Hopcraft v Close Brothers Ltd; Wrench v FirstRand Bank Ltd; Johnson v FirstRand Bank Ltd

[2025] UKSC 33

Case Note

Introduction

1. The Supreme Court has now handed down its eagerly anticipated decision in these three conjoined appeals. The defendant lenders ("the **Lenders**") provided finance to the claimant consumers ("the **Consumers**") who were purchasing motor cars from dealers ("the **Dealers**"). In each case, the Consumers were not aware that the Dealers received substantial commission from the Lenders, which they alleged gave rise to liability on the part of the Lenders under the common law (in bribery), in equity (in dishonest assistance in breach of fiduciary duty) and/or under s.140A of the Consumer Credit Act 1974 ("the **CCA 1974**") (arising out of an 'unfair relationship').

2. The Supreme Court has unanimously overturned the decision of the Court of Appeal, thereby rejecting the claims at common law and in equity but allowing Mr Johnson's claim under the CCA 1974. The door has therefore been left open for very substantial numbers of claims potentially to be made against lenders within the motor finance market, albeit on narrower grounds.

The Facts

3. In all three cases (as is commonplace across the motor finance industry): the Consumer decided to purchase a car from the Dealer using finance; to that end, the Consumer provided information regarding their financial means to the Dealer; the Dealer relayed that information to the Lender in order to obtain an offer of finance, via a hire purchase agreement; the Dealer then communicated the terms offered by the Lender back to the Consumer, who agreed; consequently, the car was sold by the Dealer to the Lender, which in turn leased the car to the Consumer; however, unbeknown to the Consumer, the Lender had agreed to pay a commission to the Dealer on the Consumer signing up to its terms.

4. In *Hopcraft*, the Consumer was described as *"a little naïve and perhaps vulnerable in some aspects."* She entered into a hire purchase agreement worth £8,280 with the Lender, Close Brothers

Ltd ("**Close**"). Ms Hopcraft was not told anything whatsoever about commission. In fact, Close had paid the Dealer a commission of £183. If Ms Hopcraft had known that, then she would have shopped around.

5. Mr Wrench purchased two cars under two separate agreements. On each occasion, he was assured by the Dealer that it would get the best rate for him from the Dealer's panel of lenders. Incorporated within the terms and conditions of the hire purchase agreements was a term stating that *"commission may be payable by us to the broker who introduced this transaction to us. The amount is available from the Broker on request."* Mr Wrench did not, however, read the terms and conditions and (unsurprisingly) he did not ask for any further information. He entered into hire purchase agreements worth £5,995 and £9,750. The Dealers received commissions of £180 and £409 respectively from the Lender, FirstRand Bank Ltd ("**FirstRand**"). The second commission payment arose in circumstances where the Lender had given the Dealer a discretion to set the interest rate on the finance and incentivised the Dealer to charge as high a rate as possible ("a **Discretionary Commission Arrangement**," now banned by the FCA). Additionally, also unbeknown to Mr Wrench, FirstRand's contract with the Dealer required the Dealer to give FirstRand the first right of refusal in relation to any prospective Consumer.

6. Mr Johnson entered into finance, also with FirstRand, worth a total of £6,399. He agreed to the same terms as Mr Wrench set out above. Mr Johnson also signed a separate document created by the Dealer pursuant to which the Dealer promised to find finance *"that best suits your individual requirements"* whilst also stating that *"we may receive a commission from the product provider"* and, critically, *"we offer products from a select panel of lenders."* However, as with Mr Wrench, FirstRand again had the first right of refusal, so that in fact the Dealer would <u>not</u> necessarily be selecting from a panel of lenders. FirstRand paid the Dealer a commission of £1,650, which represented 55% of the cost of finance.

The Decision in the Court of Appeal

7. The Court of Appeal[1] unanimously found in favour of the Consumers on each of the three appeals.

8. In summary,[2] the Court of Appeal held that: because the Dealer had agreed to act for the Consumer as a credit broker, the Dealer owed the Consumer a 'disinterested duty,' as

[1] Sub nom *Johnson v FirstRand Bank Ltd* [2024] EWCA Civ 1282 ("**CA Judgment**"). The panel consisted of Andrews, Birss and Edis LJJ
[2] Ibid, [18] to [20]

described in *Wood v Commercial First Business Ltd*;[3] that duty had arisen in tandem with an 'ad hoc' fiduciary duty owed by the Dealer to the Consumer; there was a conflict of interest, in respect of which no informed consent had been given by the Consumer; where the commission was 'fully secret' this was sufficient to found direct liability on the part of the Lender in the tort of bribery; where there had been partial disclosure of the commission which was sufficient to negate secrecy but not to constitute informed consent (termed a "half-way house" in *Hurstanger Ltd v Wilson,*[4] or a "half-secret" commission in *Wood*),[5] the Lender was not liable in bribery but was nonetheless liable to the Consumer in equity as a dishonest accessory to the Dealer's breach of fiduciary duty.

9. On the facts of the three cases, it was held that the commissions in *Hopcraft* and *Wrench* were 'fully secret,'[6] so that the Lenders were directly liable in bribery. In *Johnson*, the commission was 'half-secret' and FirstRand was liable because it had dishonestly assisted the Dealer's breach of fiduciary duty. Additionally, in the case of Mr Johnson only (by this time, he was the only Consumer continuing to pursue a claim under the CCA 1974), the relationship between the Lender and the Consumer was found to be unfair pursuant to s.140A of the CCA 1974.

10. Each Lender was therefore liable to pay the amount of the commission to the Consumer plus interest.[7]

The Supreme Court's Decision

11. The Supreme Court[8] unanimously upheld the Lenders' appeals.

12. In relation to the common law and equitable claims, the Court held:

    12.1. A fiduciary relationship between the claimant and the recipient of the impugned payment (i.e. in these cases between the Consumer and the Dealer) is a necessary element in the tort of bribery. The statement that the existence of a *"disinterested duty"* between the parties would suffice in *Wood* was incorrect;[9]

[3] [2021] 3 WLR 395 at [48]
[4] [2007] 1 WLR 2351 at [39]
[5] *Wood* at [21]
[6] Although Mr Wrench had agreed to a term disclosing that commission *"may"* be paid, this had been *"buried in the small print"* so that secrecy was not negated, CA Judgment [119]
[7] CA Judgment at [173(5)]
[8] [2025] UKSC 33 ("**SC Judgment**"). The panel consisted of Lord Reed PSC and Lords Hodge, Lloyd-Jones, Briggs and Hamblen JJSC
[9] Ibid [199]

12.2. The Dealers did not owe fiduciary duties to the Consumers and the Court of Appeal was wrong to have found that such duties existed. The Court's reasoning included that: the Consumers, the Dealers and the Lenders had, at all times, been pursuing their own commercial objectives; the transaction could not be separated into two stages; and *"An offer to find the best deal is not the same as an offer to act altruistically;"*[10]

12.3. The claims in bribery and in dishonest assistance in breach of fiduciary duty all failed for that reason alone;[11]

12.4. The Court, disapproved of the 'half-way house' in *Hurstanger*, holding that informed consent is required in order to negate secrecy and thereby defend a claim in dishonest assistance of breach of fiduciary duty. This is the same requirement, as at common law, to negate a claim in bribery.[12] However, this is *obiter*.

13. In relation to Mr Johnson's claim under the CCA 1974:

13.1. A non-exhaustive list of relevant factors for the court to consider under s.140A CCA 1974 includes *"the size of the commission relative to the charge for credit; the nature of the commission (because, for example, a discretionary commission may create incentives to charge a higher interest rate); the characteristics of the consumer; the extent and manner of the disclosure (including by the broker insofar as section 56 is engaged); and compliance with the regulatory rules"* (emphasis added);[13]

13.2. The Court of Appeal had committed errors which vitiated its decision on unfairness,[14] and the mere paying of commission to a Dealer does not render the Lender's relationship with the Consumer unfair;[15]

13.3. However, the relationship between Mr Johnson and FirstRand was unfair in all of the circumstances. The high level of the commission was *"a powerful indication"* of unfairness,[16] the Dealer (deemed to be the Lender's agent under s.56 CCA 1974) had breached the FCA's rules,[17] and also misstated the nature of its commercial relationship with FirstRand by omitting the *"commercial tie"* which gave FirstRand the right of first

[10] SC Judgment, [268] to [285]
[11] Ibid, [289]
[12] Ibid, [225]
[13] Ibid, [319]
[14] Ibid, [309], [312] & [316]
[15] Ibid, [320]
[16] Ibid, [327]
[17] *Viz* rule 4.5.3R of the Consumer Credit Sourcebook ("CONC") within the FCA Handbook, SC Judgment, [329]

refusal (rather than offering *"products from a select panel of lenders"*).[18] Finally, Mr Johnson's failure to read the documents provided to him was not held against him because he was *"commercially unsophisticated,"* the disclosure of the possibility of commission was not given prominence and because reading the material would not have revealed the *"commercial tie;"*[19]

14. The appropriate order was to require FirstRand to pay the commission to Mr Johnson with interest.[20]

Discussion

15. Lenders will certainly be relieved that the most serious claims at common law and in equity were knocked out. These had tarnished the motor finance industry's usual business practices with the labels of bribery and dishonesty. This will help to assuage some of the *"shock"* suffered by Lenders.[21]

16. However, Mr Johnson's success under the CCA 1974 leaves open the possibility that the same remedies will be pursued through the statutory cause of action. Although the Supreme Court has provided a detailed judgment, including a helpful list of factors relevant to the issue of fairness,[22] there remains substantial uncertainty:

    16.1. Such a list can never be exhaustive because s.140A(2) CCA 1974 requires the court to *"have regard to all matters it thinks relevant;"*

    16.2. Mr Johnson's claim appears to have been a particularly egregious example because of the very high level of commission and the misleading nature of the literature that he was provided with. We are left in the dark as to whether Ms Hopcraft and/or Mr Wrench's claims would have succeeded under the CCA 1974;

    16.3. Although Mr Johnson's case did involve a Discretionary Commission Arrangement, no commission was in fact paid under it. Consequently, although it is clearly a point in the Consumers' favour, it is unclear precisely how that feature of such cases will weigh in the balance;

[18] SC Judgment, [333]
[19] Ibid, [336]
[20] Ibid, [338]
[21] Ibid, [54]
[22] Ibid, [319]

16.4. The Supreme Court has stated that *"the supply of a vehicle at an inflated price could be highly relevant"* when considering unfairness.[23] However, this was not taken into account in Mr Johnson's case and so we are deprived of a worked example;

16.5. And finally, the Supreme Court noted that the Court has *"very wide powers"* under s.140B CCA 1974 in relation to remedies. In Mr Johnson's case, FirstRand was ordered to pay him the commission it had paid to the Dealer, but no reasoning whatsoever was provided.[24]

17. For all these reasons, it is likely to remain difficult to predict in practice whether a court will find 'unfairness' and, if it did, what remedy it would award. Consequently, it seems likely that the war between the Consumers and Lenders will rage on. And this could spread to other parts of the consumer finance industry, where credit brokerage services are offered to customers as an adjunct to an ordinary sale.

18. The FCA will announce its intentions with regard to a consultation on a redress scheme *"before markets open on Monday 4 August."*[25] Given that the sums of money at stake are comparable to those paid out by banks during the PPI scandal,[26] a redress scheme seems inevitable. As with PPI claims, however, even a comprehensive scheme is unlikely to resolve all of these disputes.

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2nd August 2025

[23] SC Judgment, [311]
[24] Ibid, [338]
[25] https://www.fca.org.uk/news/statements/fca-reaction-supreme-court-motor-finance-judgment
[26] £38 billion had been paid out by banks by April 2020 (https://www.fca.org.uk/news/press-releases/fca-publishes-ppi-complaints-deadline-final-report), the motor finance claims are reportedly estimated to be worth £44bn (https://www.ft.com/content/85fa5bd3-50ae-44c8-bae1-7dcb60685f9c)