interest payable under the agreement. I accept Mr Irving's evidence that the commission was based entirely on the amount of the capital of the loan.
>
> c. It was submitted on the claimant's behalf that if the commission had been less the instalments would have been lower. There was no evidence to support this submission. I find that it was illogical in any event because the only variable in the arrangements between both claimant and defendant and defendant and TCW was the range of interest which the broker could have applied. Having applied the minimum rate available the claimant could not have paid any less.
>
> d. [T]he claimant's instalments would have been the same regardless of the amount of commission or if no commission was payable at all[.]
>
> e. [T]he claimant is not entitled to claim against the defendant if he has made a bad bargain over the price of the car. This is not an issue relating to the fairness of the credit agreement.
>
> f. There was no evidence that the dealer/broker had caused the claimant to enter into an agreement for a higher sum of money than he needed. Had this applied it might have been an argument that the commission was inflated but this is not the case. It is not for the court to speculate about what might have happened in hypothetical circumstances.
>
> g. The defendant had complied with CONC.

> h. The claimant had made himself aware of interest rates and repayments and was content to enter into this agreement on its particular terms[.]
>
> i. [T]here is nothing in the agreement which is itself unfair.
>
> j. [T]he antecedent documents and clause 13.6 of the Terms and Conditions provided ample information and opportunity for the claimant to understand his position exactly but he chose not to read them."

306. As the Court of Appeal pointed out (at para 163), the approach of DDJ Sandercock was unduly affected by the fact that the pleadings alleged that the commission was a Discretionary Interest Commission or Fixed Fee Commission when it was not. This led the DDJ to reject pleaded allegations of breaches of the CONC rules which were in fact made out on the facts. Furthermore, he made no findings as to whether the dealer had disclosed the following important aspects of the agreement between the dealer and the lender (identified by the Court of Appeal at para 150):

> (1) The dealer was entitled to payment of a commission if the agreement was concluded.
>
> (2) The agreement between the dealer and the lender required the dealer to offer all its business to the lender which had first refusal.
>
> (3) The agreement guaranteed the dealer a commission which amounted to 25% of the total sum advanced.

(b) Judgment of HHJ Jarman KC

307. Mr Johnson appealed against the order of DDJ Sandercock dismissing his claim. The appeal was heard by HHJ Jarman KC, who was concerned that the DDJ had dealt inadequately with the claim under section 140A of the CCA. Focussing on whether the failure to confirm that a commission was paid or the amount of it rendered the relationship between Mr Johnson and FirstRand unfair, Judge Jarman noted that the DDJ had not made a finding on whether the dealer had disclosed the commission. Bearing in mind the observation of Lord Sumption in *Plevin*, para 17, that the overall consideration of fairness under the breadth of section 140A involves a wide range of considerations and forensic judgment, he concluded, entirely correctly in our view, that a finding as to whether or not the dealer made such disclosure might well have a material impact on the overall

consideration of whether the relationship between Mr Johnson and the lender was fair. Accordingly, he remitted the consideration of the fairness of the relationship for a finding of whether such disclosure was made by the dealer and a reconsideration of the overall issue of fairness in this context. He did not consider it appropriate to remit just one or more points on this issue, given that they were part of an overall consideration of fairness.

308. We note, as did the Court of Appeal (at para 164), that the Suitability Document and the Dealer Terms of Business were not expressly drawn to the attention of either DDJ Sandercock or Judge Jarman.

(c) Appeal to the Court of Appeal

309. On the appeal to the Court of Appeal, that court concluded that Judge Jarman had been in a position to make a determination as to whether Mr Johnson was entitled to protection under section 140A of the CCA, as was the Court of Appeal. It considered that this was a very clear case of an unfair relationship. In its view, the "very high" commission to the broker, which was 25% of the sum advanced, was a key fact.

310. The Court of Appeal also made findings of unfairness which had not formed part of Mr Johnson's positive case on unfairness.

311. First, it considered that the sum borrowed and paid to the dealer was much more than the car was worth. It is correct that the cash price of the vehicle (£6,499) exceeded its value according to Glass's Guide. Because FirstRand would only offer hire purchase contracts for up to 100% of the Glass's Guide retail price for a vehicle under 5 years old and in good condition, a personal loan agreement was necessary. In the result, credit of only £4,803.69 was provided under the hire purchase element of the Johnson Credit Agreement. Mr Johnson paid a deposit of £100 but did not provide a vehicle in part exchange. A personal loan was therefore necessary to fund the difference of £1,595.31. This was provided under the personal loan element of the Johnson Credit Agreement. However, whether Mr Johnson made a bad bargain in the sense of paying considerably above the market value of the car was not pleaded, and the discrepancy between the sale price and the Glass's Guide price was not explored at the trial. As Mr Howard points out on behalf of FirstRand, there could be many possible explanations. While in other cases the supply of a vehicle at an inflated price could be highly relevant to whether the relationship of lender and customer was unfair, in our view the Court of Appeal erred in taking account of this discrepancy when assessing the fairness of the relationship between Mr Johnson and FirstRand. On behalf of Mr Johnson, Mr Weir has expressly disavowed reliance on this ground of unfairness.

312. Secondly, the Court of Appeal considered (at para 161) that the difference between the sum borrowed and paid to the dealer and the actual value of the car "was largely

accounted for by commission". It proceeded on the basis that the discrepancy between the cash price of the car and the Glass's Guide valuation, as reflected in the personal loan of £1,595.31, was largely accounted for by the payment of the commission of £1,650.95. It considered (at para 154) that the proceeds of the additional personal loan were, in effect, required to pay the dealer the commission, and that if the commission had not been payable Mr Johnson would have been able to fund the purchase at the actual Glass's Guide price using the hire purchase agreement which the lender offered. However, linking the two in this way was a factual error on the part of the Court of Appeal. On behalf of Mr Johnson, Mr Weir accepts that the similarity in amount between the commission paid by FirstRand and the personal loan was a coincidence, and he did not seek to support the Court of Appeal's conclusion on unfairness on that ground.

313. Thirdly, the Court of Appeal concluded (at para 170) with regard to the contractual tie between FirstRand and The Trade Centre Wales, that the true nature of the relationship between the lender and the broker was not disclosed by the lender.

314. Fourthly, the Court of Appeal concluded (at paras 169 and 170) with regard to the Suitability Document, that the relationship between the lender and the broker was falsified by the broker and actively concealed by the broker acting as agent for the lender by virtue of section 56 of the CCA.

315. It is submitted on behalf of FirstRand that the further third and fourth findings should not have been made by the Court of Appeal because they were not pleaded, nor were they based on findings by DDJ Sandercock. We reject this submission for the following reasons:

> (1) In assessing the fairness of a relationship under section 140A it is necessary to take into account all matters the court considers relevant (section 140A(2); *Plevin* per Lord Sumption at para 10; *Smith* per Lord Leggatt at para 22).
>
> (2) The burden is on FirstRand to show that the relationship is not unfair (section 140B(9)).
>
> (3) It was pleaded on behalf of Mr Johnson that the relationship was unfair by reason of breaches of CONC. Mr Johnson expressly relied on CONC 2.5.8(13)R (duty on a firm not to give preference to the credit products of a particular lender where the object of doing so is for, or can reasonably be concluded as having been for, the personal gain of the firm rather than in the best interests of the customer) and CONC 3.7.4G (duty on a firm in a communication with a customer to indicate in a prominent way the existence of any financial arrangements with a lender that might impact

upon the firm's impartiality in promoting a credit product to a customer) (Particulars of Claim, paras 21, 23, 25(2)(4), 50).

(4) Reference has been made above to the fact that the Suitability Document and the Dealer Terms of Business were not expressly drawn to the attention of either DDJ Sandercock or Judge Jarman. The Suitability Document was in Mr Johnson's list of documents but FirstRand did not seek inspection.

(5) It is correct that DDJ Sandercock found that Mr Johnson did not read the documents. The Court of Appeal acknowledged this (at para 168). However, the Court of Appeal's conclusions in relation to the Suitability Document did not proceed on the basis that Mr Johnson had been misled but on the basis that the Suitability Document was objectively misleading. The further significance of Mr Johnson failing to read the documents is considered at para 336 below. Crucially, these aspects of unfairness on which the Court of Appeal additionally relied did not involve any real risk of procedural unfairness to the lender in the sense that something which it might have raised in evidence was excluded. Indeed, the two main features of the transaction on which we focus below – the size of the undisclosed commission and the tie – are incontrovertible.

(6) Accordingly, we consider that the Court of Appeal was both entitled and required to take account of these matters when considering the fairness of the relationship.

316. However, the errors on the part of the Court of Appeal identified at paras 309 and 312 above vitiate its decision on the issue of unfairness under section 140A of the CCA. Accordingly, it is for this court to decide the issue or to remit it to a District Judge.

(4) Was the relationship unfair?

317. On this further appeal to the Supreme Court, FirstRand submits that the issue whether the relationship between FirstRand and Mr Johnson was unfair should be remitted for decision by a District Judge. Mr Johnson submits that this court should uphold the conclusion of the Court of Appeal on this ground.

318. In *Plevin* Lord Sumption provided the following guidance (at para 10):

> "Section 140A is deliberately framed in wide terms with very little in the way of guidance about the criteria for its application, such as is to be found in other provisions of the Act conferring discretionary powers on the courts. It is not possible to state a precise or universal test for its application, which must depend on the court's judgment of all the relevant facts. Some general points may, however, be made. First, what must be unfair is the relationship between the debtor and the creditor. In a case like the present one, where the terms themselves are not intrinsically unfair, this will often be because the relationship is so one-sided as substantially to limit the debtor's ability to choose. Secondly, although the court is concerned with hardship to the debtor, subsection 140A(2) envisages that matters relating to the creditor or the debtor may also be relevant. There may be features of the transaction which operate harshly against the debtor but it does not necessarily follow that the relationship is unfair. These features may be required in order to protect what the court regards as a legitimate interest of the creditor. Thirdly, the alleged unfairness must arise from one of the three categories of cause listed at sub-paragraphs (a) to (c). Fourthly, the great majority of relationships between commercial lenders and private borrowers are probably characterised by large differences of financial knowledge and expertise. It is an inherently unequal relationship. But it cannot have been Parliament's intention that the generality of such relationships should be liable to be reopened for that reason alone."

319. In its helpful written case the FCA, while observing that a relationship will not be unfair merely because a commission was paid of which a borrower was unaware, has identified the following as relevant factors pointing towards unfairness. The court agrees that the factors in this non-exhaustive list will normally be relevant: the size of the commission relative to the charge for credit; the nature of the commission (because, for example, a discretionary commission may create incentives to charge a higher interest rate); the characteristics of the consumer; the extent and manner of the disclosure (including by the broker insofar as section 56 is engaged); and compliance with the regulatory rules.

320. The agreement between FirstRand and The Trade Centre Wales governing their business relationship was contained in FirstRand's letter dated 18 July 2017. It provided in clause 1.15:

> "Commission Disclosure. You agree to disclose to the customer early in the sales process in relation to each regulated finance agreement that commission may be payable to you for acting

> as a credit broker and/or credit intermediary. If requested to do so by the customer you will inform the customer of the amount of any commission and or other benefits payable by us to you in relation to the prospective or actual regulated (sic)".

Before entering into the hire purchase agreement with FirstRand, Mr Johnson was given by the dealer a document entitled "Suitability Document". This included the following statement:

> "We do not charge a fee for handling your application for Consumer Credit, but we may receive a commission from the product provider."

Mr Johnson then signed the hire purchase agreement with FirstRand. In doing so, Mr Johnson made a standard form declaration that his attention had been drawn to the provisions of clause 10 of FirstRand's standard terms and conditions and that he had received and read the pre-contract information. Clause 10 concerned the liability of FirstRand and is of no particular relevance to the present issue. However, clause 13.6 of FirstRand's standard terms and conditions, to which attention was not expressly drawn, provided:

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

It was Mr Johnson's evidence at trial that the payment of commission was not disclosed to him orally and that he was not aware of it because he did not read the Suitability Document or FirstRand's terms and conditions. In his witness statement he said that he was handed an enormous amount of paperwork and asked to sign the agreement. He said that the whole process felt very rushed and he did not really feel he could take time to read through the paperwork. It is clear that the commission was not disclosed. Nevertheless, we agree with the FCA and Court of Appeal (para 20) that the mere fact that there has been no disclosure of the commission, or only partial disclosure, will not necessarily suffice of itself to make the relationship between lender and customer unfair for the purposes of the CCA. It is a factor to be taken into account in the overall balancing exercise required under section 140A.

321. We have referred above to the possibility that Mr Johnson may have made a bad bargain in that the cash price for the purchase of the vehicle was substantially in excess of its market value according to Glass's Guide. However, as explained at para 311 above, the reason for this discrepancy has not been established and so the point cannot assist Mr Johnson.

322. The Particulars of Claim make reference to CONC 2.3.2R, which provides that a firm must explain the key features of a regulated credit agreement to enable the customer to make an informed choice. The pleaded breach of that provision was expressed in terms of the alleged failure to explain the existence and/or amount of the Discretionary Interest Commission or Fixed Fee Commission, for which, it is now accepted, there was no basis. To the extent that Mr Weir relied on this provision in support of a wider case, it appears that Mr Johnson was made aware of the cash price, the APR, the monthly payments and the total amount he was paying for credit. Mr Johnson was given a document entitled "Pre-Contract Credit Information" which contained the information required by section 55 of the CCA. However, Mr Johnson was not made aware of the commission or the dealer's tie to FirstRand, matters considered further below.

(i) The size of the commission

323. The commission paid by FirstRand to The Trade Centre Wales was £1,650.95. This must be compared with the total amount payable by Mr Johnson under the credit agreement of £9,422.20 (17.5%), the advance of credit of £6,399 (26%), the total charge for credit (comprising interest and fees) of £3,023.20 (55%) and the interest payments alone of £2,635.20 (63%).

324. In support of his case on the size of the commission Mr Weir, on behalf of Mr Johnson, relies heavily on the decision of this court in *Plevin*. That case was concerned with payment protection insurance ("PPI") which was taken out by Mrs Plevin in conjunction with a loan from the lender's designated PPI provider. The lender paid commission to the broker in respect of both the loan and the PPI and itself received commission from the PPI provider. As a result, 71.8% of the PPI premium was made up of commission, not disclosed to the claimant, which was shared by the broker and the lender. Lord Sumption, with whom the other members of the Supreme Court agreed, noted (at para 18) that Mrs Plevin must be taken to have known that some commission would be payable to intermediaries out of the premium before it reached the insurer. However, Lord Sumption explained, at some point commissions may become so large that the relationship cannot be regarded as fair if the customer is kept in ignorance. Wherever the tipping point may lie, the commissions paid in that case were a long way beyond it. Mrs Plevin did not have to take PPI at all. Any reasonable person in her position who was told that more than two thirds of the premium was going to intermediaries would be bound to question whether the insurance represented value for money. The fact that she was left in ignorance made the relationship unfair.

325. Mr Weir submits, by reference to *Plevin*, that the question is whether the commission was so high that it was unfair to leave Mr Johnson in ignorance of the amount because he would be unable to make an informed decision whether to enter into the credit agreement. He accepts that the context is critical to an assessment of whether the size of the commission renders the relationship unfair. He submits that in the present case the

size of the commission was clearly relevant to the claimant's decision-making, not least because most people would assume a commission of this size must have had an effect on the amount they were paying under the credit agreement. He submits that the interest and other charges (which make up the APR) represent the cost of finance and are the appropriate comparator. He submits that the fact that the commission was 55% of the total charge for credit equates to the position in *Plevin* where the commission was 71.8% of the cost of the PPI policy premiums. It is his case that Mr Johnson was in no better position to assess the true value for money of his credit agreement by reference to the APR than Mrs Plevin was her PPI agreement by reference to the premium, and the fact that he needed finance to acquire the car made him more vulnerable.

326. The analogy between the facts of *Plevin* and those of the present case is imprecise and it is not possible simply to apply the reasoning of the Supreme Court in *Plevin* to the present case. The two cases are concerned with different products on different markets. In particular, as Mr Howard points out on behalf of FirstRand, the decision to enter into a finance agreement was not optional for Mr Johnson, because without finance he could not pay for the car. He had to decide whether to purchase the car at all and, if so, with which finance product. He had been provided with information as to the price of the car and the cost of the finance agreement (interest rate, fees, APR and monthly repayments). He was, at least, in a position to compare the cost of the finance agreement offered to him with other options available on the market.

327. Nevertheless, the fact that the undisclosed commission was so high is a powerful indication that the relationship between Mr Johnson and FirstRand was unfair. If he had been told the fact and the amount of the commission, Mr Johnson would have been able to ask why it was so high. It was his evidence at trial that he had been told by his solicitors that FirstRand made a commission payment to The Trade Centre Wales in the sum of £1,650.95 which he understood represented almost 70% of the cost of credit. His evidence was that he had no idea that commission was commonly paid in this industry and he was very surprised to learn how much commission was paid under his agreement. He understood that he paid interest as part of the agreement and assumed that all of the charges under the agreement were that interest. He had always thought that car dealerships made their money by making a profit on the cars they sell rather than by arranging finance. He added:

> "If I had been told that the overwhelming majority of the cost of this agreement to me was just a commission payment to the dealer, I simply would have walked away and gone to a different dealership."

Even when allowance is made for exaggeration in this evidence, it is clear that the amount of the undisclosed commission would have been a major consideration in Mr Johnson's mind had he been made aware of it at the time of entering into the arrangements, as it would be to any similar customer. In any event, it is not necessary for him to prove that he would not have proceeded with the transaction had he been made aware of the fact and amount of the commission (see *Plevin* per Lord Sumption at para 20; *Smith* per Lord Leggatt at paras 25 and 29).

328. DDJ Sandercock accepted the evidence of Mr Irving, called on behalf of FirstRand, that the commission was based entirely on the amount of the capital of the loan. We take this to mean that it was calculated on the amount of the capital of the loan. DDJ Sandercock rejected the submission that if the commission had been less the instalments would have been lower, on the grounds that there was no evidence to support it and that it was illogical as Mr Johnson was already paying the lowest rate of interest permitted under the arrangement between the dealer and FirstRand. It is correct that the cost of the commission was not added directly to the cost of credit to Mr Johnson. Furthermore, it was not added directly to the cost of the vehicle, the price for which had already been agreed. Nevertheless, as Mr Howard accepted in his submissions, the cost to FirstRand of paying the commission was a part of FirstRand's overheads and must have been recovered indirectly from borrowers, including Mr Johnson, within the charges FirstRand made for credit. Indeed, Mr Irving accepted in cross examination that the commission was paid out of the interest which Mr Johnson paid. In this way the commission was recovered by FirstRand.

329. The failure to disclose to Mr Johnson the existence of the commission was a breach of CONC 4.5.3R which provided at the relevant time:

> "4.5.3R A credit broker must disclose to a customer in good time before a credit agreement or a consumer hire agreement is entered into, the existence of any commission or fee or other remuneration payable to the credit broker by the lender or owner or a third party in relation to a credit agreement or a consumer hire agreement, where knowledge of the existence or amount of the commission could actually or potentially:
>
> (1) affect the impartiality of the credit broker in recommending a particular product; or
>
> (2) have a material impact on the customer's transactional decision."

(ii) The commercial tie

330. The existence of a commercial tie between The Trade Centre Wales and FirstRand and its non-disclosure to Mr Johnson is a further consideration highly material to the issue of the unfairness of the relationship between Mr Johnson and FirstRand under section 140A.

331. The Suitability Document, given to Mr Johnson by The Trade Centre Wales prior to his signing the hire purchase agreement with FirstRand, states that The Trade Centre Wales is authorised and regulated by the FCA and is permitted to advise on and arrange consumer credit contracts. It states in material part:

> "We will undertake an assessment of your Demands and Needs for Consumer Finance and provide an illustration of the Consumer Finance product that best meets your individual requirements based upon the answers you provide. …
>
> We do not offer a whole market option for Consumer Credit; we offer products from a select panel of lenders, details of which can be seen below: …"

The document then sets out the names and addresses of 22 lenders, all of which save those of FirstRand have been redacted in the copy of the document disclosed in these proceedings. FirstRand appears eleventh in the list. The document then continues:

> "The following pages provide a record of the responses given by you during the assessment of your Demands and Needs for Consumer Finance. The answers provided have been used to generate the following illustration of the Consumer Finance product that best meets your individual requirements."

The document then sets out some of the terms of the proposed hire purchase agreement with FirstRand, including its duration (60 months), the option to purchase fee (£20), the initial payment (£153.72), the monthly payments (£153.72), the final payment (£352.72) and the flat rate for credit (8%).

332. In fact, the relationship between FirstRand and The Trade Centre Wales was the subject of a tie. Clause 2.1 of the Dealer Terms of Business of FirstRand (trading as MotoNovo Finance) provided:

> “Providing Credit
>
> The Dealer shall introduce Applicants to MNF by submitting Proposals to MNF using the online system or by fax or by any other agreed means (solely at the discretion of MNF). The Dealer agrees not to refer any Applicant to any party other than MNF unless the Dealer has first submitted a Proposal in relation to the Applicant to MNF and MNF has declined to accept such Proposal.
>
> The Dealer shall use reasonable endeavours to introduce Applicants to MNF in line with the rates and terms agreed from time to time.”

We note that the Dealer Terms of Business with FirstRand did not include a term requiring the dealer to draw the tie to the attention of customers.

333. Neither the Suitability Document nor any other document provided by The Trade Centre Wales to Mr Johnson disclosed the existence of the tie. We agree with the Court of Appeal (at para 155) that this omission of a key fact was a suppression of the truth. The Suitability Document created, and was clearly intended to create, the false impression that the dealer was offering “products from a select panel of lenders” and recommending “the Consumer Finance product that best meets your individual requirements based upon the answers you provide”. The reality was very different. Mr Johnson was not receiving the benefit of access to a range of possible lenders nor was he receiving advice as to which of their products best met his individual requirements. The Trade Centre Wales was simply putting forward the terms offered by FirstRand and acting in compliance with its undisclosed contractual obligation to FirstRand.

334. Here we agree with the conclusions drawn by the Court of Appeal (at para 166):

> “In fact, the reality was that the Trade Centre Wales made no attempt to be impartial between different lenders in the interests of the consumer. All the business was offered to FirstRand. The dealer gave the customer the Suitability Document which actively concealed the reality. The dealer offered no service to Mr Johnson as a broker at all except to introduce him to one lender to whom it was tied by Clause 2.1 of the Dealer Terms of Business and from whom it took a lavish commission. The existence of the relationship between lender and dealer in this case was such as to require honest and accurate disclosure so that the customer could decide whether he wanted to buy a car

> with finance obtained through a dealer/credit broker who would conduct at least some review of what the credit market, or a panel of lenders within it, might offer him."

335. The statements in the Suitability Document were made in negotiations which are deemed to have been conducted by The Trade Centre Wales in the capacity of agent of FirstRand as well as in its actual capacity, by virtue of section 56(2) of the CCA. Furthermore, there were breaches of the following provisions of CONC in force at the relevant time:

> "3.3.1R A firm must ensure that a communication or a financial promotion is clear, fair, and not misleading."

> "3.7.3R A firm must, in a financial promotion or a document which is intended for individuals which relates to its credit broking, indicate the extent of its powers and in particular whether it works exclusively with one or more lenders or works independently."

> "3.7.4G A firm should in a financial promotion or in a communication with a customer:
>
> …
>
> (2) indicate to the customer in a prominent way the existence of any financial arrangements with a lender that might impact upon the firm's impartiality in promoting a credit product to a customer; ..."

(iii) Mr Johnson's failure to read the documents

336. In deciding whether to make a determination of an unfair relationship between creditor and debtor under section 140A, the court is required to have regard to all matters it thinks relevant. The assessment involves a balancing of relevant factors. In the present case an important item to be placed on the other side of the scales is Mr Johnson's failure to read any of the documents provided by The Trade Centre Wales either before concluding the agreements or during the 14 day withdrawal period which followed. DDJ Sandercock concluded that Mr Johnson "displayed an almost wilful disregard of the precontract information and the terms and conditions of the agreement". Had Mr Johnson read in detail the Suitability Document or the standard terms and conditions attached to

the hire purchase agreement he would have been informed of the possibility that a commission might be payable by FirstRand to The Trade Centre Wales. Had he decided to pursue the matter he was likely to have discovered the amount of the commission. In fairness to Mr Johnson, however, it must be pointed out that he was commercially unsophisticated. It must be questionable to what extent a lender could reasonably expect a customer to have read and understood the detail of such documents. Furthermore, no prominence was given to the relevant statements in these documents. In the case of FirstRand's standard terms and conditions, clause 13.6 was surrounded by a mass of other terms. It should also be pointed out that particular attention was drawn to clause 10 of the terms and conditions but not to clause 13.6. A customer would not expect that a commission of this size would be payable and, as a result, a term of the importance of clause 13.6 is required to be displayed more prominently and the customer's attention expressly drawn to it. (In this regard see, generally, *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163 per Lord Denning MR at p 170C, a decision on incorporation of extravagant terms as opposed to their fairness.) So far as the contractual tie between The Trade Centre Wales and FirstRand is concerned, there was nothing in the documentation which could have alerted Mr Johnson to the true position. On the contrary, the documentation created a false impression that the dealer had access to a selected panel of 22 lenders and had selected the deal which was most suitable for Mr Johnson.

(iv) Conclusion on the CCA issue

337. In the light of the errors made by the Court of Appeal, set out at paras 311-312 above, we have given careful consideration to whether the issue of unfairness under section 140A should be remitted for decision by a District Judge or whether it is open to this court to decide the matter. We take the latter course for the following reasons:

> (1) There are no outstanding factual disputes in relation to this issue. This court is fully informed and has had the benefit of very detailed and expert submissions on the relevant law and its application to the facts. We consider that we are as well placed as a District Judge would be to decide it.
>
> (2) It would be contrary to the overriding objective to remit this issue. It would be a disproportionate use of court time and the parties would incur further costs unnecessarily in this individual case of relatively low value.
>
> (3) We note the submission on behalf of the FCA that the public interest in achieving finality and clarity in the law under section 140A in the motor finance context and that consistency in respect of the many thousands of pending complaints and claims would be aided by an authoritative ruling

by this court. The FCA submits that the prospect of a remittal should not be permitted to delay the resolution of these issues.

(4) For all the reasons set out above, we have come to the very clear view that the relationship between Mr Johnson and FirstRand was an unfair relationship within section 140A of the CCA.

338. So far as remedies are concerned, section 140B of the CCA confers very wide powers. We consider that the commission of £1,650.95 should be paid to Mr Johnson, with interest at an appropriate commercial rate from 29 July 2017, the date of the agreement.

7. Overall conclusion

339. As we have explained, the dealers in the present cases were not subject to any fiduciary duty towards their customers. It follows that the customers' claims against the lenders in equity and in bribery cannot succeed. The lenders' appeals in the Hopcraft and Wrench cases, and in the Johnson case so far as it was based on bribery or on equity, are therefore allowed.

340. The relationship between Mr Johnson and FirstRand was unfair within the meaning of section 140A of the CCA, by reason in particular of the size of the commission, the failure to disclose the commission, and the concealment of the commercial tie between the dealer and FirstRand. Mr Johnson is therefore entitled to succeed in his claim on that basis. However, the order made in his favour by the Court of Appeal was vitiated by mistakes. FirstRand's appeal must therefore be allowed so as to substitute an order in Mr Johnson's favour on different terms from that made by the Court of Appeal.