Claim No: J00SQ903
Appeal Ref: 389/23

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

Date: 31 January 2024

Before :

HHJ WORSTER

- -

Between :

Mark Hurst	**Claimant/ Respondent**
- and -	
BMW Financial Services (GB) Limited	**Defendant/ Appellant**

- -
- -

Thomas Samuels (instructed by) **Lester Aldridge** for the **Defendant/Appellant**
Andrew Clark (instructed by **McDermott Smith Law Ltd**) for the **Claimant/Respondent**

Hearing date: 9 November 2023
Draft judgment: 3 January 2024

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Judgment Approved by the court for handing down (subject to editorial corrections)

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HHJ WORSTER :

Introduction

1. This is an appeal by the Defendant ("BMW") against the order of Deputy District Judge Harrop of 17 July 2023, giving judgment for the Claimant "(Mr Hurst") in the sum of £1,233.96 plus interest. The order made that day recites that the Judge handed down judgment in accordance with a written draft. Mr Samuels, who appeared for BMW below, told the court that the draft was provided to the parties when they arrived at court on the morning of 17 July 2023. The Judge then heard further oral submissions as to the appropriate remedy to grant. Unfortunately, there is no transcript of those submissions or of the ex tempore ruling the Judge then gave on that issue.

2. Having given judgment for Mr Hurst, the Judge granted BMW permission to appeal. BMW filed an Appellants Notice on 4 August 2023. There are three grounds of appeal:

   (1) The Judge erred in his application of the principles set out by the Court of Appeal in *Wood v Commercial First Business Ltd ...* in finding that the Dealer owed Mr Hurst obligations engaging the law of secret commissions and bribery.

   (2) … the Judge erred in finding that the Commission was "fully secret" on the basis that the term disclosing its existence had not been expressly brought to Mr Hursts' attention.

   (3) … the Judge failed, adequately or at all, to properly apply s.140A(1) CCA by neglecting the evidence of Mr Hursts' view of the commission and the transaction generally.

3. Mr Hurst filed a Respondent's Notice on 22 August 2023. In summary, he seeks to uphold the Judge's decision on the basis that having considered the evidence and taken account of the matters he considered relevant, he was entitled to reach the conclusion that the relationship between the parties was unfair for the purposes of section 140A of the Consumer Credit Act 1974.

4. The appeal was listed for hearing in Birmingham. I heard oral argument on 9 November 2023 and reserved judgment. Where I refer to the page number of a document in this judgment, it is to the page number of the appeal bundle.

Background

5. The factual background to the claim is not much in issue. BMW, as its name suggests, is a company which provides finance for the purchase of motor vehicles. On 30 August 2021, Mr Hurst entered into a Credit Agreement with BMW to finance the purchase of a second hand BMW motor car. The Credit Agreement was brokered by a motor dealer called Lookers Motor Group Limited ("Lookers"). BMW paid Lookers a commission of £1,233.96, which was calculated as a fixed percentage of the amount of credit. Mr Hurst's case was that he was unaware both of the fact and the amount of that commission.

6. The evidence at trial included a number of documents. Of particular importance was a document called a "Vehicle Order and Agreement" dated 20 August 2021 in which Mr Hurst agreed with Lookers to purchase the car [217]. Mr Hurst had signed that document just above a reference to the terms and conditions overleaf and a recommendation to read and understand them before signing.

7. Those terms of business included the following provisions relevant to Lookers role as a creditor broker [218]:

   OUR SERVICE

   You will not receive advice or any recommendation from us in respect of the finance and insurance options we can offer, instead we will ask you a number of questions to narrow down the selection of products we will provide details on, ensuring that you have sufficient information to choose how you wish to proceed.

   The Judge sets out this term in full at paragraph 20 of the judgment.

8. At paragraph 21 of the judgment, the Judge makes reference to two documents headed "Your options for vehicle finance" which include the following declaration:

   VEHICLE FUNDING DECISION

   I have had all of the vehicle funding options above presented and explained to me in full and elected for a quotation for …

9. At paragraph 22 of the judgment, the Judge refers to a number of further extracts from the Lookers Terms of Business in the section headed *ABOUT OUR CREDIT BROKING TERMS* [219]. I set out those terms in full – the passages referred to in the judgment are underlined:

   CREDIT BROKER STATUS DISCLOSURE

   We are a credit broker, not a lender and have the permission to carry out the regulated activity of credit broking which includes effecting introductions between you and lenders or other credit brokers. This means that we can introduce you to a limited number of lenders and their finance products, which may have different interest rates and charges, to assist with your finance.

   <u>*We will provide details of products available from the lenders that we work with*</u>*, but no advice or recommendation will be made. You must decide whether the finance product is right for you and all finance is subject to status and income.*

   FINANCE APPLICATIONS

   <u>*We will refer your application to our main panel of lenders, which will include many of the vehicle manufacturer lenders. If this is not successful, we will refer your application to another lender within our main panel of lenders.*</u>

10. Lookers' terms also make express reference to commission:

   COMMISSION

   We do not charge you a fee for our services however, we will typically receive commission (either as a fixed fee or as a fixed percentage of the amount you

borrow) from your finance lender for introducing you to them. The lenders we work with pay commission at different rates and promotional rates may also apply from time to time. However, the amount of commission that we receive from a lender does not have an effect on the amount that you pay to that lender under your credit agreement.

You are entitled, at any time, to request information regarding any commission which we may have received as a result of placing your finance with a lender.

11. The Judge also noted that the fact of a commission is referred to in two other documents. Firstly in BMW's explanation document [226]:

Your retailer commonly introduces customers to a selected panel of lenders, which includes BMW Financial Services. An introduction to us does not amount to independent financial advice.

We pay commission to your retailer for introducing you to us for a vehicle finance or hire agreement, as a fixed sum or percentage of the amount you borrow from us. The fixed sum or percentage may vary by model or age of vehicle … This may not be the same as other lenders may pay for an introduction… The commission we pay will not affect the amounts you pay us under your finance or hire agreement, all of which are set by us.

And secondly at clause 10(f) of the Credit Agreement, which provides that:

We pay commission to a supplying retailer or other intermediary who introduces a customer to us.

Mr Hurst e-signed the Explanation document and the Credit Agreement on 30 August 2021.

12. In addition to these documents, the Judge heard oral evidence from Mr Hurst and from an employee of BMW. The latter could do little more than produce the relevant documents. BMW did not call anyone from Lookers to deal with the making of the Credit Agreement. I had a transcript of that evidence.

13. With that brief review of the underlying facts, I turn to the way in which the claim was put. The Claim Form refers only to a claim made pursuant to section 140A of the Consumer Credit Act 1974 (the "1974 Act"). However, the Particulars of Claim seek a range of remedies on other bases, in particular alleging that the payment of commission amounted to a bribe or secret commission. At paragraph 8 of the judgment, the Judge refers to way the claim is framed, and at paragraph 9 says that both claims are resisted. In other words, that he is dealing with a claim at common law and a claim under the 1974 Act.

14. That approach is reflected by the structure of the judgment. Paragraphs 13 to 42 deal with "The bribe/secret commission claim" and paragraphs 43 to 46 with "The Unfairness Claim". As to the first, the Judge concludes that the commission paid was fully secret and that consequently Mr Hurst was entitled to rescission as of right. I return to the unfairness claim later in this judgment.

Bribes and Secret Commission

15. The parties both referred the Judge to the decision of the Court of Appeal in *Wood v Commercial First Business Ltd* [2021] EWCA Civ 1471. The case involved the

undisclosed payment of commission by a lender to a mortgage broker. It was a fully secret commission case; in other words both the fact and the amount of the commission were kept secret from the principal. The leading judgment was given by David Richards LJ (as he then was). From paragraph 41 onwards he reviews the basis of the law in this area, and in particular considers the question of whether the claimant needs to establish a fiduciary relationship as between the claimant (the borrower) and the payee of the commission as a pre-condition to the grant of a remedy. It is worth setting out his conclusion on that issue in full.

[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.

[49] This is not to say that, in the many cases in which a fiduciary relationship clearly exists, the remedies available cannot be analysed in terms of the consequences of a breach of fiduciary duty. If a fiduciary relationship exists, it is a breach of that duty for the fiduciary to accept a secret commission or the offer of a secret commission, and in such a case the payer or offeror will be procuring or assisting a breach of fiduciary duty. Both will be liable to a range of remedies: accounts of profits, compensation for loss and rescission of transactions.

[50] While that applies in those cases where there is a fiduciary relationship, that is not the essential pre-condition, which in my judgment is the much simpler question posed above. Essentially, I consider that Mr Lord's second, alternative submission is correct. 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. This, as it appears to me, is in accordance with the authorities as well as with principle.

[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 <u>Novoship (UK) Ltd v Mikhaylyuk</u> [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"

16. The Judge in this case correctly identified that the first issue was whether Mr Hurst's relationship with Lookers engaged the law relating to bribes and secret commissions. At paragraph 25 of the judgment he concluded 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*;

This finding echoes the quote in *Wood* at [51] from *Novoship v Mikhaylyuk* above. The Judge's view was that the broker could decide which of its available lenders it made known to the customer, or (as he found in this case) to only provide information about BMW's products. That had a restrictive effect on Mr Hurst's decision and so meant that the broker was someone in a position to influence or affect the decision. The Judge also concluded that the broker was under a duty to fully explain the finance options, which gave rise to … *a duty to provide information advice or recommendation on an impartial or disinterested basis*; in other words the duty referred to by David Richards LJ in *Wood* at [48].

17. The conclusion that the broker was someone who was in a position to influence or affect the decision is difficult to sustain. This broker had no role in the decision making process in the sense that it could take the decision or affect the principal's legal relations with BMW. 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 this broker would qualify for membership. The broker's role here is to put forward potential finance options, not to take part in the decision making process or influence of affect that decision. It acts as a broker. The options it puts forward may affect what the purchaser decides to do in terms of finance, but that is something different to an involvement in the decision making process, or a role which allows it to affect or influence the decision. The broader group does not include a person who simply acts as an advisor or provides information.

18. The Judge then goes on to find that the broker is someone who has a duty to provide information on an impartial or disinterested basis. That was an application of the test formulated in *Wood* at [48] and accords with the approach set out by David Richards LJ in *Wood* at [102]. BMW challenge that conclusion on the facts of this case as well. However, for the purposes of the appeal on grounds 1 and 2, the issue is simpler. The *Wood* test applies to cases where the commission is fully secret. For the reasons set out later in this judgment, the finding that this was a fully secret commission case cannot stand. The commission in this case was half-secret, and in those circumstances the *Wood* test has no application. Where the commission is half-secret, the remedies are equitable, and are available only in the case of a breach of fiduciary duty; see *Wood* at [100]. I return to that matter when considering fiduciary duty below.

The nature of the payment.

19. The Judge considers the nature of the commission payment at paragraph 28 of his judgment and following. The parties referred him to the decision of the Court of Appeal in *Wilson v Hurstanger* [2007] EWCA Civ 299. *Hurstanger* was a half secret commission case; in other words the fact of a commission was disclosed, but the amount was not.

20. Having reviewed the evidence, at paragraph 35 the Judge said this:

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

He then referred to 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 terms which disclosed the payment of commission, details of which he had referred to at paragraph 30 of the judgment. He had no evidence from either party which suggested that the terms as to commission had ever been expressly drawn to Mr Hurst's attention, and so he concluded that BMW could not rely upon them to negate secrecy. For that reason he concluded that the commission was fully secret.

21. BMW's case is that the Judge was wrong to reach that conclusion, because he had taken paragraph [120] of the judgment in *Wood* out of context. The Judge too recognised that there was an issue as to his understanding of that aspect of the judgment in *Wood* when he gave permission to appeal.

22. In his judgment in *Wood* 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. It refers back to the discussion at [119] about whether the broker in *Wood* owed a fiduciary duty under the terms of its contract with its customer, in circumstances where the contract included a term that it might receive fees from lenders. As Mr Samuels submits, the issue being addressed was the scope of the duties owed to the borrower by the broker under its contract, and not the question of whether the wording in these documents negated secrecy.

23. The question of whether the payments made in *Wood* were half secret-commissions, is "Issue 3" and is dealt with in the judgment between paragraphs [127] and [134]. 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.

24. Moreover, in this case Mr Hurst had signed the documents in which the fact of a commission was disclosed. He may not have read them, but it is well-established that by signing a document, the signatory is taken to have understood what is said in it. I note that a similar point arose in *Wilson v Hurstanger* [2007] EWCA Civ 299 at [42] in the context of a discussion of whether such a term negated secrecy.

25. That leaves the Judge's initial finding that the commission was half-secret. For the bribery/secret commission claim to succeed on that basis, Mr Hurst would have to establish that he was owed a fiduciary duty by Lookers. The judgment does not go on to deal with this issue, and in the absence of any expressed consideration of that matter, the bribery/secret commission claim cannot succeed. BMW succeed on grounds 1 and 2.

The Unfair relationship claim

26. This was the focus of Mr Clark's submissions. In short he argued that there was sufficient in the findings made by the Judge in the judgment, and in the course of the consideration of remedy at the hearing on 17 July 2023, to support the order made.

27. The written judgment which the Judge handed down on 17 July 2023 proceeded on the basis that the bribery/secret commission claim had succeeded, and that as a consequence Mr Hurst was entitled, as of right, to the rescission of the finance agreement, subject to making counter restitution; see paragraph 42 of the judgment. The Judge went on to deal with the unfair relationship claim. He concluded that the relationship was unfair, but expressed the view that consideration of a remedy under the 1974 Act appeared to be unnecessary in view of his finding that Mr Hurst was entitled to rescission as of right.

28. Mr Clark's starting point is that despite this, the order that was subsequently made at the hearing on 17 July 2023 was an order made pursuant to the 1974 Act, He says this at paragraph 7 of his skeleton argument [52].

> "At the hearing for the heading down of judgment, Mr Jonathan Perry (Counsel for the Respondent) referred the Judge to the Schedule of Loss in the trial bundle, which indicated that rescission should produce a figure of £5,009.49 payable to the Respondent. Mr Thomas Samuels, Counsel for the Appellant, submitted that £5,009.49 was inflated, because the calculations should not include the commission, counter-restitution would exceed the sum paid, and there was no basis for the 40% deducted in respect of counter-restitution. The Judge stated that he had considered remedy prior to the hearing and "reached a similar conclusion". Mr Perry then contended that, as the claim was under s.140B, the Court had a wide discretion as to the remedy for unfairness and, the Judge having

found the commission was secret, it was appropriate to award the amount thereof. The Judge agreed with this approach and awarded £1,223.96 (together with 3% interest) under s.140B."

29. As I understand it, Mr Samuels accepts that, in the event, the relief the Judge granted involved the exercise of his discretion under section 140B(1) of the 1974 Act to award a sum equal to the commission paid; see paragraph 10 of his supplementary skeleton argument [68].

30. I begin with section 140A of the 1974 Act. It provides as follows:

(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).

31. The nature of the regime provided for by these provisions is well known. It was considered by the Supreme Court in *Plevin v Paragon Personal Finance Limited* [2014] UKSC 61, and more recently in *Smith v Royal Bank of Scotland* [2023] UKSC 34. Lord Leggatt gave the leading judgment in *Smith*. At [22] he referred to the … *breadth and open-ended nature of the assessment required by section 140A …* and continued:

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.

32. The Particulars of Claim in this case plead the case on unfairness at paragraphs 30 and 31. The particulars under paragraph 30 rely upon the fact that (a) the payment was a bribe; (b) that Mr Hurst did not know commission would be paid; (d) that Mr Hurst was deprived of the disinterested recommendation of the broker in relation to entering the credit agreement, and that (g) there was an "extreme inequality of knowledge" which meant that Mr Hurst was deprived of the opportunity to make a properly informed decision about whether to enter into the credit agreement. That pleading follows (and refers back to) a detailed pleading of the bribery/secret commission claim and a number of other breaches of rules and guidance. Consequently Mr Samuels submits that the unfair relationship claim "piggy backs" on the bribery/secret commission claim. He also submits that this is how the claim was put at trial. That seems to be confirmed by

the Judge's characterisation of the claim at paragraph 8 of the judgment, that in framing the claim under the Consumer Credit Act Mr Hurst relied on allegations that might be made within a common law claim for a bribe or secret commission.

33. The inadequate disclosure of commission paid to a broker by the creditor in the context of a credit agreement is a common enough allegation to find being made in support of an unfair relationship claim. Mr Clark referred to the decision in *Nelmes v NRAM* [2016] EWCA Civ 491 as an example of a case where a section 140A claim was made on that basis without the parallel claims at common law and/or in equity for rescission and payment of damages which arose from the same facts. Those remedies would have been available on the facts, but relief was granted because:

> *A relationship between a lender and a borrower which involves such a payment derives the borrower of the disinterested advice of his broker and is, for that reason, unfair.*

34. Mr Samuels does not disagree, but he makes the important point that in *Nelmes* the root of the unfairness found was the fact that the payment deprived the borrower of the disinterested advice of his broker; the essence of the pleaded allegations of unfairness in this case. Thus the issue of unfairness includes the consideration of whether there has been a breach of a duty to give disinterested advice, and an application of the approach in *Wood*.

35. With that, I turn to the judgment. The Unfairness claim is dealt with after the bribery/secret commission claim at paragraphs 43 to 46. At paragraph 43 the Judge indicates that there is … *another factor ... which lies within the scope of an "unfair relationship" claim but outside the scope of the law relating to bribes/secret commissions.* I read that as the Judge recognising that the conclusions he has reached in relation to the bribery/secret commission claim are to be taken into account in determining unfairness, but that there is a further matter which he regards as relevant to the unfairness claim.

36. The further issue identified at paragraph 44 is the failure of the broker to comply with the terms of its arrangements with BMW as to the disclosure of commission. The document the Judge refers to is in the appeal bundle at [245]:

> *3.1. Commission Disclosure*
>
> *As a credit-broker, it is your responsibility to comply with FCA Principles, Rules and Guidance in relation to commission disclosure. This includes prominently disclosing to your customers in good time before our credit or hire agreement is made the existence of all commissions payable by us together with the nature of how they are calculated and paid, and whether they may affect the amounts payable by the customer under our credit or hire agreement, and also whether your commissions as well as the interest rates vary between different lenders you engage with.*
>
> *Whilst we, as the lender, have included wording to identify the existence of the commission we pay in our pre-contract explanatory information document that is given to customers, this is in addition to, and not in substitution of, your responsibility to make full commission disclosure as the credit-broker.*
>
> *The amount of the commission payable is disclosable by you upon request by a customer. It is your responsibility to decide if, when and how the amount of*

> *commission paid by us should be disclosed, and in a timely manner, to meet the customer's needs and we require that you comply with your responsibilities fully and correctly in every instance.*

37. The Judge found that it was improbable that the broker was at pains fully to explain what these terms required it to explain. The Judge accepted Mr Hurst's evidence on that issue and towards the end of paragraph 44 of his judgment said this:

> *… Thus, I appear to be looking at an agreement between the claimant and the defendant in which the defendant's requirements as to the information given to the claimant about commission have not actually been met by the broker. In these circumstances can the claimant's relationship with the defendant be described as fair? I think not. This feature in this caser … would lead me to conclude that the parties relationship was unfair, quite apart from the decision reached as a result of commission arrangements.*

38. The problem with this finding is that it relates to the failure of the broker. This was not a thing done (or not done) by or on behalf of BMW, and so not a matter which Mr Hurst can rely upon as a cause of unfairness for the purposes of section 140A(1)(c). In the event, Mr Clark did not rely upon this element of the Judge's reasonniing.

39. That leaves two matters which might support a finding of unfairness. The first was the inadequate disclosure of the commission arrangements; in other words the findings of fact which lay behind the Judge's conclusions in the bribery/secret commission claim. The second is the failure to provide details of all the financial products from its panel of lenders, but only those provided by BMW.

40. In his judgment in *Carney v NM Rothschild and Sons Ltd* [2018] EWHC 958 (Comm) (a mis-selling claim) HHJ Waksman QC (as he then was) said this at [50]:

> *Claims under s140A (1) (c)*
>
> *Sometimes the thing done or not done by the creditor is a free-standing matter – for example the failure to disclose the high level of commission (equal to 71% of the PPI premium in issue) in Plevin. But it could also be something which is, or could be the subject of a separate claim. That is true of both the bad advice and misrepresentation allegations made here. Indeed, but for the expiry of the limitation period, they would no doubt have been alleged separately as well. That gives rise to the question whether, in such cases, for such matters to be "made out" it must be shown that in the case of advice, for example, not only was advice given but there should have been an accompanying duty of care. Or in the case of misrepresentation, that the representation made was material and relied upon, and matters of that kind. It seems to me that generally speaking, and subject to the burden of proof which is of course on the creditor here, the same elements as are required by the cause of action should be shown when such matters are raised as constituting an unfair relationship. Otherwise, there is a danger that the analysis of their significance or otherwise becomes blurred and uncertain.*

41. It may be that in the appropriate case, the court would be entitled to look at the factual basis for such an allegation and conclude that whilst the separate claim was not made out (perhaps for technical reasons, or limitation issues) they still justified a finding that the relationship in question was unfair per section 140A. However, this is not such a case. The claim was put on the basis that the non-disclosure of the commission payment

justified remedies at common law (or in equity) and a finding of unfairness. The same elements as were required to make out the cause of action are required to make out a matter which leads to unfairness. In this instance, the element at issue is whether the broker owed a duty to give disinterested advice, here on the footing that it owed Mr Hurst a fiduciary duty to do so.

42. Whilst the Judge reaches conclusions on the *Wood* duty, he did not consider the question of whether or not there was a fiduciary duty. Mr Samuels might say that such an omission was itself a reason for this court deciding that the matter could not be one which could support a finding of unfairness. However, as I understand his submissions, he goes further, and would argue that the broker was plainly not subject to a fiduciary duty.

43. To my mind there are two related points to explore. Firstly that the broker was self evidently not someone who was impartial or disinterested. It was selling a car, and in the course of undertaking that sale, it was providing Mr Hurst with some (limited) options to provide finance for that sale. Here Mr Samuels relies upon the decision of HHJ Jarman KC in *Johnson v Firstrand Bank Limited* (6 July 2023), a decision on appeal in the County Court in Cardiff. 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.

44. 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. I refer in particular to 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) where a different conclusion was reached. I did not hear any submissions in relation to the decision in *Jones*, but I find myself in agreement with the approach in *Johnson*.

45. The second point is that on the face of it, the documents in this case tend to support BMW's case that the broker was not under a fiduciary duty to disclose (or indeed a *Wood* duty). It is unnecessary for me to determine that point on this appeal. It is a matter better left to be argued at a trial before a Judge who has heard all the evidence. But I am certainly not satisfied that the findings of the Judge below are sufficient to demonstrate that the broker here was under a duty to disclose, or that the elements of a claim for breach of fiduciary duty were established.

46. The failure to provide details of financial products from a lender other than BMW is dealt with at paragraph 45 of the judgment:

    Quite apart from and in addition to that, the defendant has to satisfy me that its relationship wit the claimant was fair. Is it able to do so when the broker did not do what was required not only by the defendant's requirements, but also by its own terms of business, namely to " provide details of products available from the lenders that we work with"? The broker provided details only of the finance available from the defendant. I find the answer to this question to be in the negative.

47. This was not a matter that was pleaded as going to unfairness. But in any event, it seems to me to be susceptible to the same line of attack as the allegation of inadequate disclosure. It is, in essence, an allegation that the broker failed to act in a disinterested and impartial manner. The Judge did not find that the broker was under a fiduciary duty to act in that way. Nor am not satisfied that there is sufficient in his findings to justify this court coming to that conclusion.

48. In addition to those matters, I should make reference to the matters which BMW raise under ground 3. Mr Samuels notes that whilst the Judge found that there was unfairness, he did so on two discrete bases. The breach of duty arising from the commission payment, and the failure to refer to other lenders. What he does not appear to do is to look at the whole of the relationship between the parties, or if he does, he makes no reference to any other aspects of that relationship in his judgment. It may be that he considered that they were not relevant, in which case an argument can be made for saying that he might not have needed to refer to them expressly,

49. There is, however, one aspect of the evidence which is plainly relevant to the issues of unfairness with which the Judge was grappling, and that is Mr Hurst's attitude to the commission payment. At the end of his evidence, the Judge asked Mr Hurst some questions:

    Q: If you had phoned you bank or looked at any other source of finance ... is it likely that they could have said anything to you to dissuade you from just signing on the dotted line and getting this car quickly?

    A: The reality is, probably not, judge… you are right, I don't think the bank could have matched the monthly figures of the finance document.

    Q: If the dealer had said, "If you buy this car, we're going to get a commission of some £1,200," would that have made a difference to your decision to buy it?

    A: … That figure probably wouldn't have put me off doing the deal with them.

    Q: …it sounds as though you're saying, "Yes, I was denied that opportunity, but if I'd had the opportunity it wouldn't have made any difference.

    A: With the vision of hindsight, probably not…

    Q: So if the conclusion is that the dealer denied you the opportunity to assess the commission and its effect but that if you'd had that opportunity it wouldn't have made any difference, can that be described as unfair?

A: How you've worded that, judge, no, I would say not.

50. Those were some rather good questions, which drew some relevant answers on the issue the Judge was considering. Yet there is no reference to this evidence in the judgment, or even to the issue the Judge was exploring. Mr Samuels relies upon that omission as illustrating a failure by the Judge to undertake the exercise required by section 140A(2) - to have regard to all matters it thinks relevant. Taking that submission in the context of the rest of the case, he is well justified in doing so. BMW succeed on Ground 3 as well.

Decision

51. Both Mr Samuels and Mr Clark reminded me of the limited circumstances in which an appeal court should interfere with the findings of a trial Judge, particularly in relation to a test which is as broad and fact based as the test under section 140A of the 1974 Act. In addition to the authorities which were drawn to my attention, I note the decision of the Court of Appeal in *Jean-Francois Clin v Walter Lilly and Co* [2021] EWCA Civ 136 at [83]-[87].

52. The Judge in this case took the trouble to produce a written judgment, and plainly put a lot of work into his consideration of the issues. For that he is to be commended. Unfortunately I have concluded that there were errors of law and approach which mean that his decision should be set aside and the case re-heard. Given the issues of relevance which might arise on the evidence, and the absence of a comprehensive set of findings of fact, this is not a case where the appeal court should attempt to undertake an evaluation of the issue of fairness.

53. The appeal is allowed, and the claim is to be remitted to the County Court at Stoke. If practicable, it is to be re-listed before DDJ Harrop.