Case No: J00SQ921
Appeal reference: 338/23

IN THE COUNTY COURT AT BIRMINGHAM
On appeal from Deputy District Judge Harrop

Date: 31 January 2024

**Before** :

**HHJ WORSTER**

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**Between :**

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| **Andrew Wrench** | **Claimant/ Respondent** |
| **- and –** | |
| **FirstRand Bank Limited** | **Defendant/ Appellant** |

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**Greg Lawton** (instructed by **Cooper Hall Solicitors**) for the **Claimant/Respondent**
**William Hibbert** (instructed by **Eversheds Sutherland**) for the **Defendant/Appellant**

Hearing date: 15 November 2023
Draft judgment: 4 January 2024

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# Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HHJ WORSTER

## HHJ WORSTER :

### Introduction

1. This is an appeal from the judgment of Deputy District Judge Harrop of 17 July 2023. The Judge handed down a written judgment giving judgment for the Claimant ("Mr Wrench") on the basis that the Defendant ("FirstRand") had paid secret commissions to the motor dealers who had supplied him with two cars and acted as credit brokers in relation to two Hire Purchase agreements, one in 2015 and the other in 2017. He held that Mr Wrench was entitled to rescind the two Hire Purchase agreements at common law because the commission payments were fully secret. The Judge gave FirstRand permission to appeal, and adjourned the issues of remedy and quantum until after the appeal.

2. I heard oral argument for the best part of a day, dealing with the issues raised by FirstRand in its Appellant's Notice, and by Mr Wrench in his Respondent's Notice. I come to the detail of those matters later in this judgment, but reduced to its essentials, the appeal raises two broad issues. The first is whether the commission paid was fully secret (as the Judge found) or half secret, and the second is whether the Judge's finding that Mr Wrench is entitled to the rescission of the agreements is sustainable. I deal with the issues in that order, because the nature of the payment is relevant to the approach to the issue of rescission.

3. On 23 May 2015, Mr Wrench entered into a Hire Purchase agreement with FirstRand for a second hand Audi TT. The car dealer and credit broker was Fast Lane Motor Cars Limited ("Fast Lane"). Mr Wrench borrowed £5,995 repayable with interest and charges over 49 months. FirstRand paid Fast Lane a commission of £179.85. Then on 11 March 2017, Mr Wrench entered into a second Hire Purchase agreement with FirstRand for a second hand BMW 3 series. The car dealer and credit broker on this occasion was TT Sports and Prestige Limited ("TT"). He borrowed £8,750 which was repayable with interest and charges over 49 months. The Defendant paid TT a commission of £408,98. The claim also referred to a third agreement, but that was made with a difference finance company, and that part of the claim was not pursued.

4. Mr Wrench made claims for the rescission of these two agreements and related relief on the basis that the payments made were bribes or secret commissions at common law. His case was that these payments were "fully secret"; in other words that both the fact and the amount of the commission were secret. He also made a claim pursuant to section 140A(1) of the Consumer Credit Act (the 1974 Act) alleging that the relationship between the parties was unfair.

### The nature of the payments

5. The Judge deals with the nature of the commission payments in his judgment at paragraph 28 and following. He notes that it was common ground that Mr Wrench was never told the amount of the commission. At paragraph 29 he identifies the issue as being whether the payments were secret or half-secret. At paragraph 30 he says this:

> *It is clear that the word "commission" did appear during the course of both agreements. Each agreement contains a clause that says "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.*

6. At paragraphs 31 to 35 of the judgment the Judge considers the decisions of the Court of Appeal in *Wilson v Hurstanger* [2007] EWCA Civ 299 and *Wood v Commercial First Business Ltd* [2021] EWCA Civ 1471. At paragraph 36 he says this:

> *Upon that basis, I would, but for what follows, consider the commissions in the present case to be half-secret.*

What follows (at paragraphs 37 to 40 of the judgment) is a consideration of the following passage from the judgment of David Richards LJ in *Wood* at [120]:

> *I would also add that, in my view, the broker could place reliance on this term only if it expressly drew the client's attention to it.*

The Judge appears to have taken this passage to refer to the need for the client's attention to have been drawn to a term relating to the payment of commission, before such a term could be relied upon to negate secrecy. Mr Wrench had given evidence that the term referring to the payment of commission in this case had not been expressly drawn to his attention in relation to either of the Hire Purchase agreements, and so the Judge concluded that FirstRand could not rely upon the term to negate secrecy. For that reason he concluded that the commission payments were fully secret; see paragraphs 39 and 40 of the judgment.

7. Ground 2 of the Appellant's Notice is a challenge to the Judge's reading of paragraph [120] of the judgment in *Wood*. It is said that the Judge erred in finding that the commissions paid were secret commissions on the basis that, notwithstanding the term in the hire purchase agreement that stated "*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*" the term had not been drawn expressly to the attention of the Claimant. This was the point which persuaded the Judge to grant permission to appeal.

8. Mr Hibbert submits that the Judge has taken the passage at [120] of *Wood* out of context. I agree. The leading judgment in *Wood* was given by David Richards LJ (Males and Elizabeth Laing LJJ concurred). At [9] David Richards LJ identified the three issues raised by the appeals*:*

> *(1) Is a fiduciary relationship between the client and the broker a necessary pre-condition to the grant of relief against the payer of the undisclosed commission?*
>
> *(2) Did a fiduciary relationship exist between the client and the broker in these cases?*
>
> *(3) Are the commissions that were paid properly categorised as half-secret commissions?*

He deals with Issue 1 at paragraphs [18] to [102], Issue 2 from [103] to [126] and Issue 3 from [127] to [134]. Paragraph [120] appears in the part of the judgment dealing with whether a fiduciary relationship existed between the client and the broker.

9. It was argued by the brokers in *Wood* that the terms of the agreement between the broker and the borrower to the effect that the broker might receive fees from lenders was inconsistent with any duty of loyalty (owed by the broker to the borrower). In other

words, that it pointed away from there being a fiduciary duty. Having referred to that argument, David Richards LJ said this at [119]:

> *This submission cannot stand with Hurstanger, in which the broker was held to owe a fiduciary duty, notwithstanding a term disclosing in general terms the possibility of the payment of a commission by the lender to the broker. Further, for the reasons given in respect of the third issue, the broker's failure to make any disclosure in accordance with the term in these cases meant that Mr Pengelly and Mrs Wood were entitled to proceed on the basis that no fees or commissions, other than those that were in fact disclosed, were being paid.*

That is the context for the passage relied upon by the Judge. It was an argument which went to the existence of a fiduciary duty, and whether or not the term referred to was consistent with such a duty, and not to the issue of whether or not the secrecy of the commission payment had been negated.

10. The opening words of the first sentence of the judgment at [120] of *Wood* demonstrate that what follows is something further to the discussion of the argument at [119]:

> *I would also add that, in my view the broker could place reliance on this term only if it expressly drew the client's attention to it.*

[my emphasis]

The point is that, not only did the submission not stand with *Hurstanger*, the term would have to be drawn to the attention of the client for it to have any effect. The Court of Appeal is not saying that to negate secrecy, this term has to be expressly drawn to the attention of the client.

11. The question of whether the payments made in *Wood* were half secret-commissions, is "Issue 3". It is here that the Court deals with issues of negating secrecy. There is nothing in that discussion which suggests that to negate secrecy the relevant terms in the documents had to be expressly drawn to the claimant's attention. Indeed at [127] David Richards LJ says this:

> *As earlier mentioned, the appellants in both cases contended that the commissions paid by CFBL to the broker were properly categorised as half-secret commissions. What is meant by this is that the borrowers in each case knew, or they would have known if they had read the terms of business, that the broker might be paid fees by lenders. They accept that the borrowers were not told the amounts of those fees or commissions, and so accept that they were half-secret.*

The reference to the borrowers knowing about the payment of commission if they had read the terms of business, would run directly counter to a requirement that the terms would have to be expressly drawn to the borrowers attention for the payer to be able to rely upon them to negate secrecy. It is clear that the Judge has misunderstood the context and effect of the passage at [120] of *Wood*, and consequently has erred in reaching the conclusion that the term as to commission had to be expressly drawn to Mr Wrench's attention before FirstRand could rely upon it to negate secrecy. It also follows from my analysis of the meaning of *Wood* at [120] that I do not accept that the Judge's decision on the point can be upheld for the reasons set out in Ground two of the Respondent's Notice.

12. That leaves the Judge's initial finding that the commission was half-secret. He had come to that conclusion having considered the judgments in *Hurstanger* and *Wood*; see paragraphs 31 to 35 of the judgment. He noted that in both those cases there was material which disclosed the possibility of the payment of commission by the lender to the broker.

13 In *Hurstanger* the brokers in that case had been retained by the client to act as their agents for a substantial fee. The relationship was "*obviously a fiduciary one*"; see Tuckey LJ at [34]. As such the broker was required to act loyally for his client, and to get the client "*the best possible deal*". However, the payment of a commission by the lender to the borrowed gave rise to a potential conflict of interest, and the broker could only act in this way if his client had consented to his doing so *"with full knowledge of all the material circumstances and of the nature and the extent of [his] interest"*. The receipt of commission without the client's informed consent would be a breach of the broker's fiduciary duty. On the facts of *Hurstanger*, the necessary disclosure required a statement of the amount of the commission which the broker was to receive from the lender. No such statement was provided, but there was a term of the credit agreement with the lender which said that … *in certain circumstances this company does pay commission to brokers/agents.*

14. The Court considered the distinction between a situation where there was no disclosure, and where there was sufficient disclosure to negate secrecy, but something less the disclosure required to allow the client to give informed consent to the payment. A failure to make any disclosure meant not only that the broker was in breach of his fiduciary duties but that:

> *… the payment or receipt of a secret commission is considered to be a form of bribe and is treated in the authorities as a special category of fraud in which it is unnecessary to prove motive, inducement or loss up to the amount of the bribe. The principal has alternative remedies against both the briber and the agent for money had and received where he can recover the amount of the bribe or for damages for fraud where he can recover the amount of any actual loss sustained by entering into the transaction in respect of which the bribe was given. (Mahesan v Malaya's Housing Society [1979] AC374, 383). Furthermore the transaction is voidable at the election of the principal who can rescind it provided counter-restitution can be made. (Panama & South Pacific Telegraph Co. v India Rubber, Gutta Percha, and Telegraph Co. [1875] 9 Ch App 515, 527, 532-3).*

see Tuckey LJ at [39].

In other words, a remedy as of right.

15. Tuckey LJ continued at [40]:

> *But "the real evil is not the payment of money, but the secrecy attending it" (Chitty L.J. 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.*

16. The Court then considered the position on the facts of *Hurstanger*. It was common ground that the only disclosure made was the document containing the term I refer to above, which the client had signed. Nothing more was done to bring the matter to the attention of the client. By signing the document the client was to be taken to have understood what it said but no more. The lender knew that the broker was the client's agent and so it had to show that it paid commission in circumstances where the client had given their informed consent to such a payment. That was the purpose of the document the clients signed. The question was, did it achieve its purpose?

17. Having posed that question, Tuckey LJ continued:

> *[44] Did it negate secrecy? I think it did. 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. This was the Recorder's view and I agree with him.*
>
> *[45] Was the defendants informed consent obtained? I do not think it was. The passage which I have quoted was muddled although, read carefully, for the reasons given by Mr Seymour, it may not in fact have been ambiguous. But it could and should have been clearer and informed the defendants that a commission was to be paid and its amount and done so in terms which made it clear that the defendants were being asked to consent to this. I also think this statement should have been accompanied by the warning recommended by the OFT to the effect that its payment to the broker might mean that he had not been in a position to give unbiased advice.*
>
> *[46] So for these reasons I do not accept either party's submissions about the disclosure. This is a half way house case. The claimant did not pay the broker a secret commission but procured the broker's breach of fiduciary duty by failing to obtain the defendants' informed consent to the broker acting in the way he did.*
>
> *[47] This conclusion means that the defendants are not entitled to deploy the full armoury of remedies which would have been available if this had been a true secret commission case….*
>
> The judgment then considers the grant of the equitable remedies available, including the discretionary grant of rescission.

18. The Judge in this case was plainly aware of this approach to the factual issues he was faced with. He cites paragraph [43] of *Hurstanger* in full in his judgment at paragraph 33. He then went on to deal with the position in *Wood*. Here the broker's terms of business included the following statement:

> *We may receive fees from lender with whom we place mortgages. Before we take out a mortgage, we will tell you the amount of the fee in writing. If the fee*

> *is less than £250, we will confirm that we will receive up to this amount. If the fee is £250 or more, we will tell you the exact amount*.

Printed on the back of the broker's terms of business was an acceptance form, but it was common ground that in neither case (Mrs Wood and Mr Pengelly) did the client actually know that commission was being paid.

19. As the Judge noted in his judgment at paragraph 34, despite the reference to the payment of commission in the brokers terms and conditions, the Court concluded that the commissions paid were fully secret. For whilst the opening sentence of the relevant term referred to the receipt of fees from lenders, the following sentences imposed an unqualified obligation on the broker to inform the client of the amount of the fee before the mortgage was taken out.

> *Without such disclosure, the borrowers were not on notice that any commission might be paid. On the contrary, the only conclusion from the absence of any notification as required was that no commission was to be paid. The undisclosed commissions were therefore secret, not half-secret, commissions.*

20. It was having reviewed those authorities and noted the terms of the provision relied upon in this case, that the Judge reached the initial conclusion that the commissions in this case were half-secret.

21. That finding is challenged by Mr Wrench by ground one of his Respondent's Notice. There are four points. Firstly that the term relied upon was not incorporated into the Hire Purchase agreement, and that in any event it was an unusual or onerous clause, and so would have to be brought to Mr Wrench's attention in the most explicit way possible in order for it to be incorporated into the Hire Purchase agreement and for Mr Wrench to have "deemed knowledge" of it.

22. The issue here is not whether or not the provision dealing with commission was a term of the agreement between the parties. In many cases it will be, and the fact that the borrower has signed the relevant document will be practically conclusive as to his receipt and understanding of what it said. The issue in this case is whether, by providing Mr Wrench with a copy of the terms and conditions which included this term, secrecy was negated. That is a matter of fact.

23. Mr Hibbert takes issue with the contention made on behalf of Mr Wrench that there is nothing in the Hire Purchase agreement in this case which incorporates the terms and conditions which FirstRand rely upon. He points to a number of references to the "terms and condition", for example under the provisions as to charges, and in relation to individual terms as to early repayment. Mr Hibbert also makes the point that there was no evidence that these terms and conditions were not included in the documents given to Mr Wrench at the time of the making of the contract. The terms and conditions appear to be "overleaf"; see for example at page 54 of the appeal bundle. Mr Wrench did not have to sign for them, but it was not suggested at trial that they were not part of the pack which he did sign for at page 55. For obvious reasons the Judge made no finding that these terms and conditions were not provided to Mr

Wrench before he made these agreements. He appears to have proceeded on the basis that they were; see paragraph 30 of the judgment.

24. Mr Lawton also submitted that the provisions for the payment of commission were onerous and unusual, and that consequently they should have been expressly drawn to Mr Wrench's attention if FirstRand intended to rely upon them. I tend to agree with Mr Hibbert's point that such a term is neither unusual nor onerous, but in any event I repeat that it is not a question of incorporation, but of whether, as a matter of fact, secrecy was negated. It may be relevant to that argument to note that the term is one of many in a set of printed terms and conditions, that it is contained within a section headed "General" numbered 12.6, and that Mr Wrench may not have signed a copy of the terms themselves. But again, the point was not explored with the witnesses at trial.

25. The second and third of the four points made under ground one of the Respondent's Notice can conveniently be considered together. It is said that the language used by clause 12.6 is too conditional to negate secrecy; saying only that commission may be payable, and not that commission may (or will) be paid. Moreover, that the term does not say to whom the commission is payable.

26. Again it is important to focus on the issue – does this negate secrecy – with the approach of Tuckey LJ in *Hurstanger* at [43] in mind. As to the use of the word "payable"; if commission may be "payable", then it may be "paid". The difference is semantic and not of any real substance. As to the recipient of the payment, the term seems clear enough. The reference to *the Broker who introduced this transaction to us* is apt to refer to the motor dealer who acted as broker. Who else might it refer to? Mr Lawton suggests that the use of a capital B in "Broker" makes this look like a defined term, and that there is no definition of a "Broker" in the relevant documents. He contrasts that with the reference to the dealers in the Hire Purchase agreements as Credit Intermediaries. Again I regard that as an argument with no real substance. Who else is being referred to?

27. The fourth point under ground 1 of the Respondent's Notice is that the facts of this case are to be distinguished from the facts of *Hurstanger*. I agree that the facts are different. The question for the court, however, is the same. Was secrecy negated? The Judge at first instance found that it was, subject only to his reading of *Wood* at [120]. On the evidence before him he was plainly entitled to come to that conclusion. Whilst Mr Lawton puts the arguments forcefully, I am in no position to reach the conclusions on the facts which he asks me to make on the issue raised by ground one of the Respondent's Notice. The point was not raised before the Judge at trial, and not explored in the evidence. There are no findings of fact made for this Court to work with. I can reject the argument that the term needs to be incorporated into an agreement to have any effect because it is a point of law, and requires nothing more. But it is not open to me to support the Judge's conclusion that this was a fully secret commission case on this additional ground. It is not a case where the uncontested evidence, or the documents demonstrate that the Judge was wrong to make this finding of fact.

28. The upshot on the first broad issue is that Ground 2 of the Appellant's Notice succeeds, and grounds 1 and 2 of the Respondent's Notice fail.

## Rescission

29. The second broad issue is whether the Judge's finding at paragraphs 41 to 43 of the judgment that Mr Wrench was entitled as of right to rescission is sustainable. For a number of reasons, I have concluded that it is not.

30. The first point is a relatively simple one. This was not a fully secret commission case, and so rescission was not available as of right. This was a half-secret commission case, and for the claim to succeed, Mr Wrench must establish that he was owed a fiduciary duty by the brokers, that the duty was breached, and that (as a matter of discretion) the court should order rescission. Having found that the commission payments were fully secret, the Judge did not deal with the issue of whether or not Mr Wrench was owed a fiduciary duty by the brokers. There was, therefore, no consideration of whether or not there was a basis for rescission for breach of fiduciary duty, and no consideration of whether or not such a remedy should be granted (although issues of remedy were left over).

31. The Judge considered the relationship between Mr Wrench and the broker; see the judgment between paragraphs 18 and 26. He found that the broker was:

> *… someone with a role in the decision making process in relation to the transaction in question, e.g. as an agent, or otherwise someone who is in a position to influence or affect the decision taken by the principal*;

32. By making this finding, the Judge was applying the approach set out by David Richards LJ in *Wood* at [48] and [51], which he refers to (albeit not in that order) at paragraph 19 of the judgment:

> *[48] 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.*
>
> *[51] I should add that in most of the cases the law on bribery and secret commissions is referred to as applying to payments to "agents", whether or not they are said to owe fiduciary duties. As will appear, I doubt whether the law on bribery is restricted to an "agent" properly so called, by which I mean a person authorised or ostensibly authorised to act on behalf of another. It is enough, in my view, that the person who is offered or paid a secret commission is, as Christopher Clarke J put it in Novoship (UK) Ltd v Mikhaylyuk [2012] EWHC 3586 (Comm) at [108], "someone with a role in the decision-making process in relation to the transaction in question e.g. as agent, or otherwise someone who is in a position to influence or affect the decision taken by the principal"*

33. There are a number of points. The first is that *Wood* was a fully secret commission case, and the approach to the question of whether or not there is a duty such as that identified at [48] does not apply to a case where the commission is half secret. That proposition appeared to be in issue before me, but is apparent from the judgment in *Wood* at [100] where David Richards LJ says this:

> *This entitlement to rescission is contrasted with the court's discretion to set aside a transaction in the case of a half-secret commission, which was held in Hurstanger to be available only in the case of a breach of fiduciary duty.*

I also note the distinctions drawn in *Wood* at [21] [49] and [84], and the recognition of that distinction in the judgment of HHJ Jarman KC in *Johnson v FirstRand* in the County Court at Cardiff (6 July 2023) at [15].

34. The second is that the conclusion that the brokers were in a position to influence or affect the decision is a difficult one to sustain. These brokers had no role in the decision making process in the sense that it could take the decision or effect the borrowers legal relations with FirstRand. The test referred to in *Wood* at [51] is formulated in the context of the duties of such a person. *Novoship* is authority for the proposition that the duty under consideration is not to be restricted to agents properly so called, but covers a broader group. But to qualify for membership of that broader group, the person must be involved in the decision making process in some way. On these facts I cannot see that these brokers would qualify for membership. The broker's role here is to put forward information; see the judgment at paragraph 24; not to take part in the decision making process or influence of affect that decision.

35. In the same paragraph the Judge concludes that the brokers had a duty to provide information on an impartial or disinterested basis. That was an application of the test formulated in *Wood* at [48]. The problem with that finding, is that the brokers were self evidently not impartial or disinterested. They were selling the cars, and in the course of undertaking that sale they were providing Mr Wrench with information about finance. The issue arose recently at County Court level in *Johnson v FirstRand Bank Limited,* a decision on appeal in the County Court by HHJ Jarman KC. Mr Johnson bought a second hand car from a dealer on hire purchase. The dealer received a substantial commission from the creditor. The fact of a commission was disclosed, but the amount was not, so it was a half-secret commission case. HHJ Jarman KC considered whether (on the facts of that case) the dealer owed a fiduciary duty. He was clear that it did not. At [19] he says this:

> *[Counsel for Mr Johnson] accepted that the dealer was wearing two hats, one when it was selling the car and the other when it was dealing with finance. In my judgment this is the essential distinction with the broker cases, where brokers do not themselves offer what their client wants, but offer the service of obtaining it, namely finance. It is difficult to see how in practice or in principle a car dealer could offer single minded loyalty to a customer when dealing with the finance, but not when selling a car to the same customer which gives rise to the need for finance. Finance is incidental to the purchase of the car for those who need to borrow.*

At [20], HHJ Jarman KC rejected Mr Johnson's case that the facts relied upon gave rise to such a duty.

36. I am not bound by that case, but should follow it unless I regard it as wrong. It is not the only such case to be decided in the County Court in recent times at Circuit Judge level which touches on this issue and which reach different conclusions. I was provided with the judgment of HHJ Richard Carter in the case of *Daniel Jones v BMW Financial Services (GB) Limited* in the County Court in Liverpool (23 October 2023) in which a different conclusion was reached. However, I find myself in agreement with the approach in *Johnson*. Given that this aspect of my decision is obiter, it is unnecessary to say any more.

37. These issues are raised by Ground 1 of the Appellant's Notice and (in effect) responded to in ground 3 of the Respondent's Notice. I heard some detailed argument about them, and Mr Lawton made reference to the duties of a credit broker as provided for by the FCA's Principles and Consumer Credit Sourcebook. The effect of Mr Lawton's argument as I understand it, is to bolster the Judge's finding that these brokers owed a *Wood* duty (my description rather than his). As I have explained, this is not a case where *Wood* applies. Mr Wrench has to prove a breach of fiduciary duty. Consequently FirstRand succeed on Ground one of the Appellant's Notice, and ground 3 of the Respondent's notice fails.

38. The fourth and fifth grounds of the Respondent's Notice can be considered together. By ground four it is contended that the Judge's findings at paragraphs 24 to 26 of the judgment amounted to a finding that the dealers did owe fiduciary duties, and by ground five that rescission was a remedy the court should grant if it were exercising its discretion to do so. It is plain from a reading of the judgment that the Judge did not consider whether or not the dealers were fiduciaries. There is nothing in his reasons which would form a sound basis for such a finding. It is a question of fact in each case, but it would be very surprising if these motor dealers were fiduciaries. They were selling cars, and brokering finance agreements. It is had to see how they could offer a single minded loyalty to the customers as a fiduciary. This is not a case like the mortgage broker in *Hurstanger*, where there was an obligation to get the best deal, and a substantial fee was paid. I cannot accept the arguments put forward under ground four, and ground five falls with it.

**The unfair relationship claim**

39. In addition to the claim for rescission, Mr Wrench brought a claim under section 140A of the 1974 Act. At paragraph 45 of the judgment, the Judge indicated that having come to the conclusion that Mr Wrench was entitled to rescission as of right, it was unnecessary to consider the unfair relationship claim. By ground six of the Respondent's Notice, this Court is invited to consider that claim, to find that the relationship between the parties was unfair, and to make orders for accounts to be taken and for rescission pursuant to section 140B.

40. I follow the desire of Mr Wrench and those who represent him to bring this matter to a conclusion. This is a small claim, and there have now been two hearings. But the nature of an unfair relationship claim is highly fact specific. The regime was recently considered by the Supreme Court in *Smith v Royal Bank of Scotland* [2023] UKSC 34. Lord Leggatt gave the leading judgment. Having referred to the … *breadth and open-ended nature of the assessment required by section 140A …* at [22] he continued as follows:

> *What is more, subsection (2) makes it clear that there is no restriction on the matters to which the court may have regard in deciding whether the relationship is unfair to the debtor, provided only that the court thinks them relevant. Subsection (2) also makes it clear that, if any matter is thought relevant, the court not only can but must have regard to it. The breadth of the matters that may be thought relevant is illustrated by a list of examples given by Hamblen J in Deutsche Bank (Suisse) SA v Khan [2013] EWHC 482 (Comm), para 346.*

For an appeal court to embark upon a consideration of such a claim, particularly when the court at first instance has not considered the matter and has made no relevant findings of fact, would not be appropriate.

## Decision

41. The appeal is allowed, the judgment set aside, and the matter remitted to the District Judge for trial.