crane and cutting through bolts (at [241]) and would not be economically viable (at [243], [247], [248]). In place, the building was worth c.£6m (at [219(i)], [233(v)]) but if dismantled its re-sale value was "negligible" (at [493]).

On balance, the building is fixed to the college's land and so the property of the college. This provides an elegant solution to three issues.

First, the college was enriched not merely by use of the building for a length of time. Instead, it was enriched by title to the building forever. Consequently, there was no need to take a year-by-year approach to counter-restitution. Instead, the builders' claim for restitution in respect of the college's enrichment (the building, worth approximately £6 million) required the builders to give counter-restitution of the college's payments for the building (£3.2 million).

Second, the builders cannot raise a change of position defence to the college's claim for counter-restitution. They can be credited for either the value of the building or the cost of providing it. But giving the builders credit for both would amount to double recovery. The builders can either claim restitution or raise a change of position defence. Not both.

Finally, on the court's approach, the college has to pay only £0.7 million now, but the builders still own the building. As each day passes, the college comes under a new obligation to make restitution of the value of that day's use to the builders (arguably: see [433]–[440] of Foxton J.'s decision). By contrast, if the college owns the building, then it is entitled to continue using it and will not come under further obligations. The college has to pay more now (approximately £2.8 million) but then the parties get a clean break.

In summary, buildings accede to the land on which they are built. The college should have been ordered to make restitution of the value of the building (approximately £6 million), less the £3.2 million already paid.

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CIVIL CLAIMS FOR SECRET COMMISSIONS

THE civil law's objection to bribery and undisclosed commissions is usually said to be a concern about abuse of position by an agent for his or her personal advantage, typically to the disadvantage of his or her principal (*Industries and General Mortgage Co. Ltd. v Lewis* [1949] 2 All E.R. 573, 575 (Slade J.); *Fiona Trust & Holding Corp v Privalov* [2011] EWHC 715 (Comm), at [73]). In these circumstances, the agent is

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traditionally described as a fiduciary, and the receipt of a bribe of secret commission as a breach of fiduciary duty.

Yet it is widely acknowledged that not every agent is a fiduciary (*New Zealand Netherlands Society "Oranje" Inc v Kuys* [1973] 1 W.L.R. 1126, 1129H) and that in any event the nature and scope of the duties owed by agents will vary according to the circumstances (*Henderson v Merrett Syndicates* [1995] 2 A.C. 145, 206); cf. P. Watts (ed.) *Bowstead and Reynolds on Agency*, 22nd ed. (London 2020), [6]–[034]). However, given English law's understandable concern to provide a remedy for the innocent victims of bribery, the courts have sought to make available the relevant causes of action even in circumstances that strain the traditional boundaries of fiduciary relationships.

Thus, in *Reading v The King* [1949] 2 K.B. 233, 236 (aff'd [1951] A.C. 507, 516), Asquith L.J. noted that "the term 'fiduciary relation' in this connexion is used in a very loose, or at all events a very comprehensive, sense .... [It] exists (a) whenever the plaintiff entrusts to the defendant property ... and (b) whenever the plaintiff entrusts to the defendant a job to be performed". More recently, in *Conway v Prince Eze* [2019] EWCA Civ 88, at [39], Asplin L.J. said that "there must be a relationship of trust and confidence between the recipient of the benefit or the promise of a benefit and his principal (used in the loosest of senses) which puts the recipient in a real position of potential conflict between his interest and his duty".

Although this analysis allowed the courts to grant relief in the relevant cases, it was unsatisfactory as a matter of principle, because it stretched the notion of a fiduciary beyond recognisable bounds. As the Court of Appeal noted in *Wood v Commercial First Business Limited; Business Mortgage Finance 4 PLC v Pengelly* [2021] EWCA Civ 471, at [46], the authorities had come to apply the term "fiduciary duty" "*so widely as virtually to deprive it of content*". In this appeal, the court was asked to determine the underlying question: whether the fiduciary requirement is good law. It held that it is not.

Each case concerned a loan and associated mortgage, arranged through a broker. In each case, the lender had paid the broker an undisclosed commission of 3–4 per cent of the value of the loan. In the first case, the borrower, Mrs. Wood, claimed damages for breach of duty against both the lender and the broker. In the second case, the borrower, Mr. Pengelly, sought rescission of his mortgage agreement by way of defence to the lender's repossession claim. The *Wood* case was heard in the High Court; it held, in favour of Mrs. Wood, that the claim against the broker did not depend upon demonstrating that the broker owed her fiduciary duties. The court granted relief against both the broker and the lender. The *Pengelly* case was heard by a circuit judge and then appealed to the High Court, which held that the relief

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did depend on demonstrating that the broker owed Mr. Pengelly fiduciary duties. The court held in favour of Mr. Pengelly on the facts.

Asked to address the underlying issue of principle for the first time at appellate level, David Richards L.J. (with whom Males and Elisabeth Laing L.JJ. agreed) held that there is no fiduciary requirement. Rather (at [48]), the essential question is "whether the payee [of the bribe/secret commission] was under a duty [to the innocent party] 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". Further, he suggested in *obiter dictum* (at [51]) that the payee need not even be an *agent* of the innocent party; he or she need only be "someone with a role in the decision-making process in relation to the transaction in question … [namely] in a position to influence or affect the decision taken by the principal" (quoting *Novoship v Mikhaylyuk* [2012] EWHC 3586 (Comm), at [108]).

The rejection of the fiduciary requirement is to be welcomed for focusing attention on the substance of the parties' relationship, rather than entrenching the increasingly artificial definition of a fiduciary in this context. It appropriately reflects the reality that there is a broad range of instances in which the judgment of a party with influence over another may be swayed by a bribe or commission, and that this reality is not best served by imposing the label "fiduciary" in all cases where relief is considered appropriate.

However, the court's approval of the passage from the *Novoship* case quoted above suggests that the test is one of a "role in the decision-making process". It is suggested that this test is insufficient; something more should be required before imposing liability. A more appropriate test is as follows: the claimant must have a reasonable expectation that he or she can rely upon the defendant's disinterested advice, and it must be reasonably foreseeable to the defendant that the claimant would so rely. Two examples are considered below to illustrate these competing tests.

At [67], David Richards L.J. gave an example of a case in which liability is clearly appropriate: a barrister is instructed to advise a client on the legality of a contract it was proposing to agree, in circumstances where the other party offers to pay the barrister a sum of money if the contract is concluded. Though a barrister will not typically be considered his or her client's fiduciary, nonetheless he or she is clearly obliged to provide impartial advice, on which the client can be expected to rely. It is appropriate for the client to be compensated for losses resulting from that self-interested advice (in addition, regulatory law may provide for punitive consequences).

By contrast, consider a wholesaler which receives a commission on sales paid by the manufacturer of goods. If the wholesaler (acting through a

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salesperson) encourages a retail client to buy the relevant goods, it will certainly have a "role in the [client's] decision-making process". But the wholesaler will not usually – subject of course to the terms of the parties' contract – be required to provide disinterested advice, nor would the client usually have a reasonable expectation that he or she can rely upon the wholesaler's disinterested advice. It would be an unwelcome extension of the law to give the dissatisfied client an action against the wholesaler in respect of the commission.

On the facts of *Wood* and *Pengelly*, the court concluded (at [110]) that the brokers were indeed obliged to disclose the commissions, since they had an obligation to provide their clients with a selection of mortgage products from which the client could make an informed and unimpeded decision. Given that obligation, Mrs. Wood and Mr. Pengelly would (applying the test proposed above) each have had a reasonable expectation that they could rely upon their brokers' disinterested advice, and it would have been reasonably foreseeable to the brokers that Mrs. Wood and Mr. Pengelly would so rely.

Having reached that conclusion, David Richards L.J. went on to consider whether the commissions were "fully" secret, or merely "half-secret". This distinction (although not these phrases) derive from *Hurstanger Ltd. v Wilson* [2007] EWCA Civ 299, in which a broker disclosed some but not all of the commissions which he would receive for arranging a consumer loan. That disclosure was held to negate secrecy but nonetheless to be insufficient to give rise to informed consent. In that case, the defendants were held to be entitled to compensation in the sum of the undisclosed commission, but not to the other remedies, such as disgorgement, which are available in cases of secret commissions.

The commissions in *Wood* and *Pengelly* were held to be "fully" secret. Each of the brokerage contracts contained a term alerting the borrowers to the fact that commissions might be paid, but stating that, if they were, the borrowers would be informed of that fact and their amount. Since no such disclosure was made, the borrowers were not on notice of the commissions. Indeed, the reasonable conclusion from the absence of disclosure, in light of that contractual provision, was that no commissions would be paid.

A final issue is the effect of *Wood* and *Pengelly* on the available causes of action in an undisclosed commission case. If the payee was under a duty to provide disinterested advice even though not a fiduciary, the innocent claimant can – subject to any applicable bars – rescind the contract procured by the secret commission (as in *Pengelly*). Alternatively, he or she can bring a personal claim for the wrong of accepting a bribe (see Leslie and Taylor, "Civil Claims", in F. Horlick and R. Lissack (eds), *Lissack and Horlick on Bribery*, 3rd ed. (London 2020), [17.108]–[17.117]), or perhaps for breach of contract and/or unlawful means conspiracy. But he or she

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could not, *ex hypothesi*, claim for breach of fiduciary duty, and so will not usually have any basis to seek a disgorgement of profit.

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JURISDICTION IN MULTI-FACTOR CLAIMS

THE two judgments of the Court of Appeal in *Manek v IIHL Wealth (UK) Ltd. and others* [2021] EWCA Civ 264 and 625 provide good examples of the complexities in determining whether the English High Court has and should exercise jurisdiction to decide a case with multiple connecting factors to many countries. The Indian claimants wished to bring an action in deceit against the defendants before the English Commercial Court. They alleged they had been cheated by the defendants out of the true value of their minority shareholding in an Indian company, Hermes. The majority shareholder was another Indian company controlled by two Indian residents, Ramu and Palani, the second and third defendants in this action. Jurisdiction against them was the only subject of the appeal. The claimants alleged that Ramu and Palani had persuaded the claimants' representatives to sell their minority holding in Hermes valued at $40 million to the majority shareholder. Hermes was then in fact swiftly sold to Wirecard, a German company, for 250 million Euros.

Ramu and Palani as natural persons could only be served with a claim form if they were physically present here. The court can give permission to serve defendants out of the jurisdiction under CPR 6.36 and Practice Direction 6B. The claimants must show: (1) that there was a serious issue to be tried against Ramu and Palani; (2) that there was a "gateway" available to found jurisdiction; and (3) that England was the proper place for trial (the *forum conveniens*). (1) was not in issue. The first judgment dealt with (2) and the second with (3). The additional argument, that the claim could not be decided in a court but must be dealt with by arbitration, was rejected by the Court of Appeal's second decision. This claim in deceit did not fall within the terms of the agreement and was made against persons who were not party to the agreement.

The claimants relied on the second paragraph of the tort "gateway". They bore the onus of proving that (1) there was a tort and (2) the damage sustained resulted from "substantial and efficacious acts" committed in England *(Metall und Rohstoff v Donaldson* [1990] 1 Q.B. 391). The defendants conceded, only for the purposes of jurisdiction, that there may have been a tort. The case therefore turned on whether the acts were substantial and whether England was the *forum conveniens.* Jurisdiction is determined

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