Claim No. J80LS108

IN THE COUNTY COURT IN LEEDS
BUSINESS AND PROPERTY WORK
BETWEEN:

Before: Recorder Geoffrey Pritchard
5 March 2024

(1) WEARDALE ENTERTAINMENTS LIMITED
(2) ANDREW SMITH T/A Q TAN

Claimants

and

ENGIE POWER LIMITED

Defendant

Judgment

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1. This is a claim for equitable compensation for a third party's breach of fiduciary duty.

2. The First Claimant ("Weardale") has purchased (and continues to purchase) electricity from the Defendant ("Engie"). The contracts relating to such electricity supply were entered into with the assistance of third-party brokers acting under letters of authority granted by Weardale. The Claimants were aware that the brokers would be compensated financially by Engie for their involvement in the contractual process. However, the Claimants' assert that they did not know the nature of the compensation arrangements, nor did they know about the underlying conflict of interest that those arrangements might cause. The Claimants therefore argued that they did not give informed consent to the brokers' commission arrangements, and in consequence the brokers were acting in breach of the fiduciary duties they owed to Weardale.

3. The Defendant ("Engie") denies that the brokers acted in breach of fiduciary duty. However, it accepts that if there were breaches (and therefore that Weardale did not give informed consent), then it is liable for those breaches subject to a) a limitation argument

and b) determination of the precise sum due. The brokers themselves took no part in this action.

Background

4. Weardale operates an amusement arcade known as "Queenie's Casino Slots" in Crook, Bishop Auckland. Mr Smith, the Second Claimant, is the sole shareholder and director of Weardale. He also operates, as a sole trader, a tanning salon called "Qtan". Qtan is located at the same premises as Weardale. Mr Smith left school at 18 and had spent all his working life working for these two businesses.

5. At the times relevant to this action, the nature of the Claimants' operations was as follows. Weardale was an SME with a turnover of less than c. £100,000 per annum. Its day-to-day "shopfloor" operations were carried out by Mr Smith and one other employee. Qtan was also an SME, and its turnover was c. £70-80k. Its shopfloor operations were also carried out by Mr Smith, this time with the assistance of two to three part time employees. Mr Smith was the person in charge of entering contracts, such as electricity contracts, on Weardale's behalf. For the purposes of electricity supply, the electricity regulator OFGEM classifies businesses of the size of Weardale and Qtan as "microbusiness".

6. From December 2015 to date, Weardale has purchased electricity for its and Qtan's energy needs from Engie[1]. At the times relevant to this action, Engie's business was in the supply of electricity to non-domestic customers. The vast majority of the Engie's customers (the evidence suggested at least 85%) were introduced to the Engie by third parties, referred to at trial as "energy brokers". Such energy brokers would seek out potential electricity customers for companies such as Engie. The brokers did so by cold calling in person or by telephone. Those customers could then give the brokers authority to negotiate and/or enter electricity deals with Engie. If the customers did enter electricity supply contracts with Engie, then the brokers would obtain a payment (by way of a commission paid on a fixed figure per kWh) from Engie. It was Engie's policy to not reveal the size or nature of this commission. Likewise, it appears that brokers also did not, or at least were very reluctant, reveal their commission arrangements. Unsurprisingly, as the brokers were a vital part of

[1] Until 2016 the Defendant traded as GDZ Suez Marketing Limited. It is unnecessary however to refer to it other than as Engie in this judgment.

Engie's business, Engie maintained a very active and close relationship with them. It was in Engie's interests to keep the brokers happy and to, as far as possible, attract them to do business with Engie as opposed to another electricity supplier.

7. Immediately prior to switching to electricity supply to Engie, Weardale had obtained its electricity from Npower. That supply had been arranged directly between Weardale and Npower by Mr Smith's sister who has since deceased (and was not involved in the formation of the contracts at issue in this action).

8. Weardale's involvement with Engie began with a cold call from a broker made in 2015. This cold call was made in person, and the broker's representative offered to go out into the market and get the best electricity deal he could for Weardale[2]. The broker's representative also asserted that he would seek to aggregate a number of different local businesses in order to improve the nature of the deal[3]. Later interaction with both brokers in this case followed a very similar pattern – that is to say the brokers offered to obtain the best deal they could for Weardale, provided they were also authorised by Weardale to act on its behalf.

9. The brokers, having obtained a letter of authority to act on Weardale's behalf, would seek a base price per kWh from Engie. This was the figure per kWh consumed, together with a standing charge, that Engie required to be paid to supply electricity to Weardale. Having established that base price per unit, the broker then would ask Engie to add an additional sum per kWh as a broker's commission. This was a sum that the broker was contractually entitled to be paid by Engie. Engie would accept that uplift figure (whatever it was) subject to the following. Prior to May 2017 that uplift was not capped, and the broker could set as commission any figure it chose. A cap of 1.5p per kWh was introduced in May 2017. That cap was lifted to 3p per kWh in late August/early September 2017 as a result from pressure from the brokers working with Engie. Having established a base price and a commission rate the broker (with one exception discussed below) had the authority to bind Weardale to an electricity supply contract without further permission or reference to Weardale.

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[2] This mode of operation was entirely consistent with the way that Utilitywise described its mode of operation on its website – albeit it was not suggested that Mr Smith visited the website at any material time.

[3] There was no evidence that such aggregation was attempted. However, whether it did or didn't does not directly affect matters I have to decide.

10. As far as Weardale were concerned, its contracts of supply were each based on a single figure per kWh plus the standing charges (i.e. the contracts did not identify the way in which commission was to be accrued. Indeed, at most they did not indicate anything more than that commission might be charged). Furthermore, neither the brokers nor Engie otherwise informed the Claimant of the way in which commission was charged. Nor did the Claimants ask for this information, albeit it appears that neither the broker nor Engie would readily have disclosed such information had either of them been asked. As far as Mr Smith was concerned the position was that Weardale was not paying the brokers, however it was likely that the brokers would be obtaining some recompense (e.g. a one of payment) from Engie.

11. Weardale's purchases of electricity from Engie were made under a series of supply contracts. Five contracts, entered into between 2015 and 2020, are relevant to this action[4]. Each of these was arranged on Weardale's behalf by a third-party broker. In the case of the first four, the broker was a company called Utilitywise Plc ("Utilitywise"), in the case of the final contract the broker was a company called Ideal Energy and Fuels Ltd ("Ideal"). In relation to these contracts the commission payments payable to the brokers under their agreements with Engie were as follows[5]:

Contract (and date of formation)	**Commission rate** (per kWh)
1 (14/12/15)	3p
2 (13/7/16)	1.2p
3 (15/7/16)	0.10p
4 (9/11/17)	1.4p
5 (16/3/20)	2p

12. The fifth contract is still extant and if not terminated may run until 31 March 2025. To the extent it does, further sums, equivalent to the agreed commission, will be collected by Engie. The precise amount collected will depend on the energy used.

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4 These relate to two different electricity meters, but it is unnecessary to distinguish between them for the purposes of this action.

5 The actual sums paid are complicated a) by the payment method used and b) by the fact that Utilitywise has since become insolvent (entering administration on 14.2.21) and as a result there is an insolvency set off with Engie. For reasons explained later, it is the promised payments not the actual payments that matter. Be that as it may, I note that the brokers were paid by Engie as follows. A proportion of the commission based on an estimated electricity consumption was paid upfront. Then, at the end of the contract, a final reconciliation was made based on the actual amount of electricity consumed.

Issues at Trial

13. The primary disputes at trial were as follows:
    a. did the commission arrangement give rise to a conflict of interest;
    b. was the relationship between Weardale and its brokers such as to give rise to a fiduciary relationship (this also raised the linked question of whether the brokers were acting as Weardale's agents); if so
    c. did the scope of that fiduciary duty require the broker to disclose the nature of the commission arrangements and hence disclose the conflict of interest; if so
    d. were the brokers in breach of that duty because Weardale had not given its informed consent to the commission arrangements and hence the conflict of interest.

14. The Defendant accepted, subject to a limitation point in relation to the earliest contract in time ("Contract 1") and points relating to exactly what sums were due under contracts 2 – 4, that if I were to find that there were breaches of fiduciary duty by the brokers (and therefore that Weardale had not given informed consent) then they were liable to pay equitable compensation for those breaches (subject to the Court's assessment of the extent of such compensation).

15. Finally, it is convenient here to address the status of the Second Claimant. By the end of trial, it was common ground that the claim for breach of fiduciary duty arises solely between the Weardale and Engie. No separate claim was advanced on behalf of the Second Claimant. Both parties referred me to a novation agreement and side letter, however, by the close of trial it was common ground that these did no more than vest some parts of the claim with the Second Claimant (i.e. the Second Claimant had no separate cause of action). I therefore do not need, at least for the purposes of this judgment, to address the issues relating to novation any further.

The Witnesses

16. Mr. Smith gave evidence on behalf of the Claimants. He described his background, his businesses, and his interactions with the brokers. He was in my view honest, straightforward and did his best to assist the Court. His background was as a shopfloor

based small businesses man. Mr. Smith's evidence did not suggest that he was in any meaningful sense financially vulnerable. Nor did it suggest that he had any financial knowledge of sophistication beyond that of the normal practical man of business in his position. He was clearly capable of entering straightforward contracts, such as for the supply of electricity or the hire of gaming machines, but the was no suggestion that his knowledge of the energy supply market or other straightforward financial transactions was any greater than the basics needed to do this. It was suggested by the Defendant that a man in Mr. Smith's position would have been expected to consult external documentation such as OFGEM reports on commercial energy supply and the accounts of Engie. That represents, in my judgment, a level of financial sophistication and interest far above that exhibited by Mr. Smith or, in my judgment, likely to be exhibited by the ordinary businessman in his position.

17. The Defendant submitted that Mr. Smith was an unreliable witness, and that his evidence should therefore be treated with caution. It challenged his recollection of what had been said to him by the representatives of the brokers and the precise nature of the email communications with the brokers that may have taken place thereafter. It supported these submissions by pointing to what, it submitted, were surprising variations in the degree and accuracy of Mr. Smith's recollection. For example, it submitted that it was surprising that Mr. Smith had a clear recollection of his first meeting with a broker's representative, but a much less clear recollection of what happened thereafter.

18. I reject the Defendant's criticisms of Mr. Smith. Mr. Smith's recollection was, as he very fairly conceded, patchy. However, in my view, the degree to which he could remember some matters and not others, was a function of (a) the passage of time and (b) the extent to which some matters occurred in circumstances which made them stick in his mind. There were, in my judgment, good reasons why Mr. Smith could recall his initial meeting with the brokers representative, and likewise good reasons why his recollection of later correspondence was limited. In particular, his later interactions with the brokers were more routine, and therefore less memorable, than the first cold call meeting.

19. Mr. O'Connor gave evidence on behalf of the Defendant. He did not have direct knowledge of the transactions between Weardale and the Defendant. These would have been managed by a person at a lower level in Engie's organization albeit one possibly

managed by him. Instead, he was able, as one of the Defendant's Sale's Directors, to speak to the Defendant's general practices, the commercial energy marketplace, and to Engie's relationship with third party brokers.

20. In my judgment, Mr. O'Connor's evidence was less than entirely satisfactory. Whilst I do not regard Mr. O'Connor's evidence as overtly dishonest it was plain that he regarded his task to be, at least to a significant extent, to protect his company's position. Thus, Mr. O'Connor was, on several occasions, extremely reluctant to answer questions which presented a choice of straightforward answers. One, but by no means the only example of this tendency, was Mr. O'Connor's difficulty in rationalizing what he had said about Engie's broker commission arrangements in cross-examination in this case, with what he had said, in similar circumstances in an earlier case (*The Dark Blue Pig v Engie Power Limited*, for which see below). In my view it is was clear that the reason, or at least a significant reason, for this reluctance was because Mr. O'Connor feared his answer might damage his client's position or undermine his previous evidence. His evidence was also over lawyered and went beyond matters to which he could speak personally (although that may have been as much the fault of those settling the draft witness statement as Mr. O'Connor himself).

The Law

21. This action is an example of a so called "half-secret" commission case. That is to say a case where the Claimants were aware of the possibility of a commission but were not aware of the nature of such a commission.

22. The underlying claim against the Defendant arises on the basis that if I were to find a breach of fiduciary duty on the part of the broker, the Defendant would be liable in restitution for the amount of that commission whether paid or promised (see *Grant and Mumford on Civil Fraud*, 1st edition, 2018, 7-058).

Existence and Scope of a Fiduciary Duty

23. It was not disputed that the leading decision in this area is that of Tuckey LJ (with whom the remainder of the Court agreed) in *Hurstanger v Wilson* [2007] 4 All ER 1118. Whilst the facts of that case differ from this case (it concerned the payment of a single fixed

commission to a mortgage broker, in relation to a deal concluded in the non-status lending market[6]) it addresses analogous issues in relation to the existence/scope of a fiduciary duty on the part of a broker and its breach where a commission was obtained, but informed consent to that commission was not given.

24. The Court of Appeal in *Hurstanger* clearly found that a fiduciary duty existed as between the principal and its broker. This issue was however a matter of dispute in this case, and it is therefore necessary for me to consider the underlying principals in a little more detail below.

Agency

25. The parties disputed whether the brokers acted as Weardale's agents. Whilst the existence of an agency as between the broker and Weardale was not an essential ingredient of finding a fiduciary duty, its existence is highly relevant to the presence of such a duty (see *McWilliams v Norton Finance (UK) Ltd (trading as Norton Finance in liquidation)* [2015] 1 All ER (Comm) 1026 at paras 38-39).

26. By the close of trial there was no material dispute between the parties as to the applicable legal test. The starting point is summarised in *Bowstead* (*Bowstead and Reynolds on Agency*, 23rd ed (2023 at paragraph 1-001) in following terms:

> (1) 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. The one on whose behalf the act or acts are to be done is called the principal. The one who is to act is called the agent. Any person other than the principal and the agent may be referred to as a third party.
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> (2) In respect of the acts to which the principal so assents, the agent is said to have authority to act; and this authority constitutes a power to affect the principal's legal relations with third parties.

27. The Claimants submitted, and this again was not seriously disputed, that the concept of agency extends wider than the strict ability to affect legal relations with third parties or to

[6] Non-Status borrowers being those with impaired or low credit ratings who would find it difficult generally to obtain finance from traditional sources on normal terms and conditions.

contract on behalf of a principal. In this regard it relied upon the decision of Marcus Smith J in *Pengelly v Business Mortgage Finance 4 Plc* [2021] 1 All ER (Comm) 1191, which was later approved by the Court of Appeal and which I understand to be an accurate statement of the law:

> 32. It was suggested by Finance 4 that (at least in the case of a mortgage broker) the reference to "a power to affect the principal's legal relations with third parties" meant that "true" agency was limited to those relationships where the agent was empowered to affect the principal's legal relations by causing a contractual relationship to arise between the principal and the third party. Whilst, clearly, this is an instance of agency, I do not accept that the relationship of agency is limited to this case. An agent can affect his legal relations with third parties in many cases where the agent has no power to conclude a contract on behalf of his principal. Thus, and purely by way of example, a solicitor acting for a vendor in a house purchase, has authority to receive and give good discharge for the purchase monies received, but does not have authority to conclude the sale itself; equally, an insurance broker may have no power to conclude the contract of insurance, but may well be the "agent to know" for the purposes of disclosure and – if guilty of a non-disclosure or misrepresentation – may very well render the contract of insurance voidable even though the contract itself was concluded by the principal. This is because it is perfectly possible for an agent to affect the principal's legal relations with third parties in ways other than the conclusion of a contract.

Fiduciary Duty

28. Millet LJ (as he then was) explained the nature of fiduciary duty in *Bristol & West Building Society v Mothew* [1998] Ch 1 at page 18 A-C as follows:

> "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. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations".

29. It is clear from later cases, in particular *McWilliam*, that where a person has the capacity to alter a principal's legal position, they may be subject to a fiduciary duty. This applies in both the cases where that person has the authority to bind the principal and also where that person does not have authority to bind the principal, but it nonetheless has the capacity to alter the principal's legal position (for example by receiving or communicating

information). Similarly, the High Court in Australia, in *Hospital Products Ltd v United States Surgical Corpn* (1984) 156 CLR 41 at 96 (cited with approval by the House of Lords in *Hilton v Barker Booth and Eastwood (a firm)* [2005] UKHL 8) explained that:

> "the fiduciary undertakes or agrees to act for or on behalf of the interests of another person in the exercise of a power or discretion which will affect the interests of that 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".

30. The Defendant emphasised that nonetheless the provision of professional services which are administrative in nature, even if they include advice, does not automatically turn a relationship into a fiduciary relationship, something more is required to justify the entitlement to expect that a party is obliged to act in the other's interest. I agree and have born this factor firmly in mind when considering the facts.

31. In *Hurstanger* itself Tuckey LJ addressed the question of the existence and scope of the fiduciary relationship on the facts of that case as follows:

> 33. Certain things are clear. The defendants retained the broker to act as their agent for a substantial fee. The contract of retainer contained the usual implied terms, but the relationship created was obviously a fiduciary one. As a fiduciary the agent was required to act loyally for the defendants and not put himself into a position where he had a conflict of interest. Yet he agreed that he would be paid a commission by the other party to the transaction which his clients had retained him to procure. By doing so he obviously put himself into a position where he had a conflict of interest. The defendants were entitled to expect him to get them the best possible deal, but the broker's interest in obtaining a further commission for himself from the lender gave him an incentive to look for the lender who would give him the biggest commission.

32. I do however keep in mind, as I have stated above, that the facts in *Hurstanger* are materially different from those in this case. Here no initial fee was paid, the commission arrangements were materially different (see below), and Weardale was not a non-status borrower.

Breach of Fiduciary Duty

33. As far as the case is concerned, if there was a relevant fiduciary duty, it will have been breached unless Weardale gave informed consent to the commission arrangements and to potential conflicts of interest those arrangements gave rise to.

34. In *Hurstanger*, Tuckey LJ addressed the question of whether or not the broker, having acted in the way set out in the extract in paragraph 31 above, was in breach of his fiduciary duty, and stated as follows (emphasis added):

> 34. The broker could only have acted in this way if the defendants had consented to his doing so **"with full knowledge of all the material circumstances and of the nature and the extent of [his] interest"**: *Bowstead & Reynolds on Agency*, 18th ed (2006), art 44, para 6–055-duty to make full disclosure. An agent who receives commission without the informed consent of his principal will be in breach of fiduciary duty. A third-party paying commission knowing of the agency will be an accessory to such a breach.

35. In *Hurstanger*, Tuckey LJ went on to explain that:

a. the question of informed consent is fact sensitive as it depends on both the scope of the particular fiduciary relationship and the particular conflict of interest;
b. informed consent had to be positively proved and the burden of doing so lay on the Defendant;
c. proof of mere disclosure, sufficient to put the principal on inquiry, is not sufficient to prove informed consent (i.e. it is not "full knowledge" as required), and
d. it does not matter if the principal would have given consent had s/he been asked.

36. In half-secret, as opposed to fully-secret, cases the principal is of course aware that some form of commission is being paid. It follows that a key inquiry in such cases is whether the principal had knowledge sufficient for it to give informed consent. In regard to this Tuckey LJ approved the following proposition (taken from the then current edition of *Bowstead*) [36]:

> "**where [the principal] leaves the agent to look to the other party for his remuneration or knows that he will receive something from the other party, he cannot object on the ground that he did not know the precise**

> **particulars of the amount paid.** Such situations often occur in connection with usage and custom of trades and markets. Where no usage is involved, however, the principal's knowledge may require to be more specific."

It is clear, in my view, from what follows in *Hurstanger*, that Tuckey LJ did not regard the highlighted portion of the paragraph as necessarily a complete answer to the question of informed consent. Thus, the learned judge went on as follows*:*

> "The cases cited support these propositions. **Here I think the requirement is more special. Borrowers like the defendants coming to the non-status lending market are likely to be vulnerable and unsophisticated. A statement of the amount which their broker is to receive from the lender is, I think, necessary to bring home to such borrowers the potential conflict of interest**".

37. The Defendant emphasised that the finding of a breach of duty in *Hurstanger* was driven by the vulnerable and unsophisticated nature of the principal in that case. The Defendant also referred to the later Court of Appeal decision in *Medsted Associates Ltd v Canaccord Genuity Wealth (International) ltd* [2019] 2 All ER 959. This case discussed the application of the principles set out *Hurstanger*, albeit on facts that were very different (*Medsted* concerned complex financial instruments and highly financially sophisticated principals). In a judgment with which the remainder of the Court agreed Longmore LJ said the following [42]:

> It follows from all this, in my judgment, that even if the relationship of Medsted and its clients was a fiduciary one, the scope of the fiduciary duty is limited where the principal knows that his agent is being remunerated by the opposite party. As Bowstead and Reynolds say, if the principal knows this, he cannot object on the ground that he did not know the precise particulars of the amount paid. He can, of course, always ask and if he does not like the answer, he can take his business elsewhere. Bowstead does add that where no trade usage is involved (and no usage was alleged in the present case), the principal's knowledge may require to be "more specific". In *Hurstanger* the court held that it did need to be more special "because borrowers (such as the Wilsons) coming to the non-status market were likely to be vulnerable and unsophisticated". The contrary is the case here since, as the judge found (para 90) the clients were wealthy Greek citizens and it is likely that they were experienced investors (Mr Komninos, for example, had already dealt through MAN).

38. From this, and other, passages in *Medsted*, the Defendant sought to establish the following propositions:

(1) It was necessary to consider the "*scope*" of the fiduciary duty owed (which is moulded by the nature of the relationship) and whether the requirement to give informed consent is within the scope of the fiduciary duty owed; and

(2) It is not within the "*scope*" of the fiduciary duty owed to disclose the amount of the commission paid or how the commission is calculated before informed consent can be found to have been given where:

(i) No payment is made by the customer to the broker and the broker is left to look to the third party for payment; or

(ii) There is trade custom and usage that in commercial energy supply contracts the broker (or TPIs) would receive commission as part of the unit rates; or

(iii) The customer is not "*unsophisticated or vulnerable*".

39. The proposition set out in paragraph 38(1) is clearly correct (see *Medsted*, [34]-[42] & [46]). However, I do not think that the effect of the Court of Appeal's decision in *Medsted* is that propositions set out in paragraph 38(2) are necessarily (i.e. on any set of facts) absolute bars to the existence of a relevant duty. Whilst it is clear from the decisions in *Hurstanger* and *Medsted* that these are highly important factors, I do not understand the Court of Appeal's reasoning to mean that they are necessarily determinative in all cases. The underlying reason for this is the degree to which both cases emphasise the central importance of determining a) the precise nature of conflict of interest and b) the scope of the fiduciary duty (including the extent to which the status of the parties affects this duty). Thus, in *Hurstanger*, even though the quoted passage of *Bowstead* does not refer to the nature of the principal, that nature was key to the decision in that case. Likewise, in *Medsted*, Longmore LJ stated [45-46]:

> 45. [The statement of principle in Mothew] does not absolve the court from deciding the scope of the fiduciary's obligations. If, in fact, the agent has, in the light of the facts of the case, no obligation to disclose the actual amount of commission he is paid when his principal knows he is being paid by the third party to the transaction, it does not advance the matter to say that, because he is a fiduciary, he must disclose the actual amount he is being paid. It is the scope

> of the agent's obligation that is important, not the fact that he may correctly be called a fiduciary. As Lord Wilberforce said in *New Zealand Netherlands Society 'Oranje' Inc v Kuys* [1973] 1 WLR 1126, 1130 A:-
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> > "the precise scope of [the duty] must be moulded according to the nature of the relationship."
>
> See also *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 102 per Mason J:-
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> > "… it is now acknowledged generally the scope of the fiduciary duty must be moulded according to the nature of the relationship."
>
> 46 I would therefore hold that, on the facts which the judge found, *Medsted* was not under a duty to the clients to disclose the exact amount of the commission it was receiving or, to put the matter another way, to the extent that Medsted was the fiduciary of its clients it was not a breach of that duty for it not to disclose the amounts of commission it was receiving.

The Recent County Court Cases

40. In the present case the breach of fiduciary duty arises from a conflict of interest whose precise nature is not directly addressed in *Medsted*, *McWilliam* or *Hurstanger*. However, cases that consider facts directly analogous to those in this case have recently come before the County Court, in particular in *The Dark Blue Pig Limited v Engie Power Limited* (unreported) and in *Leicester Indoor Bowls and Social Club v Drax Energy Solutions Limited* (unreported)[7]. In both these cases the Court found that there was a fiduciary duty but, because on the facts informed consent had been given, there was no breach of that duty.

41. In *The Dark Blue Pig,* Deputy District Judge Restall found that on the facts of that case, the Claimant was a small business with no particular knowledge of the energy market, however it could as a small business, be expected to consider its own interests and to be put on its guard when instructing an agent whose services would be paid for in undisclosed amount by another party.

42. In *Leicester Indoor Bowls*, HHJ Hedley reviewed the cases I have referred to above (and others), *The Dark Blue Pig*, and a further similar case, *The Roman Catholic Diocese of Hexham and Newcastle v Select Consulting and Admin Services Ltd* (unreported). The

[7] *The Dark Blue Pig* was discussed at trial. *Leicester Indoor Bowls Club* was drawn to my attention after trial. Neither party thought it necessary to make submissions on the latter case, and I did not require them to do so.

learned judge's summary of the law is set out at paragraph 56 of his judgment. I respectfully agree with and do not need to comment on paragraphs 56(a)-(g) of that summary. I do however need to consider the learned judge's conclusions on informed consent at paragraph 56(h) which are as follows:

> As to what amounts to informed consent, where the principal knows that the agent will look to the other party in the transaction (for example as a result of the customs of trades or usage), he cannot object on the ground that he did not know the precise amount (Medsted *para 42*). However, where there is no such usage the principal's knowledge may need to be greater in order for the agent to avoid a breach, particularly where they are vulnerable and unsophisticated (*Hurstanger*, para 4). However, there is no requirement for vulnerability or the lack of sophistication in order for more information to be needed to give informed consent. They are simply examples of how or when informed consent might not be given. It is a question of fact in every case.

43. My conclusions at paragraph 39 above are expressed less absolutely than those of HHJ Hedley in the passage above. I do not however think adoption (at least that as far as this case is concerned) of either formulation of the test for informed consent makes a material difference to the relevant analysis. That is because, as I address below, this is a case where I have found that there was no relevant trade custom and practice.

44. As will become apparent below, I have reached a different conclusion on informed consent on the facts of this case than the learned judges did on the facts in *The Dark Blue Pig* and *Leicester Indoor Bowls*. In this respect I should note here that neither party sought seriously to persuade me that the decisions on the specific facts in those cases (similar though they are in many respects to this case) should guide my decision in this case[8]. Instead, both parties addressed me by reference to the application of Court of Appeal's decisions in *Hurstanger*, *McWilliam* and *Medsted*.

45. I note finally that in relation to the issues of sophistication and vulnerability I need to keep in mind the following statement by Tomlinson LJ in *McWilliam* [41]:

> For my part I do not regard reasonable competence and sophistication as descriptions if the same quality or as synonymous. It is possible in matters of finance to display reasonable competence and in handling relatively straightforward transactions and yet to lack what would ordinarily be called financial sophistication.

[8] The high-water mark of the Defendant's submissions on the decision *The Dark Blue Pig* are set out in paragraph 37 of its opening skeleton. I have taken these points into account.

Analysis

Was there a conflict of interest between the brokers and Weardale?

46. There can be, in my judgment, no doubt that the manner in which the brokers' commissions were determined gave rise to a conflict of interest between the brokers and Weardale.

47. That conflict arose in two ways:

    a. Subject to the commission cap, the size of commission was decided by the brokers alone without any reference Weardale[9]. Weardale's interests required that the broker chose to ask for the lowest commission possible. The brokers' interests required the opposite.
    b. The brokers had the authority to determine the length of contract to which Weardale would be bound. It was potentially in the brokers' interests to seek to bind Weardale to a long-term contract as this would guarantee a given commission rate. On the other hand, depending on market conditions, it might or might not be in the interest of Weardale to enter a long-term contract.

48. The conflict of interest in this case is therefore somewhat different from that in either *Hurstanger* or *Medsted*. In *Hurstanger* the conflict arose from the payment of a one-off commission (£240) paid by the mortgage lender to the mortgage broker. In *Medsted* the conflict arose by reason of the payment of a part of an agreed fixed commission to a third-party broker (see *Medsted*, para 6).

Existence and Scope of a Fiduciary Duty

Agency

49. On Mr Smith's evidence, which I accept, the brokers' representatives of both Utilitywise and Ideal offered to take over management of Mr Smith's electricity contractual negotiations in order to obtain the best deal the brokers could for Mr Smith's company.

[9] As noted below, for a period of c. 1 month it appears the broker at that time (Ideal) did not have authority to bind – merely authority to obtain information and negotiate. I address this further below.

50. In the case of Utilitywise this resulted in the signature of a letter of authority which allowed Utilitywise, without further reference to Weardale, to a) cancel existing electricity contracts and b) negotiate and bind Weardale to new electricity contracts. The first such letter of authority was dated 29 October 2015 and provided, amongst other things, as follows (the later letters in favour of Utilitywise were effectively in identical terms):

> *"Utilitywise are hereby engaged and authorised to acts as a service provided to Weardale Entertainments Ltd all matters pertinent to [Weardale's] Gas and Electricity supplies and service. They are authorised to cancel [Weardale's] contracts in accordance with [Utilitywise's] terms and conditions, as well as enter into any new contracts on [Weardale's] behalf until further notice and without further consent from [Weardale]."*

In my judgment it follows that at all material times Utilitywise were acting as Weardale's agent.

51. In the case of Ideal there were two consecutive different grants of authority. The first was contained in a letter of authority dated 12 February 2020. This provided, amongst other things, authority to request current and historic information from Weardale's suppliers and to request and negotiate prices on Weardale's behalf. Although the case for agency is weaker here than in the case of the Utilitywise letters of authority (because there is no power to cancel and enter contracts) nonetheless I believe that this first letter to ideal gave rise to an agency from on or about 12 February 2020. It did so because by negotiating the prices on the basis of a hidden commission, Ideal materially affected the legal relationship between Weardale and electricity companies with whom it might wish to contract (see paragraph 27 above). If I am wrong on this, I also believe that an agency was in any event formed with Ideal on or about 11 March 2020. On that date, two further letters of authority were signed (one each for Weardale and Qtan). These both provided the authority to terminate existing contracts, negotiate the terms of new contracts, and the authority to enter new contracts. It follows in my judgment that at all material times Ideal was acting as Weardale's agent.

52. The Defendant argued that despite the letters of authority, and the powers said to be granted by them, other contractual terms prevented an agency being formed. If this was correct it would, in my view, have led to a very surprising and contradictory state of affairs. By

closing the point was not strongly contested by the Defendant, however as the point was not dropped, I shall deal with it briefly here.

53. In respect of Utilitywise, the Defendant relied upon clause 8.5 of Utilitywise's terms and conditions which provided that:

> *"Nothing in the Contract ... [shall].. .constitute any party the agent of another for any purpose. No party shall have authority to act as agent for, or to bind, the other party in any way".*

54. The Claimants submitted clause 8.5 was not incorporated into the contract between Utilitywise and Weardale. It also submitted that even it was, it did not prevent the agency referred to in the letter of authority being formed. I will deal with these points in reverse order.

55. It is clear, in my judgment, that the intention of Weardale and Utilitywise was to enter a contract based on the agency set out in the letters of authority. That was the whole point of the letters and without that authority it is unclear on what basis Utilitywise could have entered into contracts on Weardale's behalf (although this latter point is one I do not need to consider here in any detail). Furthermore, clause 8.5 itself is inconsistent with the wording of both the letter of authority and the earlier clauses of the terms and conditions. Thus, clause 2.1 makes the letter of authority the basis of the contract and clause 1.1 defines the letter of authority as *"the customer's signed letter of authority appointing [Utilitywise] as it's agent in connection with the Services"*. For these reasons, even if clause 8.5 was incorporated it cannot have had the effect for which the Defendant argues. For these reasons, clause 8.5 is in my judgment verbiage which cannot alter the true relationship of the parties (see Chitty on Contracts, 34 ed, 1-067, 1-071 and 21-025).

56. I also do not believe that clause 8.5 was incorporated into the contracts between Utilitywise and Weardale. The clause has such an unusual and surprising effect it would have to have been fairly and reasonably brought to Weardale's notice (see Chitty, 34ed, 15-012). This would, in my judgment, have required evidence that Weardale's attention was brought to the specific clause and to the (very surprising) effect that the Defendant contends that that clause has. There is no evidence, in my judgment, that goes this far. The letters of authority refer to the existence of the terms and conditions, but they do not recite them. The Defendant suggested to Mr Smith that he would have received a hard copy of the terms and

conditions from Utilitywise's representative. Mr Smith's recollection on this point was hazy and somewhat contradictory. However, taking his evidence on the point as a whole, I think the better view is that it was more likely than not he did not receive a hard copy of the terms or conditions. The Defendant also asserted that Mr Smith may have received an email that had a reference in it to the incorporation of the terms and conditions, plus a link to those terms and conditions. There was no satisfactory documentary evidence on this point. Mr Smith had, prior to (and for reasons unconnected with) this litigation, destroyed his email records from this period and neither party had obtained the broker's copies of these records. The Defendant sought to rely on copies of emails sent to other parties which included the wording they relied upon. On balance I am not prepared to accept that Mr Smith received a similar email. However, even if I had accepted that Mr Smith received a copy of the terms and conditions, and/or notice asserting their incorporation, this on its own is not in my view sufficient to have brought clause 8.5 fairly and reasonably to his notice. To be given fair and reasonable notice of clause 8.5, Mr Smith would, in my judgment, have had to have been specifically pointed to it and also to its alleged affect. There is no evidence suggesting this happened.

57. Turning now to Ideal, both letters of authority stated that *"by signing this LOA you confirm that you understand that you are not entering into an agency agreement with Ideal Energy and Fuels and all contracts are strictly between your chosen supply and yourself"*. For effectively the same reasons as I have already discussed I do not believe that this wording can alter the fact that Ideal were acting at all material times as Weardale's agents[10].

Fiduciary Duty

58. In my judgment the facts establishing the agencies discussed above, equally establish that both Utilitywise and Ideal owed Weardale a fiduciary duty. The Defendant submitted that when all the circumstances surrounding Weardale's relationship with the brokers were considered this was not the case. I will deal with its detailed submissions on this point below. However, I note at the outset that none of those submissions, in my view, adequately engaged with the fact that the brokers, by their own request, had obtained the power to

[10] During trial the Defendant raised the possibility that agency might also be excluded by reason of Ideal's terms and conditions. This was a point that was neither pleaded nor made good in evidence. By the close of trial, the Defendant had largely ceased to press this point, however, if it had I would have rejected it for effectively the same reasons that I have given in relation to Utilitywise.

cancel, negotiate, and bind Weardale contractually without asking permission from, or providing further information to, Weardale.

59. The Defendant submitted that the appropriate relationship of trust and confidence did not exist because there was no inequality of knowledge between Weardale and the Brokers. In summary, this was because, the Defendant said:

    a. Mr Smith was able to arrange electricity contracts for Weardale.
    b. The payment of commission was common practice.
    c. The payment of commission on a per kWh basis was a matter of trade custom and usage.
    d. Engie obtained no commercial advantage over other energy provides by paying commission in the way that it did, and
    e. Weardale might not have obtained as favourable deal with Engie had it attempted to deal direct.

60. Dealing with each of these in turn.

61. The fact that Mr Smith was capable of arranging an electricity supply contract is not, in my view, of material significance to the question of whether a fiduciary duty exists. The ability of Mr Smith to enter such contracts does not provide him with special knowledge of the way in which the commission arrangements relevant to this case were structured, nor to the way that that companies such as Engie interacted with its brokers. Therefore, Mr Smith's ability to enter electricity contracts provide him with no material knowledge that would put him on his guard against the conflicts of interest in this case.

62. I will deal with the second and third points made by the Claimant together. I start by noting that, as stated in *Bowstead*, the burden of proving the existence of a custom or trade practice is a heavy one, whose burden lies with the person relying upon the assertion (see 3-036 and 3-040). Likewise, *Chitty on Contracts* (16-035) states as follows;

> "If there is an invariable, certain and general usage or custom of any particular trade or place, the law will imply on the part of one who contracts or employs another to contract for him upon a matter to which such usage or custom has reference a promise for the benefit of the other party in conformity with such usage or custom; provided there is no inconsistency between the usage and the terms of the contract. To be binding, however, the usage must be notorious, certain and reasonable; and it must also be something more than a mere trade practice."

Furthermore, in my judgment it is clear that the usage or custom relied upon must relate to the commercial interaction between Engie and its customers (such as Weardale). Proving a usage or trade custom that existed only between the brokers and Engie is not sufficient.

63. The evidence established that Mr Smith was aware that some form of financial recompense (possibly a one-off payment) would be received by the brokers. The evidence also established that Mr Smith did not know any particulars of the commission arrangements or that such arrangements were customary in the trade. The Defendant sought to demonstrate that the payment of commission on a per kWh basis was both well-known and customary in the trade by relying upon a) the evidence of Mr O'Connor, b) publications by OFGEM c) the content of Utilitywise's public accounts, and d) publications by the Citizens Advice Bureau. In my judgment, neither Mr O'Connor's evidence, nor the documents, (whether taken singly or together) were sufficient to establish that such knowledge was either well-known to people such as Mr Smith, nor that it was a matter of relevant trade usage and custom. For example, there was in my judgment no satisfactory evidence as to the extent to which the content of the publications relied upon had been made widespread to microbusinesses such as the Claimants. On the contrary, prior to this case, Mr Smith had no knowledge of the publications relied upon by the Defendant. Furthermore, it would (given the evidence in this case) have been fanciful to suggest that a businessman in Mr Smith's position would have gone out and looked for such information prior to entering a contract with the brokers.

64. As to the fourth point. The Defendant submitted that payment of commission by Engie to its brokers provided no commercial advantage to Engie. There was, in my view, no evidence that supported this submission. In this regard, I reject Mr O'Connor's evidence that the size of commission offered by Engie did not benefit Engie by attracting brokers to deal with it. This evidence a) was contrary to Mr O'Connor's evidence in the *Dark Blue Pig* case b) contrary to the fact that the Defendant conceded it had to raise its commission cap at the behest of its brokers and c) inherently implausible. On the contrary, the evidence suggested that the payment of commission to the brokers and the amount of that commission they were allowed, were highly important factors in the ability of Engie to obtain business through brokers. Even if this were not the case, I do not believe that the question of whether Engie benefited from its arrangement with the brokers is directly

relevant to whether or not there was a fiduciary duty as between those brokers and Weardale.

65. As to the fifth point. In my judgment this is legally irrelevant on the facts of this case. The brokers did not contend that they would provide Weardale with a better deal than it could receive from Engie if it went direct. On the contrary, as I have found above, they contended they would find Mr Weardale the best deal they could.

66. The Defendant also submitted that the fact that the letters of authority allowed the broker to bind Weardale did not give rise to a fiduciary relationship because that authority enabled the broker to enter a contract at a quoted price in a fast-moving market. The difficulty with this submission is that it proceeds on an incomplete factual basis. The power to bind Weardale granted in the letters of authority was not limited to the case where a quote had already been approved and needed to be acted on quickly, on the contrary it was a general authority to bind Weardale.

Breach of fiduciary Duty

67. This issue turns on whether or not Weardale gave the brokers its informed consent. There are effectively two issues: (1) what did Weardale know and (2) was this sufficient to enable informed consent.

68. As I have already stated, Mr Smith's evidence was that he knew that whilst Weardale were not paying the broker, the broker would obtain some compensation from Engie. His evidence, which I accept, was that he had no idea of the commission arrangements that were actually being imposed on Weardale by the brokers. In particular he did not know that the commission was a) set by the broker and b) tied to the per kWh price. It was suggested by the Defendant that Weardale had notice in relation to Ideal that commission was charged as part of the kWh rates charged by Engie. I reject that submission for the reasons I have already discussed. The Defendant also submitted that Weardale should have been aware of the manner in which commission was paid as a matter of trade usage and custom. Again, I reject that for the reasons discussed above.

69. The question of informed consent therefore boils down to whether the fact that Mr Smith/Weardale were aware that there was some kind of commission arrangement between

Engie and the brokers sufficient to provide Weardale with "*full knowledge of all the material circumstances and of the nature and the extent of [the brokers] interest".* In my view it does not. The heart of the conflict of interest is not the payment of a commission *per se*, it is that the brokers could choose, without reference to Weardale, the commission rate they were to be paid per kWh (within the bounds of the cap), and could lock that commission in, again without reference to Weardale, for such period as it could negotiate with Engie.

70. This is a case where, as I have found above, there was no relevant trade usage or custom. In my judgment, it follows that without a specific indication that the commission was set by the broker itself on a per kWh basis, Weardale could not be said to have had full knowledge concerning the broker's interest in the transaction. Weardale might well be said to have been on their guard as to the existence of a commission of some kind, but this is not, in my view enough. In particular, I do not believe that the information available to Weardale was sufficient to put it on its guard against the conflict of interest caused by a commission arrangement based on the broker setting its own commission rates on a per kWh basis.

71. Against this, the Defendant submitted as follows.

72. First, the Defendant submitted that I should find that Mr Smith and Weardale were financially and commercially sophisticated. I agree that Weardale and Mr Smith were not unsophisticated or vulnerable in the manner discussed in *Hurstanger*. This is however a long way from finding that they were sophisticated in a way which would, given the facts available to them, put them on their guard of the actual conflict of interest that existed. I therefore reject this submission.

73. Second, the Defendant submitted that Mr Smith would have or should have enquired as to what services were being provided and how much they were going to cost. As I understand the Defendant's case the underlying justification for this submission is the passage in *Medsted* quoted at paragraph 37 above. I reject this submission for the following reasons. First, as a matter of fact I do not believe that the Defendant has shown that the Claimant had sufficient actual knowledge to be put on its guard about the risk of the particular conflict of interest in this case. Second, the Defendant has not proved that such knowledge was custom and practice. Third, whilst Weardale/Mr Smith were not unsophisticated or

vulnerable, they were not of a level of sophistication that would have, given the information available, put them on their guard as to the commission arrangements and hence the potential conflict of information. Thus, in the end, I regard the Defendant's submission as bad because it is no more, on the facts of this case, than a submission that Mr Smith/Weardale had sufficient information to be put on inquiry, which *Hurstang*er makes clear they were not required to do.

74. Third, the Defendant submitted that Mr Smith and Weardale should in all the circumstances have been sufficiently alive to the prospect of a conflict of interest without further disclosure. In my judgment if the commission was a flat fee, determined in advance, then there would be force in this submission. However, for the reasons set out above, I do not believe that the information available to Mr Smith/Weardale would be sufficient to put them on their guard of this type of conflict.

75. Fourth, the Defendant submitted that if Mr Smith and Weardale wanted to know more they could have made enquires. This is, in my view, wrong for the reasons I have already stated above.

76. For all these reasons I find that Weardale did not give informed consent. It follows that I also find that Engie are liable for Utilitywise and Ideal's breach of fiduciary duty.

Limitation

77. The Defendant submits that the first contract is statute barred as the appropriate period expired on 13 December 2021 and the claim was issued on 8 July 2022.

78. In its skeleton, the Claimant did not admit that the statute of limitation applied to claims for equitable compensation of the kind raised in this action. In the event this contention was not seriously pursued in closing. Furthermore, the Defendant relied upon the judgment at first instance in *Wood v Commercial First Business Limited* [2019] EWHC 2205 (Ch) [173]-[178] which supported the proposition that the limitation act does apply in a case such as this. I therefore proceed on the basis that prima facie the claim under the first contract could, barring the operation of section 32 of the Limitation Act 1980, be statute barred.

79. The remaining issues on limitation are therefore whether the date for limitation is postponed by operation of sections 32(1)(b) or 32(2) Limitation Act 1980.

80. The Claimant's case on postponement, relying on the Court of Appeal's decision in *Canada Square Operations Ltd v Potter* [2021] EWCA Civ *("Potter"*), was advanced as follows (per the Claimant's opening skeleton at para. 72):

    a. The amount of the commissions and the model under which they were paid are facts relevant to the Claimants' cause of action (in fact, they lie at its heart).
    b. Neither were disclosed prior to the issue of this claim despite requests from the Claimants' solicitors in respect of the same.
    c. The Defendant deliberately concealed the commissions payments and the model under which they were paid. A thing is deliberately concealed where a party is under a duty to disclose it and chooses not to: see *Potter*, per Rose LJ at [75]-[77] and [84].
    d. The commission amounts and the model were deliberately concealed as the Defendant and the brokers were contractually forbidden from revealing the same.
    e. The concealment was "deliberate" as it was done knowingly or recklessly: see *Potter*, Rose LJ at [137] as to meaning of "deliberate".
    f. In any event, in failing to disclose the commission amounts and the commission model, the Defendant deliberately breached its duty to disclose the same thereby engaging sub-section 32(2). "Duty" is not limited to strict contractual duties but should be given a broad meaning: see *Potter*, per Rose LJ at [61]-[63].
    g. The commission amounts and the model were not disclosed until the service of the defence and therefore any period of limitation period did not commence until 2022.
    h. The Claimants could not have discovered either the commission amounts or the model under which they were paid at an earlier date had they exercised reasonable diligence because, had they asked about the same, neither the brokers nor Defendant would have revealed the information as such would breach the terms of the brokerage agreements referred to above.

81. Following trial, the Supreme Court handed down its judgment in *Potter* [2023] UKSC 41. This decision was, quite properly, brought to my attention by both parties. The appeal before the Supreme Court concerned the meaning of the phrases "deliberately concealed" in s.32(1)(b) and "deliberate commission of a breach of duty" in s.32(2).

82. As far as it is relevant to the matters I have to decide in this action, the decision of the Supreme Court in *Potter* was as follows:

    a. a fact will have been concealed if the defendant has kept it secret from the claimant, either by taking active steps to hide it or by failing to disclose it. The Claimant does not need to establish that the defendant was under a legal, moral or social duty to disclose the fact, nor does the Claimant need to show that the defendant knew that the fact was relevant to the Claimant's right of action. All that is required is that the defendant deliberately ensures that the claimant does not know about the fact in question and so cannot bring proceedings within the ordinary time limit [67], [98-105] and [109]. Concealment of a relevant fact will be deliberate if the defendant intended to conceal the fact in question. In this context deliberately cannot also mean reckless [106]-[109].
    b. a Claimant who wishes to rely on section 32(2) must show that the defendant knew it was committing a breach of duty or intended to commit a breach of duty [153], [155]. The Supreme Court rejected the submission that "deliberate" includes "reckless" so that a defendant could be said to commit a breach of duty deliberately if it realised that there was a risk that what it was doing might be a breach of duty and took that risk in circumstances where it was objectively unreasonable for it to do so ([112]-[144],[151]-[152]).

83. It is clear that the facts alleged to have been concealed by Engie, namely the commissions and the model under which they were paid, were facts essential to Weardale's ability advance its cause of action in this case. In my judgment it is also clear from the confidentiality provisions in the overarching brokerage agreements between Engie and its brokers and from Mr O'Connor's evidence, that it was Engie's deliberate policy not to disclose to Weardale (or any other consumer in its position) the commissions and the model under which they were paid. That policy was not, in my view, undermined by the obligation in the brokerage agreements that the broker should act in a fair, honest, and transparent way

(and it was clear from Mr O'Connor's evidence that he did not regard this as requiring disclosure of the commissions or the model under which they were paid). The relevant information was therefore kept secret from Weardale and that concealment was, in my judgment, deliberate on Engie's part. I also agree with the Claimants' submission that the Claimants could not have discovered either the commission amounts or the model under which they were paid at an earlier date had they exercised reasonable diligence because, had they asked about the same, neither the brokers nor Defendant would have revealed the information as such would breach the terms of the brokerage agreements referred to above.

84. I therefore reject the Defendant's limitation Defence. Given this, and given that this judgment is already overly long, I will not engage with the section 32(2) limb of the Claimant's submission on limitation.

Relief

85. The Claimants' pleaded case claims a payment of an amount equal to commissions promised and/or agreed and/or paid by Engie to the brokers. I address this claim by reference to the figures set out in the agreed Case Summary.

86. I will deal with the four Utilitywise contracts first. In respect of these contracts the various calculated and actual payments are as follows.

	A	**B**	**C**	**D**
Contract	**Commission based on consumption**	**Sum paid upfront**	**D's calculated reconciliation adjustment** (considering actual usage)	**Net sum after reconciliation**
1	£4,460.62	£9,124.20	-£5,166.08	£3,958.12
2	£3,558.04	£3,458.30	£430.34	£3,888.64
3	£17.71	£0	£0	£0
4	£2,709.18	£951.91	£227.23	£1,179.14
Total	**£10,745.55**	**£13,534.41**		**£9,025.9**

87. The commission promised to Utilitywise was based on actual consumption. The contract between Engie and Utilitywise provided that this commission would be paid as follows. At the commencement of each contract between Weardale and Engie, Utilitywise was to be paid 80% of the estimated total commission for the contract based on estimated figures for consumption. At the end of the contract a reconciliation was then to be carried out, in order

that Utilitywise received the correct sum it was due (i.e. the sum based on the actual consumption). At least to some extent a reconciliation was carried out between Engie and Utilitywise. However, as is apparent from the table above, the sums produced by that reconciliation do not align with the promised figure for commission based on actual consumption[11].

88. The Claimant sought the sum paid upfront (see column B in the table above). The Defendant argued for payment of the net sum after reconciliation (see column D in the table above). Neither party spent a more than nominal time on this point and beyond the reference I have made to Grant and Mumford in paragraph 26 above, I was not referred to authority.

89. Based on the materials and submissions before me it seems to me that the appropriate sum is the sum promised (i.e. that in column A in the table above). That sum reflects the inducement to the broker promised by Engie. It is also the sum which Weardale has been deprived of as a result of the breaches of fiduciary duty. I do not believe, contrary to the Claimants' submissions that the correct sum is represented by the upfront payments in column B, as these are no more than payments on account that would require later reconciliation. The fact that the reconciliation has been complicated by Utilitywise's insolvency does not, in my judgment, make a difference to this point. Likewise, I reject the Defendant's submission that the appropriate sum is the net payment to Utilitywise after reconciliation. Those figures are altered by the fact of Utilitywise's administration and by the fact that this resulted in the Defendant ceasing to pay commission to Utilitywise. They also fail to take into account the fact that Weardale, as a result of the breaches of duty paid to Engie the sums set out in column A. I therefore find that Weardale is due the sum of £10,745.55 in relation to the Utilitywise contracts.

90. Turning to Contract 5. To date some £3,512,54 has been paid in upfront commission. This figure is, as it was with Utilitywise, subject to reconciliation at the end of the contract. Based upon actual consumption to 31 October 2023 the commission earnt by Ideal amounts to £1,775.42[12]. This latter sum is clearly owed to Weardale. I must however decide how to

[11] The payment of sums under the reconciliation has now been subsumed into, and complicated by, Utilitywise's insolvency.
[12] Actual consumption of 87,771 kWh x 2p commission rate=£1,775.42

address the commission payments that may be paid during the remainder of the contract. For the same reasons as I have set out above, I find that the appropriate sum to be paid to Weardale is based on the actual consumption of electricity. This self-evidently cannot be determined before the end of the contract. It would not, again for the reasons set out above, be appropriate to order that Weardale is paid the total sum already paid to Ideal, or a sum based on an estimate of the energy to be consumed by the end of the contract. The question therefore arises as to how payment is to be made. Neither party made detailed submissions on this. My current view is that the most appropriate way to address this issue is to order that Engie set off against any future electricity bills under Contract 5 a sum of 2p per kWh used. However, I will hear from counsel on the appropriateness of this approach together with submissions on the form of post judgment order.

91. Finally, I would like to express my gratitude for the careful and detailed assistance I received both during and after trial, from Mr Grant KC for the Claimants, and Mr Cutting for the Defendant, and from their respective instructing solicitors.