
UNDISCLOSED COMMISSION CLAIMS: ADVICE

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INTRODUCTION

1. As is often the case in commerce, one person (**A**) can represent the interests of another (**B**) and help them conduct business with third parties (**C**). English law has, for a long time, prohibited secret payments (often called ‘bribes’ or ‘secret commissions’) from being made to (**A**), without the knowledge and consent of (**B**). If a secret payment is made, either the recipient or the payer must return it to (**B**).
2. The English Courts have recently extended the principles preventing ‘bribery’ or the payment of ‘secret commissions’ to contexts in which, unbeknown to a customer, their broker receives secret payments from a third party. The relevant case law is contained in *Wood v Commercial First Business Ltd [2021] EWCA Civ 471*. As explained below, the principles set out in *Wood* can be applied to a scenario where a nondomestic customer engages a broker to help switch gas or electricity contracts, and the broker receives a secret (or partially secret) payment from the energy supplier.
3. A typical scenario is as follows:
 - (1) a business customer (“**Customer**”) is approached by an energy broker (“**Broker**”);
 - (2) the Broker offers to get the Customer into an energy contract with a company that supplies gas or electricity (“**Energy Supplier**”);
 - (3) the characteristics of the Broker-Customer relationship are such that the Customer is justified in feeling that an energy contract, presented by the Broker, has been chosen only because it is the best option for the Customer;
 - (4) the Customer is not told that the Broker gets paid by the Energy Supplier;
 - (5) the Energy Supplier pays the Broker a commission payment for the referral. The Commission payment is undisclosed to the Customer;
 - (6) the Energy Supplier adds the amount of commission to be paid to Broker to the Customer’s energy bill (“**the Uplift**”), so that the commission increases the cost of the energy contract for Customer.
4. Applying the legal principles from the case of *Wood* to this scenario, it is very likely that the payment from the Energy Supplier to the Broker is considered a ‘bribe’ or ‘secret commission’ for which no consent was provided by the Customer - and the Customer is very likely to be able to recover the amount of the Uplift from either the Energy Supplier *or* the Energy Broker.

THE LAW ON SECRET COMMISSIONS

(A) Legal principles: in what circumstances will a Broker be liable?

5. The Court of Appeal in *Wood v Commercial First Business Ltd [2021] EWCA Civ 471* set out the principles to be applied:

- (1) **Relationship and duty to give disinterested advice:** the relationship between the Broker and the Customer must be such that the Broker: (a) was under a legal duty to provide information, advice or recommendation on an impartial or disinterested basis; and (b) so had a role to play in the decisionmaking process by virtue of being in a position to influence or affect the Customer's decision¹.
- (2) **Payment of commission and non-disclosure:** The Broker must receive a commission payment from the Supplier. If the Customer did not give **informed consent** to the payment of the commission by the Supplier, the Customer has a claim². Conversely, if the Customer did give informed consent to the payment of the commission, they cannot complain. So if the payment was not disclosed, no informed consent could have been given by the Customer, who accordingly will have a claim.
- (3) **Different degrees of disclosure:**
 - (i) If the Customer is completely unaware that the Broker will be paid a commission, the Customer cannot provide informed consent. This will be known as a **fully secret commission**. Here, the Customer has a claim.
 - (ii) If the Customer is told some (but not all) of the relevant information (such as the possibility of a payment being made but not the amount of it) it will be known as a **half secret commission**. Here, the Court will look to see whether the information provided to the Customer went far enough to enable them to provide their informed consent³. If the partial-disclosure was insufficient⁴, the Customer has a claim.

(B) Remedies: what, and against whom, can a Customer claim?

6. If the above conditions are satisfied, the payer (i.e. the Energy Supplier) and the payee (i.e. the Broker) are jointly and severally liable - meaning the Customer can bring a claim against one, or the other, or both of them. The claims that can be brought are as follows:

(1) **Recovery of the bribe / secret commission:**

- The Customer is entitled to recovery of a sum equal to the amount of the relevant bribe or secret commission⁵. In other words, whatever the Energy Supplier has paid to the Broker, the Customer is entitled to recover the same amount. This is available against the Energy Supplier and the Broker

¹ Wood [2021] EWCA Civ 471 at [48]-[51]

² Hurstanger Ltd v Wilson [2007] EWCA Civ 299 at [35]

³ Hurstanger at [36]-[45]. On the facts of Hurstanger, it was said that an actual statement of the **amount** which their Broker was to receive from the lender was necessary to bring home to such borrowers the potential conflict of interest ([37]).

⁴ The materiality of what must be disclosed is to be assessed on the basis of whether it might have affected the Customer's decision and not whether it would have done so: FHR European Ventures LLP v Mankarious [2011] EWHC 2308 (Ch) ("FHR") at [79]. The sophistication of the Customer may also be relevant: McWilliam v Norton Finance (UK) Ltd [2015] EWCA Civ 186.

⁵ Wood [2019] EWHC 2205 (Ch) at [172]

and will apply whether or not the payment is ‘secret’ (with no disclosure) or ‘half-secret’ (with insufficient disclosure).

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- The time limit for bringing such a claim is likely to be **six years** from the date that the Broker received the commission⁶.
- (2) **Rescission:** this means an ‘undoing’ of the agreement between the Customer and the Energy Supplier:
- In a **fully secret** commission case, the Customer has the automatic right to ask the Court to rescind the agreement⁶.
 - In a **partially-secret** commission case, the Court has a discretion about whether or not to grant rescission. That will be a question of fairness⁷. If the energy contracts contain contractual terms which are fair (save for the Uplift which will be returned in any event), it is unlikely that a Court would order them to be rescinded.
 - There is not likely to be any time limit for a rescission claim⁸.
- (3) **Damages:** any particular losses stemming from the Customer’s entrance into the contract recommended by the Broker can be claimed⁹. The time limit for bringing such a claim is likely to be **six years**.

HOW DOES THIS APPLY TO ENERGY SUPPLY CONTRACTS?

7. With reference to the typical scenario as set out in paragraph 3 above (i.e. that in which the Customer engages a Broker to help them switch gas/electricity contracts), the questions are as follows:

(A) Did the Broker have a duty to provide impartial and disinterested advice?

8. In many scenarios, the answer is likely to be Yes. In many of the cases, there will be factors which point towards the Customer being entitled to expect the Broker to get them the best possible deal. Where the actions of the Broker are such that the Customer was objectively justified in feeling that an option presented by a Broker has been chosen because it is the best option for them, it can be said the Broker had a duty to give disinterested advice to the Customer¹⁰. Here, the Broker suffers a conflict of interest - because his interest

⁶ Wood [2019] EWHC 2205 (Ch) at [286]

⁷ Hurstanger at [46]-[50]

⁸ Wood [2019] EWHC 2205 (Ch) at [181].

⁹ Hurstanger at [39]. The damages are for breach of fiduciary duty or fraud.

¹⁰ Hurstanger at [34]

in obtaining a further commission for himself provides him an incentive to look for the Supplier who would give him the biggest commission, rather than to find the best option for the Customer.

(B) Was a commission paid?

9. In most scenarios, the answer is likely to be Yes. The payment of such commissions is endemic in the gas and electricity market. Most businesses use Brokers to obtain energy contracts and most Brokers receive a commission from the relevant Energy Supplier. Further, it is commonplace for the Energy Supplier to pass

⁶ Wood [2019] EWHC 2205 (Ch) at [172]-[176]; Limitation Act 1980 s.5 and/or s.36.

on the cost of the commission to the Customer, via higher gas/electricity bills. For example, if the cost of energy is 10p/kWh, a Customer could pay e.g. 11p/kWh to the Energy Supplier over the term of the contract; the 1p/kWh uplift represents the Broker's commission.

(C) Was informed consent provided?

10. This will depend on the level of disclosure provided by the Broker or Energy Supplier:
- In many cases, absolutely nothing is said to the Customer by the Broker or Energy Supplier regarding the commission (**fully secret commission**). This means there is **no informed consent** provided by the Customer for the payment.
 - In some cases, the Broker's and/or Energy Supplier's terms and conditions will provide some level of information about the fact or possibility of a commission being paid, but often will not disclose the amount or that it will be added to the Customer's bill (**half-secret commission**). Much will depend on the exact wording used (and in some respects, the characteristics of the Customer), but **there will be a significant proportion of cases where the disclosure is insufficient - meaning there will still be no 'informed consent' even though some information is provided to the Customer.**

(D) Which remedies are available to Customers to pursue?

11. As such, in many cases the Customer will be able to bring a claim against the Broker and /or the Energy Supplier. The available remedies are: **recovery of the commission** (i.e. the Uplift), **rescission** (unwinding of the contract) or **damages** (further losses arising, separate to the Uplift paid):

- (a) **Recovery of the commission:** The best, and most straightforward claim, will be one for recovery of the sum paid by the Supplier to the Broker. In practice, this means the Customer will be able to recover the Uplift in price on their energy contract caused by the Supplier adding the commission payment to the Customer's bill. How much a Customer can claim will depend on the size of the commission paid, the amount of energy used, and the length of the contract.

- (b) **Rescission:** Whilst a Customer can, in theory, ask to rescind its gas or electricity contract, there are complications that may make this impractical or undesirable. A Court can only unwind a contract ‘to the extent possible’, and when it does so - such unwinding works both ways (such that both parties have to ‘return’ what they have received from the contract). This means that if a contract cannot practically be unwound, the Court will not unwind it - but even where it can, the Customer will have to return what they have received from it. Within the context of energy contracts, the Customer will already have received and used the energy, so will be unable to return it. Even if the return could be achieved by the Customer giving credit for the energy used, the credit may simply cancel out the sums that the Energy Supplier would have to return to the Customer - meaning there is a risk of there being little practical point to the exercise. Further, given current energy prices, most of the deals entered into within the past 6 years will undoubtedly be at better rates than those currently available
- so the Customer would probably not want to unwind an agreement which likely to represent a better deal than those currently available.
- (c) **Damages:** If claiming damages, a Customer would have to prove (i) the amount of loss suffered and (ii) that it was caused by the Broker’s wrongdoing. First, in the vast majority of cases the new energy deals themselves still represented a better deal (and therefore a saving) when compared to the Customer’s previous deal - so there may be no loss. But even if there was some other loss, pursuing it would mean providing additional evidence that proves both the loss and the causes of it. In circumstances where the claim for recovery of the commission is available and valuable, it is most probably not worth the additional cost (in time and in money) of pursuing an alternative damages claim.

(E) How long do the Customers have to pursue the recovery of the commission?

12. The usual time period for a Customer bringing a claim against the Broker or Supplier is six years from the time the undisclosed commission payment was made to the Broker.
13. However, there is some case law that suggests in the case of fully secret commissions, the clock may not start running until the Customer *discovers* that the secret commission has been paid¹¹.

¹¹ *Limitation Act s.32 - as considered in Wood [2019] EWHC 2205 (Ch) at [179], and Canada Square Operations Limited (CSOL) v Potter [2021] EWCA Civ 339.*

CONCLUSION

14. In the typical scenario described in paragraph 3 above, the prospects of such a claim are good: a Customer is very likely to be able to recover the amount of the secret commission (effectively, the Uplift on their energy contract) from either the Energy Supplier *or* the Energy Broker.
