Expert Tooling v Engie: A Settlement That Paves the Way for Business Energy Claims – Paul Kerfoot

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On 9 January 2026, the Supreme Court **made an order by consent** to enter judgment and allow the appeal of Expert Tooling. This followed the **refusal of Engie's permission to appeal** which was refused on 29 September 2025 on the basis that it did not raise an arguable point of law.
The judgment by consent was influenced by the decision in *Johnson v FirstRand Bank* that was **previously discussed by Paul Kerfoot**. In this follow up article, Paul explores the implications of the recent settlement.

What were the grounds of appeal?

The Court of Appeal had **previously found in favour of Expert Tooling** on the issue of fiduciary duty and breach but found against Expert Tooling on the issue of liability of Engie as payer of the commission on the basis that a dishonest state of mind was required for the claim against them to succeed.

Expert Tooling was given permission to appeal on two grounds:

1. That the Court of Appeal erred in distinguishing between a "half secret" and a "fully secret" commission and that both ought to be treated as bribes and the payer of a bribe incurs a restitutionary liability for money had and received in the amount of the bribe.
2. Alternatively, if "half secret" commissions are to be treated differently from "fully secret" commissions, the Court of Appeal erred in applying a test of dishonesty at all and, in any event, a test which is inconsistent with Hurstanger and which required more than that the commission-payer knew of the existence of a fiduciary relationship.

What does the successful appeal mean going forward?

The Supreme Court in *Johnson* overturned the decision in ***Hurstanger Ltd v Wilson*** **[2007] EWCA Civ 299** which had differentiated between "fully secret" commission claims in bribery and "half secret" commission claims in equity. Following *Johnson* and following the allowed appeal in *Expert Tooling*, there is no difference between "fully secret" and "half secret" commissions, as "partial disclosure" does not equate to full disclosure of all material facts. Further, there is no dishonesty stage to the test as both payer and payee of the bribe are primarily liable.

As full disclosure of all material facts is necessary to obtain informed consent, it follows that claims in bribery in the energy brokerage industry have essentially a two-stage test:

1. Was there a fiduciary relationship between the customer and the broker?
2. If so, did the broker obtain informed consent after giving full disclosure of all material facts?

In relation to the first question, the High Court in *Expert Tooling* made a finding that the broker was the fiduciary of the customer which was not appealed to the Court of Appeal, save as to the issue of whether the 'scope' of that duty required disclosure. That ground was upheld, as such arguments about a narrowing 'scope' requiring less disclosure is best left to the second stage. The Court of Appeal also rejected the argument that the authority of ***Medsted Associates Ltd v Canaccord Genuity Wealth (International) Ltd*** **[2019] EWCA Civ 83** allowed the core fiduciary duty of loyalty to be limited or moulded, simply that it was a decision based on its unusual circumstances. The conclusion on the question of a fiduciary relationship is therefore consistent with previous decisions and is unlikely to be a real battleground going forward.

In relation to the second question, the Court of Appeal in *Expert Tooling* gave a list of facts which it considered were material in the relationship between Expert Tooling and Engie, being:

1. The amount of commission.
2. The addition of commission to the unit price.
3. The impact that this had on the length of the contract recommended to the customer.
4. The ability for the energy broker to set its own commission.
5. The fact that commission was paid up-front.

The Court of Appeal said that these were all factors which might, at least, have affected Expert Tooling's decision to enter into their contracts with Engie, and that individually and cumulatively, they created significant incentives for the broker, Utilitywise, to cause Expert Tooling to contract with Engie. Where brokers have failed to disclose these factors, customers are unlikely to face a difficulty with the second stage of the test.

What is the effect of limitation?

Whilst broker practices have changed more recently, there are likely numerous examples of energy brokers failing to disclose any and all of these material factors. There will likely be a sliding scale of disclosures, where historically nothing has been disclosed and more recently all facts will be disclosed. In between, during what may be a 'transitional period' for brokers, some but not all facts may have been disclosed. As the test for materiality is low, and all material facts must be disclosed to obtain informed consent, it is likely that the failure to disclose even one of the above five material facts would be sufficient to amount to a failure to obtain informed consent.

What this likely means for limitation, therefore, is that the oldest cases are likely the ones with better prospects of success, as they will likely be closer factually to *Expert Tooling*. More recent cases are likely to be more difficult depending on the extent of disclosure of material facts and will require further analysis.

Limitation in *Expert Tooling* in the Court of Appeal was considered pursuant to the *Hurstanger* analysis of the claim arising in equity. On that basis, ss.5 and 36 Limitation Act 1980 was said to create a six-year limitation period from when the cause of action accrued. Whilst the analysis may differ slightly after *Johnson* on the basis that the claim in bribery is a species of fraud and may therefore engage s.21 Limitation Act 1980, it is likely that any claim against a payer of the bribe would be six years from when the cause of action accrued. *Expert Tooling* held that the cause of action accrued when the broker became entitled to receive commission. On the facts of that case, pursuant to the brokerage agreement between Utilitywise and Engie, that was upon the commencement of supply of energy. This may differ if payments for commission are made up-front before contracts go live, but this practice is historic and is likely to be rare now.

Further, s.32 Limitation Act 1980 provides for scope to postpone limitation. *Expert Tooling* was considered under s.32(1)(b), being where a fact relevant to the right of action had been deliberately concealed by the defendant. However, following *Johnson*, a claim in bribery is a claim in fraud, meaning s.32(1)(a) can be engaged and avoids arguments about which facts were concealed, whether they were relevant, whether there was concealment and whether that was deliberate. The only question will therefore be reasonable diligence.

Reasonable diligence will inevitably be fact-specific, but suppliers will likely run the argument that “had they asked, they would have been told”. Customers may be able to draw on past experience of suppliers and brokers when requests for disclosure of commission and the details of the arrangements between brokers and suppliers have been refused, which could be relied upon as evidence that “had they asked, they would not have been told”.

There does appear to be scope, therefore, for arguments about postponement under s.32 Limitation Act 1980, but this will need to be tested. If such postponement arguments prove successful, energy suppliers will likely face an abundance of claims by business customers who have not given their informed consent to commission being paid by suppliers to brokers.

Therefore, the judgment and order in *Expert Tooling* by the Supreme Court is a very positive sign for business customers looking to bring such claims. **Paul Kerfoot** has been recognised in the leading directories:

'Paul is an excellent communicator, who assimilates information quickly and thoroughly and then provides clear and robust advice.' **Legal 500**, Rising Star, Commercial Litigation