

Broker not a fiduciary: Hurstanger Ltd v Wilson distinguished

On 15 August 2011, HHJ Jarman QC, the chancery judge in Cardiff, sitting in Mold County Court, held that a loan broker was not the borrower's fiduciary, with the consequence that the lender, GE Money Secured Loans Ltd (represented by William Hibbert) could not be criticised for paying a commission to the broker without disclosing the amount of it to the borrower.

*GE Money
Secured Loans
Ltd was
represented by
William Hibbert
of Henderson
Chambers*

The FISA Guide, sent out with the broker's application form, warned that commission is paid by lenders to FISA brokers. This was confirmed by the lender's credit agreement and its customer care leaflet (as well as in the lender's "speak-to" conversation prior to execution). Notwithstanding that the borrowers themselves paid a substantial fee to the broker for its services, the broker could not be said in those circumstances to be agreeing to undertake obligations of undivided loyalty to the borrower and consequently was not a fiduciary.

In so holding the Judge distinguished the Court of Appeal decision in *Hurstanger Ltd v Wilson* [2007] EWCA Civ 299, where the borrower's loan application form had expressly stated that the broker was the borrower's agent (the paradigm form of fiduciary), fixing the lender with knowledge that he ought to ensure the borrowers gave informed consent to the payment of commission.

Further, the Judge said that, even if the broker had been a fiduciary, he would have held that the borrowers had given their informed consent to the payment of commission. It had been made clear that commission would be paid and the borrowers had never demurred or asked how much it was. Although in *Hurstanger* the Court of Appeal considered that telling a non-status borrower the amount of the commission was necessary to obtain informed consent, it had stated that the question of informed consent was a matter of fact in each case and the Judge noted that, unlike the statements in this case as to payment of commission, those in *Hurstanger* had been unclear and ambiguous.

The Judge also held that there was no unfair relationship under s.140A of the Consumer Credit Act 1974.

Sealey and Winfield v (1) Loans.co.uk Ltd (2) GE Money Secured Loans Ltd
HHJ Jarman QC, Mold County Court, 15th August 2011.

William Hibbert

Henderson Chambers
2 Harcourt Buildings, Temple
London EC4Y 9DB

T 020 7583 9020 F 020 7583 2686
E clerks@hendersonchambers.co.uk
DX 1039 Chancery Lane

www.hendersonchambers.co.uk