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Consumer Finance

31 January 2024

Appellate Guidance on Fiduciary Duty Allegations in Motor Finance Claims

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William Hibbert and Thomas Samuels analyse two recent cases on car dealer commissions, in which they each appeared for the lender in successful appeals heard by HHJ Worster, the designated Circuit Commercial Judge for Birmingham, and currently the Lead Judge for the Business and Property Courts in Birmingham.

BACKGROUND

1. By way of background, there have been a mounting number of claims against lenders in relation to the commission paid by them to car dealers acting as the credit broker for the finance agreement financing the transaction, be it hire purchase, conditional sale or a simple loan. Some customers complain that they were not told at all that commission would be paid and the commission was therefore secret, others that the information that commission would be paid was buried in the paperwork and was effectively secret as their attention was not drawn to it. In other cases the claimants concede that the commission could not be described as secret, but complain that they were not told the amount of commission, or that they were not told that the dealer had a discretion to offer on behalf of the lender a lower

rate of interest (so-called 'difference-in-charges' commission structures, also referred to as 'discretionary commission arrangements').[1]

2. Such claims are commonly made on a number of bases: for bribery, for procuring a breach of the dealer/credit broker's alleged fiduciary duty, for breach of statutory duty under the Financial Services and Markets Act 2000 (in respect of breaches of the rules in the FCA Handbook) and/or for relief from an unfair relationship under the Consumer Credit Act 1974. These two recent decisions give useful support to the industry in resisting such claims.

3. The appeals were both from decisions of the same Deputy District Judge sitting in the County Court at Stoke in the cases of *Wrench v FirstRand Bank Ltd* and *Hurst v BMW Financial Services (GB) Ltd*. In Wrench the Deputy District Judge had found that the payment of commission in relation to two hire-purchase transactions, one in 2015 and the second in 2017 and long since completed, had been secret, notwithstanding a term "buried" in the small print of the HP agreement that "A commission may be payable by us to the broker who introduced this transaction to us. The amount is available from the broker on request". The Deputy District Judge found that as the term had not been expressly drawn to the attention of the customer, who was therefore unaware of it, it could not be relied on to negate secrecy. As a secret commission, the payment fell within the common law tort of bribery. On that basis the Deputy District Judge had not gone on to consider whether the relationship between the lender and Mr Wrench was unfair.

4. Hurst concerned a hire-purchase transaction entered into in August 2021, after the FCA's amendments to CONC 4.5.3R. Consequently, the

[1] The FCA has now intervened, announcing its intention to take further action to review historic motor finance commission arrangements, including skilled persons investigations under s.166 of Financial Services and Markets Act 2000 – see the Henderson Chambers Alerter at LINK.

commission in issue was not paid pursuant to any discretionary arrangement and, indeed, the claimant accepted that it would have made no difference to his transactional decision. The existence and nature of the commission were disclosed both by the dealer and lender in standard pre-contractual documentation. The Deputy District Judge found that the dealer owed duties engaging the law of secret commissions and – there being no evidence of the written disclosures having been drawn to the claimant's attention – concluded the commission was fully secret. He went on to find the parties' relationship to be unfair in any event on the basis of the dealer's apparent failure to adhere to the contractual obligation imposed on it by the lender in relation to commission disclosure.

BRIBERY ALLEGATIONS IN MOTOR FINANCE COMMISSION CONTEXT

5. Claims based on bribery are especially troubling to lenders. Bribery is considered to be a species of fraud, giving the payee's principal the right to rescind the relevant contract at his or her election, with the right merely being subject to making counter-restitution. Further, unlike equitable rescission, common law rescission is a self-help remedy which does not require the intervention of the court and therefore is not subject to any period of limitation under the Limitation Act 1980.[2] This leaves the way open to customers to rescind historic hire-purchase transactions, where records may not be available to challenge the claim that the fact of commission was not disclosed by the dealer. As well as rescission, the customer can in addition claim the amount of the secret commission as money had and received.

[2] *HMRC v IGE USA Investments Ltd* [2021] EWCA Civ 534 at [20].

6. Claims based on bribery have been fuelled by the recent decision of the Court of Appeal in the combined cases of *Wood v Commercial First Business Ltd* and *Business Mortgage Finance 4 Plc v Pengelly* ("*Wood*").[3] David Richards LJ, who gave the judgment in that case with which Males and Elisabeth Laing LJJ agreed, explained that to engage common law bribery, it is not necessary for the payee to be a person who owes a fiduciary duty. It is sufficient that "*the payee was under a duty to provide information, advice or recommendation on an impartial or disinterested basis*"[4] and was "*someone with a role in the decision making process in relation to the transaction in question, e.g. as agent, or otherwise someone who is in a position to influence or affect the decision taken by the principal*".[5] The Deputy District Judge found that the dealers in the transactions in both *Wrench* and *Hurst* satisfied both limbs of that test.

7. A secret payment to a person who owes a fiduciary duty would also engage the tort of bribery, as such a person would naturally also be subject to the lesser standard of duty described by David Richards LJ. But in the case of a fiduciary duty, this would also engage equitable duties and equitable remedies. The payee would be in breach of his/her fiduciary duty in accepting a payment without the informed consent of his/her principal and the payer would have procured or assisted in that breach of fiduciary duty and would therefore be exposed to a range of discretionary equitable remedies such as account of profits, equitable compensation or equitable (discretionary) rescission. Such remedies would be available even if the payment was not secret but insufficient information had been given to allow for the principal's informed consent to the payment to the fiduciary (a so-called "half-secret commission"). Such a half-secret commission was the situation in *Hurstanger*

[3] [2021] EWCA Civ 471.
[4] *Wood* at [48].
[5] *Wood* at [51].

Ltd v Wilson.[6] However, in *Hurstanger*, in exercising its equitable discretion, the Court of Appeal refused to order rescission of the credit transaction but only ordered compensation in the amount of the commission paid.

WRENCH v FIRSTRAND BANK LTD

8. In *Wrench v FirstRand Bank Ltd*, the term informing the customer about the payment of commission was on the last page of the detailed Terms and Conditions that came with the HP agreements signed by Mr Wrench. It was not expressly drawn to Mr Wrench's attention. The Deputy District Judge, who said he would otherwise have held this was a half-secret commission case, considered the commission should therefore be treated a secret, following a passage in David Richard LJ's judgment in *Wood* in relation to the term in the broker's agreement in that case going to the payment of commission: "*I would also add that, in my view, the broker could place reliance on this term only if it expressly drew the client attention to it*".[7] As the commission was secret in both transactions, the Deputy District Judge held Mr Wrench was entitled to rescind both HP agreements.

9. HHJ Worster held that the passage had been taken out of context by the Deputy District Judge. David Richards LJ had been dealing with the lender's argument that the term in the broker's contract showed the broker did not, under his contract, owe a fiduciary duty to the customer, and not whether the term negated secrecy. David Richards LJ had held that it was not necessary for the broker to owe a fiduciary duty (see above), that the agreement to the payment of commission did not prevent the broker owing a fiduciary duty relationship (as demonstrated in *Hurstanger*) and, in this passage, he was expressing the view that the term was not effectively

[6] [2007] EWCA Civ 299.
[7] *Wood* at [120].

incorporated into the broker's contract in any event. It was clear from David Richards LJ's judgment that he was not holding that to negate secrecy the term had to be drawn to the customer's attention. HHJ Worster held that, since the Deputy District Judge had said he would have found this to be a half-secret commission case but for the words of David Richards LJ, there was no basis for treating this as anything other than a half-secret commission.

10. HHJ Worster's judgment did not stop there. The Deputy District Judge had found that the car dealers in both transactions had satisfied the test in *Wood* for when the tort of bribery is engaged. HHJ Worster considered they did not:[8]

> "… the conclusion [by the Deputy District Judge] that the brokers were in a position to influence or affect the decision is a difficult one to sustain. These brokers had no role in the decision making process in the sense that it could take the decision or effect the borrowers legal relations with FirstRand. The test referred to in Wood at [51] is formulated in the context of the duties of such a person. Novoship is authority for the proposition that the duty under consideration is not to be restricted to agents properly so called, but covers a broader group. But to qualify for membership of that broader group, the person must be involved in the decision making process in some way. On these facts I cannot see that these brokers would qualify for membership. The broker's role here is to put forward information… not to take part in the decision making process or influence of affect that decision."

11. In relation to the second aspect of the test in *Wood* HHJ Worster said:

[8] At [34]-[35] of his judgment.

> "In the same paragraph the Judge concludes that the brokers had a duty to provide information on an impartial or disinterested basis. That was an application of the test formulated in Wood at [48]. The problem with that finding, is that the brokers were self evidently not impartial or disinterested. They were selling the cars, and in the course of undertaking that sale they were providing Mr Wrench with information about finance."

12. HHJ Worster quoted with approval from the judgment of HHJ Jarman KC in *Johnson v FirstRand Bank Limited,* an appeal in the Cardiff County Court:[9]

> *"[Counsel for Mr Johnson] accepted that the dealer was wearing two hats, one when it was selling the car and the other when it was dealing with finance. In my judgment this is the essential distinction with the broker cases, where brokers do not themselves offer what their client wants, but offer the service of obtaining it, namely finance. It is difficult to see how in practice or in principle a car dealer could offer single minded loyalty to a customer when dealing with the finance, but not when selling a car to the same customer which gives rise to the need for finance. Finance is incidental to the purchase of the car for those who need to borrow."*

13. Finally, on the question of whether there was liability on a Hurstanger basis (i.e. for procuring the dealers' breach of fiduciary duty) he considered that the dealers did not owe Mr Wrench a fiduciary duty:

> *"It is a question of fact in each case, but it would be very surprising if these motor dealers were fiduciaries. They were selling cars, and brokering finance agreements. It is hard to see how they could offer a single minded loyalty to the customers as a fiduciary. This is not a*

[9] 6 July 2023. The Claimant is currently seeking permission to appeal.

case like the mortgage broker in Hurstanger, where there was an obligation to get the best deal, and a substantial fee was paid."

14. However, since the Deputy District Judge had not addressed in his judgment the issue of whether the dealers owed a fiduciary duty, as he had decided the case on the basis of bribery/secret commission, and since for the same reason he had not dealt with the issue of whether there was an unfair relationship, HHJ Worster remitted the case to the Deputy District Judge to determine the issues that he had not addressed.

HURST v BMW FINANCIAL SERVICES

15. Perhaps not surprisingly given the similarities in the decisions of the Deputy District Judge at first instance, the appeal judgment in *Hurst* reached similar conclusions to those set out above in *Wrench*.[10]

16. However, *Hurst* has a greater focus on the interaction between secret commission claims and allegations of unfairness under s.140A of the Consumer Credit Act 1974 (**"CCA"**). That was the necessary result of the claimant/respondent's reliance upon a Respondent's Notice seeking to uphold the Deputy District Judge's decision on the basis that, in all the circumstances, he was entitled to reach the conclusion that the parties' relationship was unfair.

17. HHJ Worster noted that while in an appropriate case a Court might be willing to find an unfair relationship on a factual basis which is not enough to engage the law of secret commissions, the general approach should be that set out by the High Court in *Carney v NM Rothschild & Sons*.[11] Namely, that where a free-standing cause of action is relied upon as giving rise to

[10] At [17] and [43].
[11] [2018] EWHC 985 (Comm).

unfairness the elements of that cause of action must be established.[12] It was in that context that the decision of HHJ Jarman KC in *Johnson v FirstRand Bank Ltd* was considered. HHJ Worster noted that there was also a rival analysis at circuit judge level in *Jones v BMW Financial Services (GB) Ltd*. However, without having heard submissions on it, his preliminary view was that "*I find myself in agreement with the approach in Johnson.*"[13]

18. The decision also expresses the view that a dealer's failure to put forward a range of finance options was "*in essence*" another way of alleging that the dealer failed to act in an impartial or disinterested manner. Although the point did not arise on the pleadings in Hurst, it was not a matter relevant to unfairness unless the Court could be satisfied that fiduciary duties to act in that way were owed.

19. Finally, the decision quotes key passages of evidence at trial in which the claimant accepted that even if the commission had been disclosed to him in terms it would probably have made no difference to his purchasing decision. HHJ Worster considered that the Deputy District Judge's failure to make any reference to that evidence was an obvious illustration of his failure to take account of all relevant matters under s.140A(2) CCA.

20. Thus, as in Wrench, the case has been remitted to the County Court at Stoke for reconsideration of the residual issues of unfairness.

CONCLUSION

21. These decisions illustrate the difficulties claimants are likely to face in arguing for obligations on motor dealers to act impartially and dishonestly in relation to finance. In the ordinary course dealers necessarily act in their own

[12] At [40]-[41].
[13] At [44].

interests in arranging hire-purchase for their customers. For most individuals, it is the only means by which so substantial a transaction can proceed and cannot properly be separated out from the sales process itself. Further, an alternative pleading of unfairness on the same facts is unlikely to add anything further.

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31 January 2024