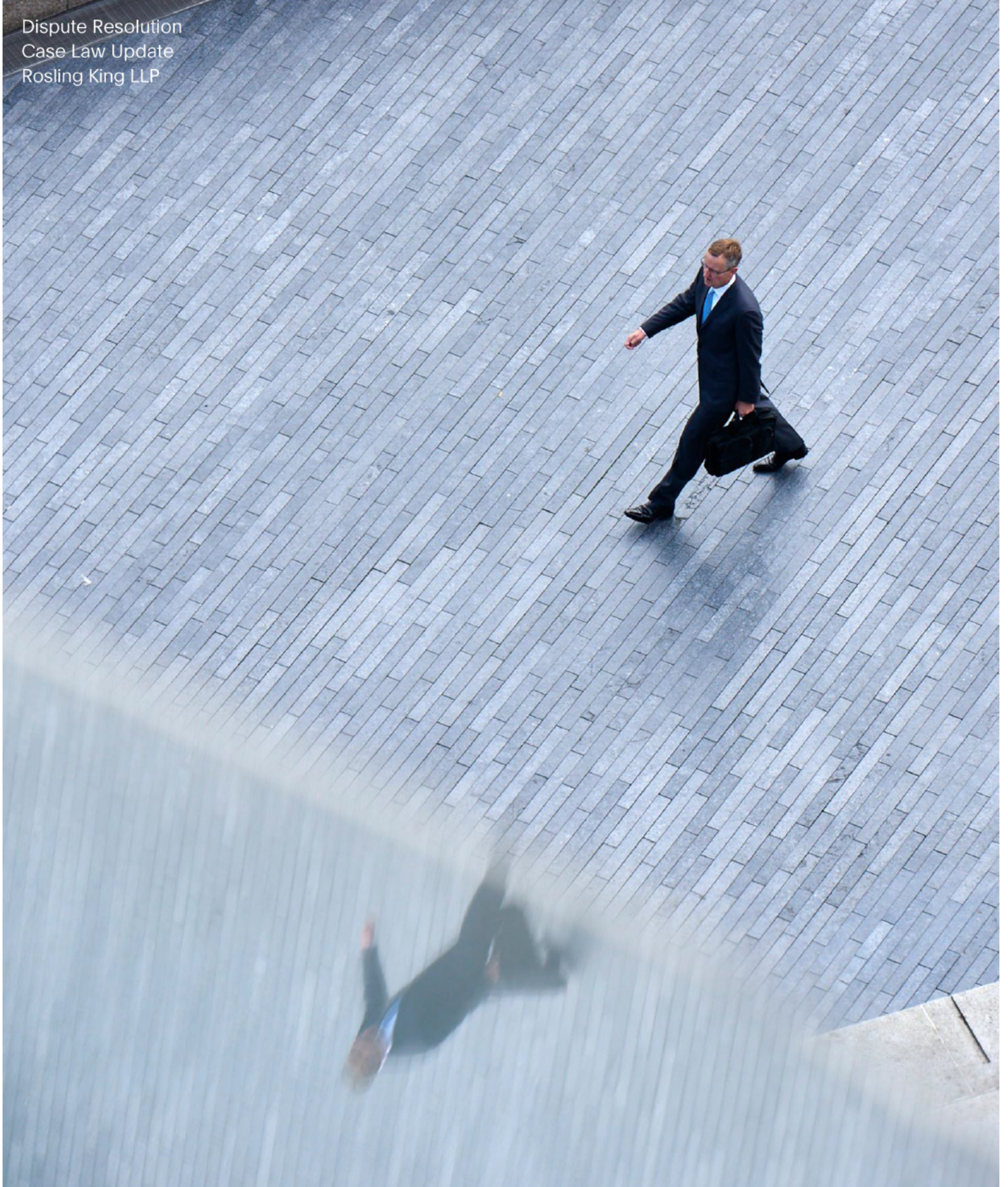


Dispute Resolution  
Case Law Update  
Rosling King LLP



**Wood v Commercial First Business Ltd and Others and Business Mortgage Finance 4 PLC v Pengelly [2021] EWCA**

The Court of Appeal heard two separate appeals from mortgage lenders where the borrowers sought to have their mortgages rescinded on the basis that the lenders had paid a commission to the brokers who arranged the loans without the borrowers' knowledge or consent – a secret commission.

**A Fiduciary Relationship between Broker and Borrower**

The main question the Court of Appeal had to consider was whether a fiduciary relationship existed between the borrower and the broker and, if so, whether this was a necessary pre-condition to the grant of relief against the lender. Counsel for the lender argued, without such a high duty of care in existence, the third-party lender could not be held to be an accessory for the broker's breach of fiduciary duty.

The Court of Appeal rejected this argument.

It confirmed that a secret commission is tantamount to a bribe for which common law and equitable remedies, including rescission of the loan, will be available. The payer of the bribe will be viewed as a primary wrongdoer. The Court of Appeal decided that to ask whether a fiduciary duty exists between the broker and borrower is altogether too elaborate, and inaccurate, a question. The correct question is simply whether the broker owed a duty to provide the borrower with information, advice or a recommendation on an impartial basis. The duty of the broker can be determined most easily by its terms of engagement with the borrower. If the broker did owe such a duty, and a secret commission was paid, it may be open to the borrower to cancel (or 'rescind') the mortgage contract thereby putting the lender and borrower back in the position in which they were before the contract was entered into.

In both cases, the appeals by the lenders were dismissed.

**Comment**

It is first important to note that rescission of the contract by a borrower is a remedy as of right where the commission was fully secret. If there was a partial disclosure of the commission (a "half secret commission"), where, for example, a borrower knows that a commission would be paid by the lender to the broker but the amount of the commission was not disclosed, rescission of the contract will be at the discretion of the Judge. The commissions paid by the lenders to the brokers in these cases were fully secret commissions because the borrowers did not know a commission was paid. A general term



## Court of Appeal Clarifies the Law on Secret Commissions between Lenders and Brokers

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in the brokers' terms of business stating that commission may be received was not sufficient to negate the secrecy in respect of these consumer borrowers.

This ruling means borrowers will be able to rescind their mortgage contracts if they can show that the broker owed a duty to provide impartial advice and a fully secret commission was paid by the lender to the broker. This may be relatively straightforward for a borrower to prove in many cases and will leave lenders vulnerable to claims by borrowers.

It remains to be seen how rescission will be effected in these cases as both parties will put their proposals to a Judge if they cannot be agreed. We do not yet know how rescission will work and in practice, how it would be proposed to put the parties back into the position they were in before the contract was entered into. We will continue to monitor this and report further once we see how we see this being dealt with in practice following these decisions.

Moving forward, lenders and brokers should ensure there is complete transparency regarding the payment of commission payments, bearing in mind that (as least as far as consumers are concerned) they are unlikely to be able to rely solely on a general term in the broker's terms and conditions. Lenders may want to prepare a specific document dealing with commission and ensure that this is explained to and signed by the borrower.

For further information, please contact [Hannah Sharp](#) or the Partner with whom you usually deal.