HENDERSON CHAMBERS

ALERTER

[2024] EWCA Civ 1282

28 October 2024

Motor Finance Commission Claims:

Bribery, accessory liability for breach of fiduciary duty and unfair relationships

Introduction

1. The Court of Appeal has given judgment in the conjoined appeals of (1) Johnson v FirstRand Bank Limited (London Branch) T/A Motonovo Finance (2) Wrench v FirstRand Bank Limited (3) Hopcraft v Close Brothers Ltd [2024] EWCA Civ 1282 allowing the claimants' appeals.

2. The claimant customers were financially unsophisticated consumers on relatively low incomes who had engaged car dealers prior to January 2021 to arrange hire-purchase agreements (and in one case an additional personal loan) on their behalf, to enable them to acquire second-hand cars. The dealers therefore had two commercial roles: seller of the car and credit broker. On each occasion only one offer of finance was presented to and accepted by the claimant. The dealers made a profit on the sale of the car, but also received commission from the lenders for introducing the business to them, financed by the interest charged under the credit agreement. In *Wrench* the dealer received two lots of commission, one based on Difference in Charges ("**DiC**") commission (whereby the lender permitted the dealer to decide or negotiate the total charge of credit, including the interest rate, and paid the dealer commission calculated as a percentage of the difference between the lowest rate of interest in the permitted range and the agreement rate) and the other calculated as a fixed percentage of the sum advanced. In *Hopcraft* the manner in which the commission was calculated was not disclosed. In *Johnson* there was a DiC element but no DiC commission was paid because

the claimant was given the lowest possible rate of interest by the dealer, so the rate of commission was based solely on the amount of the loan.

3. In *Hopcraft*, there was no dispute that the commission payment was kept secret from the claimant. In *Wrench* and *Johnson* the claimants did not know and were not told that a commission was to be paid, but the defendant's standard terms & conditions stated that a commission *"may"* be paid. In *Johnson* the dealer also provided the customer with a document stating that it *"may"* receive commission.

4. Each of the claimants brought proceedings against the defendant lenders seeking, amongst other things, the return of the commission paid to the credit brokers on the basis that the brokers owed them a duty to provide information, advice or recommendation on an impartial or disinterested basis (the 'disinterested duty' set out in *Wood v Commercial First Business Ltd* [2021] EWCA Civ 471), which was found in *Wood* to be sufficient to found a claim for the disgorging of a secret commission, and that they were 'agents' within the broad definition of that term adopted in *Wood* (namely, *"someone with a role in the decision-making process in relation to the transaction in question, e.g. as an agent, or otherwise someone who is in a position to influence or affect the decision taken by the principal"*).

5. Miss Hopcraft's case, and Mr Wrench's primary case, was that the commission paid was secret, that the lenders made payment of the commission knowing of the "agency" relationship between the borrowers and the brokers, and that the claimants were entitled to rescission of the credit agreements and to payment of the commission as damages or as money had and received. Mr Johnson's case, and Mr Wrench's alternative case, was that even if the commission was not secret, the dealers did not obtain their

fully informed consent to the payments (described in *Hurstanger Ltd v Wilson* [2007] EWCA Civ 299 as 'half-secret' commission, but which the Court in this case termed 'partial disclosure'). Each claimant also made claims under sections 140A-C of the Consumer Credit Act 1974 alleging that their relationship with the defendant was unfair within the meaning of those provisions because of the defendant's non-disclosure of the amount of the commission and/or because the payment of the commission rendered the broker in breach of the disinterested duty.

6. Mr Johnson was unsuccessful at first instance on all grounds. On first appeal, having abandoned the secret commission claim, his claim for accessory liability failed because the Judge found that a fiduciary duty was a necessary element of the claim and the dealer had not owed the claimant such a duty. Mr Wrench succeeded in his claim under common law or equitable principles at first instance, but that decision was overturned on appeal. Miss Hopcraft's claim was dismissed at first instance, but her appeal expedited and listed with the second appeals in *Johnson* and *Wrench*. In neither *Wrench* nor *Hopcraft* were the claims for an unfair relationship pursued before the Court of Appeal.

7. The Court allowed all three appeals, holding that in each case the dealers owed the claimants the disinterested duty, the relationship was also a fiduciary one, there was a conflict of interest and no informed consent by the consumer to the receipt of the commission. On the facts, there was no disclosure of the commission in *Hopcraft* and insufficient disclosure in *Wrench* to negate secrecy, so each of those cases involved a secret commission. In *Johnson* the lender was liable as an accessory for procuring the broker's breach of fiduciary duty. Whilst the mere fact of no or only partial disclosure of commission will not necessarily suffice to make the relationship between

lender and consumer unfair under the 1974 Act, on its specific facts Mr Johnson's claim under the 1974 Act succeeded.

The Court of Appeal's decision in more detail

8. The Court of Appeal considered five broad issues:

   (1) Does a statement in a credit agreement's standard terms and conditions that commission may or will be paid negate secrecy, even where the borrower has neither read the statement nor been directed to read it?

   (2) For the purposes of establishing accessory liability on the part of a payer of commission which has been partially disclosed, is it necessary for the broker to have owed a fiduciary duty to the claimant or does the 'disinterested duty' suffice?

   (3) If a fiduciary duty exists in a partial disclosure case, what are the necessary requirements to establish accessory liability on the part of the lender?

   (4) Did the brokers in each case owe the relevant duty to the claimants?

   (5) Was the lender in each case liable for the repayment of the commission?

9. The Court of Appeal held that:

   (1) A statement in the terms and conditions that commission may or will be paid does not necessarily have the effect of negating secrecy. Whether the borrower has been told or informed about the commission will depend upon the facts of each case, including the steps, if any, taken to bring the matter to his attention. Burying such

a statement in the small print which the lender knows the borrower is highly unlikely to read will not suffice.

(2) A fiduciary duty owed by the broker to the claimant is a necessary requirement for a claim for accessory liability on the part of the lender, but that *"in such a case as this, a fiduciary duty arises in tandem with and in consequence of there being a disinterested duty."*

(3) To establish accessory liability on the part of the lender requires knowledge of the existence of the fiduciary relationship and payment of the commission to the broker in circumstances in which the lender has not satisfied itself that the borrower has given their fully informed consent to the payment.

(4) In all three cases there was a disinterested duty which was sufficient to give rise to a primary liability on the part of the lenders in *Hopcraft* and *Wrench*, which were secret commission cases, and in all three cases there was also a parallel fiduciary duty which was sufficient to found the claim for accessory liability in *Johnson* and would have been sufficient in *Wrench* had it been a partial disclosure case.

(5) In all three cases the lenders were held to be liable for the repayment of commission.

10. In relation to the appeal in *Johnson*, the Court held that the relationship between the claimant and defendant was unfair for the purposes of the 1974 Act, the first appeal judge had been wrong to remit the unfair relationship claim to the first-instance judge for further fact-findings, and the court had sufficient information to assess the appropriate remedy, directing that the claimant be repaid the commission together with interest.

Key Points Explained

11. The Court rejected the submission of the defendant in *Hopcraft* that the decision in *Wood* was wrong and should not be followed, stating that it appeared to be an example of the orthodox application of settled principles pertaining to bribes and secret commissions. It also rejected the claimants' submission that the requirement for a disinterested duty in *Wood* should be extended to apply to partial disclosure cases, on the basis that the reasoning in *Wood* was specific to bribery, and to accept the claimants' submission would extend the disinterested duty to cases not involving bribery; partial disclosure cases fell in a different category; it was unclear where the boundaries of this suggested new approach would lie; the Court was not persuaded that such a step would be open to it, and that such an approach could encounter formidable obstacles both legally and factually [78]-[81].

12. The Court concluded that the lower courts in *Johnson* and *Wrench* had correctly identified the legal principles in requiring a fiduciary duty in claims for accessory liability, but *"the question for us is whether they applied those principles correctly to the facts"* [82].

13. The Court started its analysis with the view that *"a purchaser/borrower would view the procuring of finance as an adjunct to the sales transaction and would not expect the dealer to receive a commission…unless he tells them"*. It considered that the very nature of the duties which the broker undertook gave rise to a 'disinterested duty' unless the broker made it clear to the consumer that they could not act impartially because they had a financial incentive to put forward an offer from a particular lender or lenders. In circumstances where transactions were likely to have taken place several years ago and there was unlikely to be a clear recollection of what was said at the time, the documents

were likely to prove crucial in determining whether disclosure was sufficient to negate secrecy and, if so, whether there was or was not informed consent.

14. The Court then held that the brokers owed the claimants an *ad hoc* fiduciary duty arising from the nature of the relationship, the tasks with which the brokers were entrusted, and the obligation of loyalty which is inherent in the disinterested duty. The Court considered that *"the claimants needed the finance to be able to afford to acquire the car they wanted, which made them more vulnerable than someone who might have had the choice to pay in cash."* All three claimants relied on the dealer to find them an offer which met their needs and was, at the very least, competitive with other readily available source of finance. The brokers did not simply effect an introduction and leave it to the lender and borrower to contract between themselves. Their role related to sourcing and selecting a lender who offered the most advantageous (or at the very least, in *Hopcraft*, competitive) and suitable terms. The claimants entrusted the broker with information about their financial circumstances, and left it to them to pass that information on to prospective lenders and procure an offer.

15. In *Johnson* and *Wrench*, the lender's agreement with the dealer contained a term whereby the dealer agreed not to refer any applicant to anyone other than that lender unless it had first submitted a proposal in relation to the applicant to that lender and the lender had declined to accept it. In *Johnson*, however, the dealer had provided the claimant with a document (the Suitability Document) which the Court considered *"created the false impression that the* [dealer] *were exercising their judgment in selecting a finance provider which "may be most appropriate" for the customer's needs from a panel of 22 lenders, when in fact there was an undisclosed obligation which tied the broker into giving FirstRand first refusal in every case."* The Court considered the

Suitability Document and the agreement between the dealer and lender to be of considerable significance, and found it *"surprising"* that no mention of them was made in the judgments or skeleton arguments below. In *Wrench* the Court found that the dealer's representative gave an express oral assurance to the claimant that he would select or had selected the product most suitable for the claimant's needs.

16. The Court found that the duty to disclose the existence commission owed by brokers under CONC 4.5.3R prior to January 2021 was premised on credit brokers having a duty to be impartial in the first place. In the cases where DiC commission was payable, the brokers were in a position to determine, or at least influence, the rate of interest charged and to adjust it in a manner which would affect the rate of commission they were to receive. The Court found that fiduciary duties were owed because the brokers were in a position to take advantage of their vulnerable customers and there was a reasonable and understandable expectation that they would act in their best interests. There was an obligation to tell the claimants the amount of commission and there could be no informed consent if the claimants did not know how much it was. It was not good enough for the lenders to tell the claimants that the amount would be available from brokers on request.

17. There was no clear conflict of interest between the interests of the credit broker and the customer, because both of them were *"keen to facilitate the sale at the price that the broker/dealer is prepared to accept, and the customer is willing to pay."* Further, under the hire purchase agreement the broker/dealer sold the car to the lender, not the customer, so the dealer and the claimant were not on opposite sides of the sale transaction.

18. Mr Wrench's unchallenged evidence was that he was not told orally about the commission. The Court found that the term relating to payment of

commission in *Wrench* was *"'hidden in plain sight'…tucked away in a sub-clause of the lender's standard terms and conditions, under the heading "General"…the prospect that the borrower would read those terms was negligible. FirstRand can have had no real expectation that they would do so…FirstRand appears to have gone out of its way to try and ensure that the statement about commission…was as inconspicuous as it could be. It took no steps to require that the borrower did read it, let alone obtain their confirmation that they had done so. The prominent reference to Clause 10 gave rise to the misleading implication that this was the only provision of any significance of which the customer needed to be made aware of."* [113]. It also found that *"FirstRand could not have expected Mr Johnson to read the standard terms and conditions. The prospect that he would do so was negligible.* [FirstRand]…*buried Clause 13.6 in the "General" section whilst deliberately drawing attention to Clause 10…"* [139].

19. In relation to the Suitability Document and Dealer Terms of Business in *Johnson*, the Court found them to be *"untruthful"*, *"false"* and to contain *"lies"* on the basis that the credit agreement was *"certainly not the most suitable"* for the claimant's requirements, because (1) the dealer was charging the customer more than the Glass's Guide retail price and the difference between the guide price and the actual price roughly equated to the amount of commission paid to the dealer by the lender, and (2) the arrangement between the dealer and the lender tied the dealer into giving the lender the right of first refusal on offering finance to the dealer's customers [154]-[155].

20. As a remedy in *Johnson* the Court ordered that the commission be repaid as equitable compensation, together with *"interest he paid on it under the hire purchase and personal loan agreements"* and interest on the total of those two elements at an appropriate commercial rate from the date of the agreement [172].

Comment

21. Although there is much to be unpacked in this judgment, clients may wish to consider the following points:

22. Firstly, the judgment included a postscript which stated that there are tensions between the previous binding Court of Appeal judgments in *Hurstanger* and *Wood* which this Court had not found easy to reconcile, and contemplating the prospect of the lines of authority from those two cases being considered in greater depth by the Supreme Court, so that it can make a definitive pronouncement on the circumstances in which the payment of a commission by a third party to another person's agent or fiduciary will give rise to a liability (whether as principal wrongdoer or an accessory) on the part of the payer. The Court acknowledged the force of counsel's submissions that the language of bribery and fraud *"does not sit easily with the type of scenario with which the present cases are concerned"* and stated that it understood judicial reluctance *"to visit a principal liability for payment of a secret commission upon a lender who…has gone to some lengths both to notify the borrowers of the payment of the commission and obtain their consent to it, but has not quite done enough."*

23. Secondly, even where accessory liability for the broker's fiduciary duty was made out in *Johnson*, the Court declined to exercise its discretion to order rescission of the hire purchase agreement given the length of time since the transaction was effected and the fact that the claimant had long since sold the car.

24. Thirdly, in only one case (*Johnson*) was there any written documentation evidencing the nature of the relationship between the dealer/broker and the claimant.

25. Fourthly, the Court's analysis of the contractual documentation gave limited consideration to the applicable regulatory context prior to January 2021 in which that documentation was produced. Although the Court considered CONC 4.5.3R, it did not consider the disclosure requirements as between that provision and CONC 4.5.4R (which required a broker to disclose the amount of commission to a customer only if the customer asked).

26. Fifthly, in both *Hurstanger* and *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61, the claimants were taken to have knowledge of documents they had signed. The concept of a lender concealing standard terms 'in plain sight' and being unable to expect borrowers to read the documents provided to them must run the risk of creating legal uncertainty. The Court's treatment of the defendant's terms and conditions appears to be in marked contrast to its treatment of the broker's Suitability Document, which it found to be of considerable significance and to have *"created* [a] *false impression"* even though the claimant's evidence was that he had signed it without reading it [47].

27. If the defendants in this case are minded to appeal to the Supreme Court, that Court may wish to take the opportunity to clarify the law in this area.

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Henderson Chambers

28 October 2024