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Citation for published version:

Valsan, R 2016, 'Fiduciary Duties of Credit Brokers: *McWilliam v Norton Finance*', *Edinburgh Law Review*, vol. 20, no. 1, pp. 99-104. <https://doi.org/10.3366/elr.2016.0328>

Digital Object Identifier (DOI):

[10.3366/elr.2016.0328](https://doi.org/10.3366/elr.2016.0328)

Link:

[Link to publication record in Edinburgh Research Explorer](#)

Document Version:

Peer reviewed version

Published In:

Edinburgh Law Review

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Fiduciary Duties of Credit Brokers: *McWilliam v Norton Finance*

In *McWilliam v Norton Finance (UK) Ltd*¹ the Court of Appeal examined the circumstances in which an independent credit broker owes fiduciary duties to its consumer clients, and is liable to account for commissions received without their informed consent. The court ruled unanimously that fiduciary duties arise between a broker and its client where the client is unsophisticated and places trust and confidence in the broker, irrespective of whether the transaction is an information-only sale or an advised sale. In these circumstances, the broker is liable to account to its client for commissions that were not fully disclosed and consented to by the client.

A. THE FACTS

Mr and Mrs McWilliam (“the claimants”) contacted Norton Finance UK Ltd (“Norton”), an independent credit broker, to inquire about a loan of around £25,000 and payment protection insurance (“PPI”). Norton informed them that a loan was available and that only one PPI product was available with that loan. The claimants signed an application form whereby they acknowledged and consented to the fact that Norton would receive a commission from the lender upon loan completion. Subsequently, they received several other documents, including the Finance Industry Standards Association (“FISA”) Borrower Information Guide, which stated that, unless notified otherwise, the broker would receive commission from the lending company. They also received a Demands and Needs statement, which specified that the transaction was an information-only sale and the claimants retained discretion to decide how to proceed.

The claimants agreed to pay Norton a broker fee and a completion fee. Norton did not specify to the claimants that the amount of the commission from the lender was £2,675, and that it would receive an additional commission for arranging the PPI in amount of £1,685.25, or 45% of the premium. Following repayment of the loan, the claimants alleged that Norton

¹ [2015] EWCA Civ 186, [2015] 1 All ER (Comm) 1026.

had received the two commissions in breach of the fiduciary duties owed to them, and claimed that Norton should account to them for these commissions.

B. THE COURT DECISIONS

Some controversies arose during the preliminary stages of the litigation as to which entity actually received the allegedly secret commissions. In an attempt to save time and costs, Norton admitted that it had received the commissions. Subsequently, it sought to withdraw this admission. Based on largely unchallenged evidence that the commissions had in fact been received by a third party, the trial judge concluded that the most practical way forward was to treat Norton's earlier admissions as withdrawn, although no formal application was made to that effect. Consequently, it was not necessary for the court to make any further findings, as Norton was not the recipient of the allegedly secret commissions. Nevertheless, the judge held, *obiter*, that she would have concluded that there was no contractual relation between Norton and the claimants and no fiduciary duties were owed.²

The claimants appealed. Tomlinson LJ gave the lead judgment, with which Mitting LJ and Sir Robin Jacob agreed. The Court of Appeal had to consider three main issues:

- (a) whether the trial judge was right to allow Norton to withdraw its admission;
- (b) whether Norton owed fiduciary duties to the claimants; and
- (c) if fiduciary duties were owed, whether Norton had breached them.

On the first point, the court held that, due to procedural flaws, Norton should have been held to its initial admission. The trial court handled this issue inadvertently and reached a decision "which was in all the circumstances unjust."³ This conclusion allowed the court to proceed to the substantive questions surrounding the fiduciary duties claim.

The first step was to identify the nature of the relationship between Norton and the claimants. Tomlinson LJ observed that Norton undertook several tasks for which it received a broker fee from the claimants. Following Sumption LJ's judgment in *Plevin v Paragon*

² *Norton Finance* at para 6, referring to the judgment of Mrs Recorder McMullen of Middlesbrough County Court.

³ Para 29.

Personal Finance Ltd,⁴ Tomlinson LJ held that the parties entered into a contractual agency relationship.⁵

The existence of a contract of agency, Tomlinson LJ rightly noted, does not elucidate the point regarding the existence of fiduciary duties. A further fact-finding exercise needs to be undertaken, to determine whether the essential elements that give rise to fiduciary duties exist on the facts of the case. Drawing on *Bowstead & Reynolds on Agency*⁶ and *Bristol and West Building Society v Mothew*,⁷ Tomlinson LJ concluded that the central point that determines the fiduciary duties question is whether Norton was acting in a capacity that involved reposing trust and confidence by the claimants.⁸

In examining the trust and confidence element, the court considered two further factors: the claimants' level of financial sophistication and the provision of advice by Norton. On the first point, Tomlinson LJ held that the claimants were not financially sophisticated. Although they were not "non-status" borrowers and were reasonably competent in financial transactions, they were nevertheless vulnerable "in that they had debt which was for them substantial in respect of which they needed assistance in finding a loan."⁹ The claimants were vulnerable and reposed trust in Norton to provide them with the best possible deal, which gave rise to "a paradigm instance" of a fiduciary relationship.¹⁰

On the second point, Tomlinson LJ considered whether the provision of financial advice or recommendation was essential for the existence of fiduciary duties. He commented that the trial judge erred in regarding *Hurstanger Limited v Wilson*¹¹ as distinguishable on the basis that Norton offered no advice or recommendation. He interpreted Tuckey LJ's reasoning in *Hurstanger* as holding that provision of recommendation or advice by the broker was irrelevant for the existence of fiduciary duties. The critical factor was the trust, confidence and reliance that the claimants placed on Norton, which left the former vulnerable to the latter's disloyalty. At the same time, however, Tomlinson LJ noted that Norton offered a form of recommendation, by implicitly representing that the contract it offered to the

⁴ [2014] UKSC 61, [2015] 1 All ER 625.

⁵ Para 39.

⁶ P G Watts, *Bowstead & Reynolds On Agency*, 19th edn (2010).

⁷ [1998] Ch 1 [1996] 4 All ER 698.

⁸ Para 40.

⁹ Para 41.

¹⁰ Para 43.

¹¹ [2007] EWCA Civ 299, [2007] 4 All ER 1118.

claimants was the “the most competitive to which they had access” and “the best possible deal”.¹²

Tomlinson LJ concluded the fiduciary duties point by stating that the trial court “was bound by *Hurstanger* to find that the relationship between Norton and the Claimants was a fiduciary one, and so are we.”¹³ As a fiduciary, Norton had a duty not to act for its own benefit or for the benefit of a third party without the informed consent of the claimants.

The final point that the court considered was whether the claimants gave informed consent to the commissions received by Norton from the lender and the insurance provider. Tomlinson LJ found that the standard statements in the loan documentation did not amount to adequate disclosure. Norton did not inform the claimants of the actual quantum of any of the commission payments it received, nor of the fact that the PPI commission amounted to 45% of the premium.

Consequently, the claimants’ consent was not adequately informed, and Norton was liable to account for the amount of the two commissions with interest.¹⁴

C. ANALYSIS

This decision is predictable and unsettling at the same time. It is predictable in that it follows the precedent established in *Hurstanger*, where the same court described the relationship between an independent credit broker and its client as “obviously a fiduciary one”.¹⁵ In *Hurstanger* the issue of fiduciary duties was not argued before the court, because it was agreed it existed. In *Norton Finance* the court had the opportunity to clarify when and why brokers become fiduciaries to their clients. Its cursory and confusing treatment of the elements required for finding fiduciary duties in the broker-client relationship, however, left many unanswered questions.

It is respectfully suggested that the court’s identification of trust and confidence as the crucial factor that determines the existence of fiduciary duties is highly contestable. Courts and academic commentators increasingly recognise that, although trust and confidence are frequently used to describe fiduciary relations, their presence is not a clear indicator of

¹² Para 44.

¹³ Para 48.

¹⁴ Para 56.

¹⁵ *Hurstanger* at para 33 per Tuckey LJ.

fiduciary duties.¹⁶ Fiduciary duties cannot be imposed unilaterally by the beneficiary's trust and confidence or reliance on the fiduciary. A beneficiary's trust, reliance or expectations of loyalty must be legitimate,¹⁷ and the investigation of legitimacy points to a voluntary undertaking by the fiduciary.¹⁸ Moreover, trust and confidence may exist in other contractual, non-fiduciary relations, or may be absent from relations that give rise to fiduciary duties.¹⁹

Similarly, vulnerability is often associated with fiduciary duties but is not a critical factor. Vulnerability is also present in the equitable doctrines of undue influence and unconscionability, which are distinct from the fiduciary doctrine.²⁰ Moreover, Tomlinson LJ's explanation that the claimants were vulnerable because they had significant debt and needed assistance to find a loan is not persuasive.²¹ Many borrowers enter into loan agreements to consolidate existing debt, but it is difficult to accept that all of them are vulnerable and need protection by fiduciary duties.

Discretionary power, it is submitted, is the most relevant factor in determining the occurrence of fiduciary duties in private law relations. The no-conflict and no-profit fiduciary rules apply whenever a person has authority, or power, to decide how to advance the interests of the other party to the relationship. This is not simply a power to alter the beneficiary's legal position, as the court stated.²² Many persons hold powers that affect the interests of others, without being bound by fiduciary duties in exercising them. Non-fiduciary or personal powers, such as the power of appointment held in personal rather than fiduciary capacity, the power to renew or terminate unilaterally a contract, or the power to accelerate repayment of a demand loan, change the legal position of others but are subject to lesser duties than fiduciary powers.²³

Did Norton hold discretionary power? In considering the relevant facts, Tomlinson LJ noted on several occasions that the claimants were informed that Norton provided only information on the sale and no advice or recommendations, and that the clients retained

¹⁶ See P Hood, *Principles of Lender Liability* (2012) 250.

¹⁷ See M Conaglen, *Fiduciary Loyalty* (2010) 254-260.

¹⁸ See L Smith, "Fiduciary relationships: ensuring the loyal exercise of judgement on behalf of another" (2014) 130 LQR 608 at 612; J Edelman, "When do fiduciary duties arise?" (2010) 126 LQR 302 at 302.

¹⁹ Hood, *Principles* (n 15) 251.

²⁰ P D Finn, "The Fiduciary Principle", in T G Youdan (ed), *Equity, Fiduciaries and Trust* (1989) 1 at 32.

²¹ Para 41.

²² Para 40.

²³ G Thomas, *Thomas on Powers*, 2nd edn (2012) 474.

discretion to make their own choice about how to proceed. The trial judge found these elements to be indicative of the absence of fiduciary duties. The Court of Appeal's evaluation of these factors is confusing. On the one hand it held that Norton did in fact exercise a certain degree of discretion, albeit not enough to qualify as advice in the regulatory sense. Norton provided an implicit recommendation by indicating that it offered the most competitive deal in the market.²⁴ On the other hand it stated that this exercise of discretion was irrelevant for finding fiduciary duties.²⁵

The latter statement finds little support in the academic literature on fiduciary duties of financial intermediaries, and on fiduciary relations more generally. Brokers who act as order-takers, provide execution-only services and have no discretion do not owe fiduciary duties.²⁶ The existence of the discretionary power to promote the interests of the beneficiary is the very reason why the law imposes the strict no-conflict and no-profit duties on fiduciaries.²⁷ Consequently, the strict fiduciary law principles should not be binding on brokers and other intermediaries who provide no advice and have no discretionary power to promote the interests of their clients. Nevertheless, these actors may owe obligations of enhanced disclosure and fairness towards their clients based on relevant regulatory or professional ethics provisions, rather than under fiduciary principles. The non-fiduciary duties of disclosure, however, do not normally attract the far-reaching remedies associated with breach of fiduciary duties.

D. CONCLUSION

Courts should proceed with the utmost restraint when faced with allegations of breach of fiduciary duties that are “scattered throughout the pleadings with complete abandon.”²⁸ A successful fiduciary duties claim has many advantages, and an obligation to account for unauthorised benefits is among the most attractive.

²⁴ Para 44.

²⁵ Para 46.

²⁶ *Fiduciary Duties of Investment Intermediaries* (Law Com No 350, 2014) para 10.30. The position in Scots Law appears to be similar. See L Macgregor, *The Law of Agency in Scotland* (2013) 118; D Cabrelli, “Scotland” in D Busch and D Demott (eds), *Liability of Asset Managers* (2012) 507 at 510.

²⁷ L Smith, “Deterrence, prophylaxis and punishment in fiduciary obligations” (2013) 7 *Journal of Equity* 87.

²⁸ P J Millet, “Equity's place in the law of commerce” (1998) 114 *LQR* 214 at 217.

In *Norton Finance*, the Court of Appeal succumbed to the allure of fiduciary duties to achieve justice on the facts of the case. The decision is salutary in that it creates a greater level of protection for consumers, who often lack financial expertise and are at the mercy of financial intermediaries. The court's reasons for this equitable result, however, do not stand close examination. The court's hasty evaluation of the fundamental fiduciary law principles perpetuates the uncertainty prevailing in this area of law. It is not clear how this decision will affect other financial and non-financial intermediaries who act as order-takers, do not provide professional advice and receive various commissions.

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