ALERTER

Johnson & Ors in the Supreme Court: a guide

Toby Riley-Smith KC, James Palmer, Nazeer Chowdhury, Thomas Samuels, Reanne MacKenzie, Beatrice Graham, Freya Foster, Ben Norton, Thomas Mallon, Isha Shakir, Vishnu Patel, Benn Sheridan & Karl Ayling

Between 1 and 3 April 2025, the Supreme Court heard the conjoined appeals in *Johnson v FirstRand Bank Ltd (London Branch)*, *Wrench v FirstRand Bank Ltd (London Branch)* and *Hopcraft v Close Brothers Ltd*. This much-anticipated hearing arose from the payment of commissions by each of the defendant/appellant banks to third-party motor dealers, acting as credit brokers in arranging finance for each of the claimant/respondent consumers.

The Court indicated that judgment might reasonably be expected in or after July 2025.

BACKGROUND

The Court comprised Lords Reed, Hodge, Lloyd-Jones, Hamblen and Briggs SCJJ.

The agreed issues for their Lordships' consideration in these appeals are:

(1) When acting as credit brokers, do car dealers owe consumers a "disinterested" and/or fiduciary duty to provide information, advice or recommendation?
(2) If so, were the payments of commissions by the lenders to the car dealers secret such that the lenders become primary wrongdoers?
(3) Can the lenders be liable in the tort of bribery? If so, what is the correct approach to remedies?
(4) If there was sufficient disclosure of the commission to negate secrecy, was there insufficient disclosure to procure the consumers' fully informed consent to the payment such that the lenders are liable as accessories for procuring the credit brokers' breach of duty?
(5) Can insufficient disclosure also suffice to make the relationship between lender and consumer "unfair" for the purposes of the Consumer Credit Act 1974 ("**the 1974 Act**")?

Over the course of the three-day hearing, the Court heard from counsel on behalf of the banks, the consumers and two intervening parties – the National Franchised Dealers Association ("**NFDA**") and the Financial Conduct Authority ("**FCA**").

DAY ONE

The Appellants' case

The appeal was opened by leading counsel for FirstRand (Mark Howard KC), addressing issue 1. His submissions addressed the test for the imposition of a fiduciary duty, the distinction (if any) between "fiduciary" and "disinterested"[1] duties and how, on the facts of these transactions, no such duties could possibly be owed by motor dealers.

The submissions had "*a broad focus on general principles applicable in all… cases*." Thus, the Court was effectively invited to lay down general principles in this area going well-beyond the strict circumstances of motor finance commission litigation. Indeed, the Appellants' counsel sought throughout to underline the difference between the dealers *qua* broker in these cases, versus the "*plain, vanilla*" type of brokerage exemplified in the line of mortgage broker cases in which the law of secret commission had been developed.[2]

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Given that a dealer/consumer relationship was not a settled category of fiduciary relationship,[3] the focus was on *ad hoc* duties. The submissions emphasised the need for the alleged fiduciary to have undertaken to act with single-minded loyalty. These appeals were distinct from the Mortgage Authorities in that no fee was paid by consumers to motor dealers for their brokerage services. Thus, the appellants were "*not ruling out*" a dealer being found to owe single-minded loyalty in "*a different factual position*".

The importance of the words "*single-minded*" was highlighted by interventions from the Court. Lord Briggs suggested that the appellants would presumably wish to emphasise them, noting that "*one can have loyalty without it necessarily being inconsistent with some interest of your own. But query whether you can have "single minded" loyalty in that situation.*"

As to the distinction between a "fiduciary" and "disinterested" duty, it was argued that on behalf of the appellants that the latter appeared from *Wood* to be the "common law analogue" of an equitable fiduciary duty for the purposes of the tort of bribery. Lord Briggs again noted that the parties were agreed as to that analysis but appeared accept it for slightly different reasons.

Leading counsel for Close Brothers (Lawrence Rabinowitz KC) addressed issue 2. The primary submission was that the common law tort of bribery had no proper foundation and should be abolished by the Court. The proper place for such matters to be dealt with was by way of equitable claims and relief.

The submissions involved a careful review of the historic case law from the 19th century onwards, including even recent Supreme Court decisions,[4] premised on the existence of such a tort. At some point the law had "*gone wrong*" in assuming the existence of such a cause of action at common law. All of the cases could (and should) have been pursued on the basis of some other cause of action. It was submitted that the abolition of the common law tort would, therefore, not leave a lacuna in the law. These propositions were tested by a number of interventions from the Justices. Lord Briggs in particular sought clarification as the appellants position on the suggestion that treatment of bribery as a purely equitable matter "*understates the potentially primary responsibility of the briber…*" To similar effect, Lord Reed queried whether "*the common law may give remedies which equity doesn't…*"

The question of what was meant by the "disinterested" duty created by *Wood* and how it could otherwise be explained was also addressed. There was nothing in *Wood*, properly understood, inconsistent with the Appellants' position on issue 2. It was submitted that David Richards LJ (as then) was merely rejecting "*any suggestion of a fiduciary relationship in one of the traditional categories… as a precondition of liability for bribery.*" In other words, an *ad hoc* fiduciary duty – or "disinterested" duty – was enough. Insofar as *Wood* could be read more widely, it was wrongly decided.

The day was closed with 30 minutes of further submission from FirstRand on issue 3. It was argued that a defendant must know or turn a blind eye to the fact that the payee of the bribe was not entitled to act as it did. The Court of Appeal had accepted this as correct in its recent decision in *Expert Tooling & Automation Ltd v Engie Power Ltd* [2025] EWCA Civ 292.[5] Thus, it was wrong in this case to assume (as the Court of Appeal did) that the mere fact that the dealers were "credit brokers" meant they were inherently prohibited from accepting commissions.

DAY TWO

The Appellants' case continued

At the start of day 2, Mr Howard KC continued submissions in relation to issues 4 and 6.

Issue 4 was addressed only comparatively briefly. It was submitted that the payer of the commission is not liable in the tort of bribery (insofar as it exists) where it was disclosed that the commission *might* be payable pursuant to *Hurstanger*. It was particularly emphasised that the "*real evil of bribery*" was not the payment, but the secrecy of it. That position was endorsed by the FCA in its intervention and was said to be plainly right. Thus, the Court of Appeal had been wrong to find that the commission payable in Mr Wrench's case was secret.

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On issue 6, the Respondents' case was said to be framed as relying on two points: (i) per *Plevin v Paragon Personal Finance Ltd* [2014] 1 WLR 4222 there had been a payment of a suitably large commission, and (ii) the dealer had breached a fiduciary and/or disinterested duty.

On the *Plevin* point it was argued that the logic of that decision could not be read across to the motor finance context. In a PPI context, the commission "*artificially inflated*" the price paid and thereby disguised whether or not the premiums represented value for money. In the motor finance context, however, the lender simply provides finance at an agreed interest rate and APR. A consumer could go out into the market to compare offers on that basis. Lord Hodge, however, appeared to question the reality of that suggestion: "*In theory [the consumer] should go out into the market, but in reality he or she will look at [the monthly payment] figure and say "can I afford it?". So, one won't have a value for money exercise absent disclosure.*"

In any event, unlike PPI, the finance products offered consumers a real benefit. Ultimately the commission in these cases was an overhead representing the work done by dealers in carrying out a regulated activity of credit broking.

As to the respondent's second point on fiduciary duty, while it was a relevant point to be included in the mix, it could not be determinative in every case. It was argued that that suggestion had not been explored at trial such that, if the Court was of the view there was a fiduciary relationship, the case should be remitted to the County Court.

Intervention on behalf of the NFDA

The Court heard briefly from leading counsel on behalf of the NFDA (Jonathan Kirk KC). The submission was, in short, that a motor dealer was the paradigm example of a retailer acting in its own self-interest; commerciality necessarily runs through the dealer/consumer relationship.

The Respondents' case

Leading counsel for the Respondent consumers (Robert Weir KC) began by addressing the tort of bribery itself (issue 2). He submitted that the Court should not reshape the contours of the tort without compelling justification, let alone abolish it overnight. The Appellants' position, it was submitted, represented a downgrade of the protections afforded to victims of bribery without justification. The tort was concerned with the risk of corruption and therefore different from any other cause of action. The irrebuttable presumption in a claimant's favour was at the heart of the tort of bribery and rightly so.

Lord Hamblen intervened to ask what was meant by a dealer acting "*on the claimants' behalf*." In particular, whether it was suggested that he was acting "*only*" for the claimant with "*no interest of his own.*"

Categorising bribery as a purely equitable claim would strip rights from claimants. There was a real question as to whether the remedy of payment of the bribe and rescission at common law are distinct from equitable recission. In equity the role of the briber is diminished, it being necessary to also establish liability on the part of the payee of the bribe. The Court was urged to reject the distinction between "disinterested" and "fiduciary" duties suggested by the FCA. Its analysis would lead only to complication. Ultimately, the Appellants' position was not a rationalisation but a downgrade of important protections. The deterrent effect of an automatic right of rescission is significant. The common law has consistently proceeded on the basis that there is a tort of bribery even if its origins are now unclear.

Counsel then moved to consider what duty was owed by an agent in order to engage the tort of bribery. It was submitted that a strict fiduciary duty was not necessary; the common law analogue of a "disinterested" duty was enough. If the agent has a role in the decision-making process and thereby influences the principal's choice, the duty to be impartial arises because it exposes the risk of corruption.

In that regard, the dealers in fact owed disinterested duties to the consumers. The Court of Appeal's decision was not a development of the law: it was engaged in a fact-sensitive exercise and rightly applied establish law to the facts of these appeals. *Branwhite v*

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Worcester Works Finance Ltd [1969] 1 AC 552 showed that, in submitting financial information to a finance company, a dealer was acting on behalf of the customer.

This submission was explored by a number of judicial interventions raising other examples. Lord Hodge, for example, gave the example of a shoe seller: if he or she showed a customer three pairs of shoes but not a fourth, would they owe disinterested duties on the basis that they had a role in the customer's decision-making process? In answer it was submitted that the role of a dealer *qua* broker was distinct because it was agreeing a price and then moving into a credit broking role. Lord Briggs also noted that a dealer surely "*has skin in the game until the thing is signed off and the money is in his bank.*" He has "*an interest in the composite transaction until the end, which may not be the same as the customer.*" Counsel answered that that was not right: both dealer and customer were acting together to obtain finance. Thus, there was an "*alignment of interests*."

DAY THREE

The Respondents' case continued

Mr Weir KC resumed the Respondents' submissions. Returning to the question of whether dealers owed fiduciary duties to consumer he submitted that they arose from two matters: (i) the offering of a purportedly competitive finance deal, and (ii) the (lack of) financial sophistication of the borrower.

Reference was made to the facts of the appeals. The consumers' evidence that they believed the dealer would be getting them the best deal was similar to an undertaking of the type urged by the Appellants as necessary for an *ad hoc* fiduciary duty. Moreover, Mr Johnson had authorised the dealer to use his financial information to obtain credit for him, thereby creating an agency relationship. These claimants lacked financial sophistication and entrusted the dealer to get them the "*best deal*"; the contractual tie to the banks impeded that ability.

Reference was made to the decisions of *McWilliam* and the contrasting approach in *Medsted Assocates Ltd v Canaccord Genuity Wealth (International) Ltd* [2019] EWCA Civ 83. The mere act of stating, as a broker, that you will provide a range of options should be sufficient to create a disinterested duty.

Lord Hamblen queried how the Respondents dealt with the need for an undertaking of loyalty. It was said in response that references to an undertaking were "*shorthand*" for the need to look at the relationship as a whole. Thus, even if not an express undertaking, the "*driver is you should be on my side of the floor – on my 'team'.*"

Submissions then moved to the interaction of the statutory regime with the Respondents' common law rights. The line drawn by the FCA in the Handbook could not alter the relevant duties owed at common law, pursuant to the principles identified in *The Manchester Ship Canal Co Ltd v United Utilities Water Ltd (No 2)* [2024] UKSC 22. Likewise, section 56 of the 1974 Act was enacted to empower the consumer and there was no indication that Parliament had intended to qualify or revoke rights which otherwise existed at common law. Thus, while it may not fit easily, it did not exclude the possibility of a common law bribery claim against a dealer.

As to the test of dishonest in accessory liability, the lender's knowledge of the transaction only had to be such as to render participation in the act contrary to the ordinary standards of conduct. In other words, per *Twinsectra v Yardley* [2002] 2 WLR 802, a claimant need not show the lender understood the dealer should not have acted as it did. Under questioning, the Respondents settled on the relevant knowledge in these appeals as being that the dealer was "*acting as a credit broker for the consumer*."

Lord Briggs in particular observed that it was taking days of complex argument before the Court to ascertain whether the law imposed a fiduciary duty on dealers so as to make payments by lenders improper. Thus, it was "*difficult to think ordinary right thinking people would treat as dishonest a payment made by a lender where the question whether there is anything wrong is so uncertain.*"

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It was then submitted that the Court of Appeal had been right to find the payment to be secret in Mr Wrench's case. The Court was taken through the contractual documents noting that it was in very small print at the end of the document. The fact that, in the law of contract, a party is bound by a document he signs whether or not he has read it is irrelevant. The law of bribery is instead concerned with a deterrent effect. The question is whether, on the facts of each case, enough was done to bring the disclosure to the principal's attention. Likewise, in Mr Johnson's case, the Court of Appeal had been precisely correct to say the relevant disclosure was "*hidden in plain sight*."

Finally, on the question of the unfair relationship claim in *Hopcraft*, it was said that *Plevin* was of direct application to these cases. It was, as in a secret commission/bribery claim, a question of "*informed consent*". There was some discussion between the Justices and counsel as to the correct comparator for determining the commission percentage in these cases. It was also suggested that the motor finance market was no more competitive than the PPI market. When challenged by Lord Lloyd-Jones on the evidence for that, counsel noted the potential financial impact as emphasised to the Court throughout the permission to appeal stage and widely reported in the press. If one was considering an impact of billions of pounds it was self-evident that these issues were endemic in the sector.

The FCA's intervention

Brief submissions were made by leading and junior counsel on behalf of the FCA (Jemima Stratford KC & Aarushi Sahore).[6]

Of particular note, in relation to issues 1 and 2 the FCA sought to chart a "*middle course*" driven by its policy objectives and expertise as the sector regulator. It was wrong to abolish the tort of bribery altogether but, likewise, the respondents had framed the test for liability too widely. It was necessary to identify two things for liability to arise: (i) an agent (i.e. someone with a role in the decision-making process); and (ii) a duty to carry out that function on a "disinterested" basis.

In particular, it was suggested that the duty identified in *Wood* – since referred to a "disinterested duty" – is a mere "label" for what is required. It could the result of duties owed as a fiduciary, but it could also be a contractual, statutory or other duty to the same effect. Fiduciaries "*do not exhaust the universe of people who owe "disinterested" duties but it is always wrong to pay a bribe to such a person.*"

On the issue of an unfair relationship, the FCA emphasised it was a fact-sensitive exercise, albeit two particular factors were likely to be relevant: (i) the existence of a discretionary commission arrangement (now banned by the FCA), and (ii) the size of the commission (albeit *Plevin* should not be uncritically applied to these cases as motor finance was distinct from PPI).

The Appellants' reply

The Appellants then closed the appeals with brief responsive submissions. Of particular note, leading counsel for FirstRand challenged the argument that whether the dealer told the consumer it would obtain the "*best deal*" was relevant to a fiduciary/disinterested duty. If that was said and not honoured, a consumer would simply have a claim in misrepresentation.

Timing of judgment

Lord Reed stated that the Court was "*not going to rush judgment.*" If it produced a decision in the same time as taken by the Court of Appeal (four months), it would be available in July. However, timing "*depends upon the extent of agreement between members of the court.*"

ENDNOTES

[1] As first crystallised in *Wood v Commercial First Business Ltd* [2023] Ch 123.
[2] In particular, *Hurstanger Ltd v Wilson* [2007] 1 WLR 2351; *McWilliam v Norton Finance (UK) Ltd* [2014] EWCA Civ 818; and *Wood*.
[3] Variously also referred to in submissions as "*status-based*" fiduciary or one of "*the traditional categories*" of fiduciary.
[4] In particular, *Republic of Mozambique v. Privinvest Shipbuilding SAL (Holding)* [2023] UKSC 32
[5] Also now subject to PTA in the Supreme Court.
[6] The FCA's written submissions can be found here.

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