

Johnson v FirstRand Bank Limited, Wrench v FirstRand Bank Limited and Hopcraft v Close Brothers Limited [2024] EWCA Civ 1292 ('the Judgment')

31 October 2024

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1 Executive summary of the outcome of the three claims

- 1.1 The Judgment concerns three separate claims by individuals who had each purchased cars through motor dealers acting as credit brokers, who had arranged finance for the acquisition of those cars from third-party lenders. The individuals received varying forms of disclosure in relation to the level of commission paid by the lender to the dealer.
- 1.2 All of the appeals claimed that these commissions were not permitted under English common law, and that the lenders were therefore liable to return these sums to the individuals. In one of the appeals (*Johnson*), the claimant also claimed that the commission arrangements meant that its relationship with the lender was '*unfair*' under the CCA, thereby allowing the courts to provide remedies to the individual in respect of such '*unfairness*'.
- 1.3 On the facts of each of the specific cases, the Court of Appeal found in favour of the claimant borrowers holding that, even where some of the contractual documentation provided to the borrowers included a reference to the possibility that commission may be paid, the lender was liable to:
 - (a) two of the claimants (*Hopcraft and Wrench*) for paying to the dealer a '*secret commission*', in circumstances where the dealer owed a duty to provide '*disinterested*' advice or information to the borrower; and the lender had failed to establish that it had done enough to make the borrower aware of the commission (i.e. such that it constituted a '*secret commission*');

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(b) the third claimant (*Johnson*):

- (i) as an accessory to the breach of *fiduciary duty* by the dealer, the lender having failed to establish that it (or the dealer) had obtained *informed consent* from the borrower for the payment of commission (where the nature of the informed consent required takes into account the characteristics of the borrowers including their lack of financial sophistication);
- (ii) as a result of an unfair relationship which arose between the lender and the borrower.

1.4 As a result, the lenders were required to refund to the claimant borrowers the fee paid for arranging the finance and/or the commission received by the dealer. In the case of *Johnson*, the court also ordered the lender to provide compensation to the borrower for the interest they paid in respect of the commission under the credit agreements (plus interest on that sum at an appropriate commercial rate) due to the finding of an '*unfair relationship*' under the CCA.

1.5 The table below summarises, at a high level, the position on each of the claims by each of the three borrowers:

Claim against lender	Claim (1) – Bribery / Secret Commission ('Wood')		Claim (2) – Accessory Liability for breach of Fiduciary Duty ('Hurstanger')		Claim (3) – Unfair Relationship – s.140A/B, CCA
Conditions to be met	Secret?	Disinterested Duty by dealer?	Fiduciary Duty (and breach) by dealer?	Accessory liability by lender?	Unfair Relationship with lender?
Hopcraft	Yes – Parties agreed	Yes – due to the very nature of the duties that the broker undertook for the borrowers (where the broker had not made it clear that they could not act impartially)	N/A	N/A	N/A
Wrench	Yes – Court held disclosure in terms was not sufficient.		N/A	N/A	N/A
Johnson	No – The claimant did not withdraw its concession - made in the lower courts - that there had been partial disclosure (as a matter of fact), and so this was established as a common ground between the parties.		Yes – key findings related to the nature of the arrangement (with financially unsophisticated borrowers who reposed trust and confidence in the dealer); and the ' <i>inherent conflict of interest</i> ', meaning that receipt of the commission was found to be a breach of the broker's fiduciary duty where informed consent had not been obtained.	Yes – key findings were that the lender was aware that payment of commission would be a breach of fiduciary duty unless there was ' <i>informed consent</i> '. The lenders did not satisfy themselves that it was obtained.	Yes – key findings related to the insufficient disclosure of the commission and its high value as a % of the transaction (c.25% of the overall sum advanced under the credit agreements).

Key takeaway points from the Judgment

- 1.6 The cases are fact dependent, although there are similarities across them (i.e. all the borrowers were considered to be financially unsophisticated).
- 1.7 In particular, the Court considered that the borrowers in these cases were more vulnerable than other customers who may have had the choice to pay in cash, as all of the borrowers needed finance in order to acquire the car.
- 1.8 All of these cases are in respect of hire purchase agreements within the motor finance sector, but this Judgment may have wider implications for broking arrangements generally, including within both the unregulated and regulated parts of the consumer finance sector.
- 1.9 The relevant claims considered three different ways that lenders may be liable for the payment of commission to dealers acting as credit brokers:
 - (a) payment of **secret commissions** to dealers;
 - (b) having **accessory liability for the dealer's breach of its fiduciary duties** owed to the borrower (which arises in the context of '*half-secret commissions*', referred to in the Judgment as '*partial disclosure*' cases); and
 - (c) an **unfair relationship** under s.140A/B, Consumer Credit Act 1974 (CCA).

Secret Commissions ('primary liability' for the lender)

- 1.10 The extent of any claim relating to secret commissions will depend on whether there is a '*disinterested duty*' and the nature of any disclosures to the borrowers. Both of these factors will need to be considered in the context of the relevant facts and circumstances – i.e. nature of the borrower, product and relationship between the parties.
- 1.11 The definition of a '*disinterested duty*' is wider than a '*fiduciary duty*', and may therefore apply to a broad range of intermediated distribution channels across the financial services market.
- 1.12 Lenders and brokers can take steps to clarify the nature of their relationships with the borrower, which may influence the application of the law, as expressed in *Hopcraft*, to other facts or circumstances.

Accessory liability of the lender in connection with a breach of the broker's fiduciary duty to the customer

- 1.13 A claim against a lender for a breach of fiduciary duty by the broker will depend on the existence of a fiduciary relationship, the breach of that duty, and 'dishonesty' by the lender through knowing of (or turning a blind eye to) that breach by virtue of its own actions (e.g. the payment of a commission without sufficient evidence that *informed consent* has been obtained from the borrower).
- 1.14 Whilst a fiduciary duty arose in these cases, the Court did note that in other circumstances (with more sophisticated customers), a fiduciary duty may not arise, or may be of a different nature.
- 1.15 The fiduciary duty will not be breached where a customer provides their fully informed consent to the commission payment. Whether consent is 'fully informed' or not will depend on the relevant facts (i.e. nature of the customer, nature of disclosure, process for the disclosure, receipt of confirmations from customers, etc).

- 1.16 Lenders cannot merely rely on clauses in standard terms with brokers/dealers that require them to seek ‘informed consent’ for these purposes, and will need to consider how they can obtain sufficient evidence of informed consent; which may include taking a more active role in making disclosures to, or obtaining confirmations directly from customers in respect of their consent to any commission arrangements. The concept of ‘*informed consent*’ is intended to cover both the disclosures made to the customer in respect of the commission arrangements as well as evidence that the customer has understood the implications of that disclosure in the context of the overall transaction.

Unfair relationship

- 1.17 The Court did not consider that the nature of the commission arrangements between the lender, dealer and customer would automatically lead to it being an ‘*unfair relationship*’. However, in the case of *Johnson*, the fact that the commission was 25% of the total transaction value, coupled with the insufficient disclosure of information in respect of the commission arrangements were factors that the Court found contributed to the finding of an ‘*unfair relationship*’ for the purposes of s.140A/B, CCA.

Impact assessment and next steps

- 1.18 In view of the potentially broad impact of the Judgment across different types of broking arrangements and intermediated distribution models within the unregulated lending and regulated lending sector, firms should consider undertaking an impact assessment in respect of their own business models, contractual arrangements (across the distribution chain), policies, procedures and practices and consider the extent to which any changes should be made in light of the Judgment.
- 1.19 For example, as noted above, the findings of fact concerning the nature of the borrowers in these cases – as, in general terms, less financially sophisticated, some of whom who were considered to have vulnerabilities – may not be the case in all settings. In contexts which are dissimilar to the facts of these cases, careful analysis is required to determine what is required in terms of disclosure of commission by the lender and broker to the customer and, in particular, what level of disclosure amounts to ‘*informed consent*’, and how that maps across to the disclosure that was actually provided in the documentation or otherwise.
- 1.20 Given the findings on unfair relationships, lenders may also wish to understand the relative level of commission that is payable to brokers as a % of transactions (noting that the ‘*unfair relationships*’ provisions of the CCA can apply beyond ‘*regulated lending*’ under the CCA).

Possible Supreme Court appeal

- 1.21 The lenders/defendants to these claims have all sought permission from the Court of Appeal to appeal these Judgments to the Supreme Court. The Court of Appeal has rejected these applications for permission, and so the lenders will need to make a permission application to the Supreme Court itself.
- 1.22 If such applications to the Supreme Court are made, we expect that a decision on the permission applications could occur at the earliest in Q1 2025, however early Q2 2025 is more probable. If permission were granted, (and subject to any expedition being granted) the hearing of the appeals might then be expected to take place in 2026. In the meantime, and pending any appeal, this Judgment reflects the current legal position for this area of law.

FOS/FCA Motor Finance complaints

- 1.23 The common law principles considered in this Judgment are wider than the principles considered in the recent FOS complaints related to discretionary commission arrangements (known as 'DCAs').
- 1.24 The FCA had previously noted that it would delay setting out its next steps in connection with its review of historic conduct connected with DCA arrangements in the motor finance sector, until at least May 2025 to await - amongst other developments relating to the principal FOS complaints - this Judgment.
- 1.25 To date, the FCA has acknowledged the Judgment, and it is expected that there will be a more substantive update in due course as to how it may impact this ongoing review. It is expected that the FCA may issue information requests across the consumer finance sector to further understand the impact of this Judgment on firm's business models (and their financial resilience in the context of potential further customer claims).

2 Background / Key Facts

2.1 The Judgment covered three claims, namely Hopcraft, Wrench and Johnson, as all of the claims related to commission arrangements in the context of motor finance. All three claims had failed when heard by the lower courts, and were appealed to the Court of Appeal.

2.2 The table below summarises the background of each case:

Claim	Customer profile	Car purchase and finance details	Commission disclosure?	Commission payment
Hopcraft	Student nurse with a part-time job, looking for a replacement car. The Court described the claimant as ' <i>a little naïve and perhaps vulnerable in some aspects</i> '.	Purchased car for £8,530. Funded by a regulated hire-purchase agreement (interest rate of 5.5%).	Although the Court noted that the standard form "Terms of Business" referred to commission payments and related calculations (which were redacted), for the purposes of this claim, the Parties agreed as a matter of fact that there was no ' <i>disclosure</i> '.	£183.26
Wrench	The Court described the claimant as a " <i>postman with a penchant for fast cars</i> ".	Purchased two cars using regulated hire-purchase agreements: One for £8,995 (interest rate of 8.75% – fixed commission model) ² Another for £9,750 (interest rate of 4.32% – discretionary commission model). ³	The documents for both cars referred to standard terms " <i>overleaf</i> " which were not overleaf but which stated that " <i>a commission may be payable</i> ". The claimant was not directed to or told about these terms.	£179.85 under the fixed model £408.98 under the discretionary model.
Johnson	The claimant was a 27-year-old factory supervisor seeking to purchase a first car with a net annual income of £13,200.	Car purchased for £6,399. The lender provided £4,800 under a hire-purchase agreement. The remainder (£1,599) of the credit was provided as a personal loan (interest rate of 8%). The sums advanced under the personal loan were nearly equivalent to the commission payable to the broker.	Terms were presented in writing stating that (a) commission may be received and (b) credit options were offered from a " <i>select panel of lenders</i> " only. For the purposes of the claim, the parties agreed that there was some form of ' <i>partial disclosure</i> ' of the commission.	£1,650

² Under the fixed commission model, the broker/dealer's commission was calculated as a fixed percentage of the sum advanced to the borrower under the hire-purchase agreement.

³ Under this discretionary commission mode, the broker/dealer's commission, the broker/dealer had the right to set the interest rate on the hire-purchase agreements it arranged for customers for the lender between a range of 3.25% and 8.25%. The broker/dealer would receive as commission 80% of the difference in charge between the lowest rate and the agreement rate, plus commission of 1.25% of the total sum advanced to the borrower.

Other important facts

- 2.3 Other important facts that were common across all three cases included:
- (a) all of the customers were considered to be 'financially unsophisticated', which the Court considered made them more vulnerable than financially sophisticated customers, or those that may not have needed finance in order to buy the car;
 - (b) all of the dealers were regulated credit brokers; and
 - (c) the car purchase price was agreed before any finance arrangements were sought.

3 Nature of the claims

- 3.1 In all of the cases, the claimants were seeking from the lender the return of the commission paid by the lender to the dealer.
- 3.2 In order for the Court to find in the claimant's favour, the claimants needed to demonstrate one of the following:
- (a) the dealer owed a duty to the borrower to be disinterested / impartial and the commission paid by the lender to the dealer was a **secret commission** – following the established case of '**Wood**';
 - (b) the dealer owed a **fiduciary duty to the borrower but failed to obtain informed consent** to the payment of commission and the lender knew about or turned a blind eye to the breach such that the lender was liable as an accessory under English common law – following the case law in '**Hurstanger**';
 - (c) (*For Johnson only*), that the commission arrangements constituted an '**unfair relationship**' for the purposes of s.140A/B, CCA.

4 Wood / Secret Commissions

- 4.1 Under English common law, the payment of a secret commission is an actionable wrong, for which both the person paying and receiving the secret commission are liable as primary wrongdoers. In the context of these cases, this means that both the broker and lender may be liable to the borrowers as primary wrongdoers.
- 4.2 In order for the payment of a commission in this type of motor finance arrangement to be considered as a '**secret commission**':
- (a) there must be a '**disinterested duty**' between the dealer and customer; and
 - (b) the commission must be '**secret**'.

A. 'Disinterested Duty'

- 4.3 The Court agreed that, in order to succeed in a claim relating to a secret commission, the claimants needed to demonstrate that there was a '**disinterested duty**' between the dealer and customer (consistent with *Wood*). The Court confirmed that it is not necessary to demonstrate that there is a '**fiduciary**' relationship between the parties for these purposes (even though one may exist).

- 4.4 A ‘disinterested duty’ in Wood was characterised as being owed by “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”.⁴
- 4.5 The Court considered that the “very nature of the duties which the credit broker undertook gave rise to a ‘disinterested duty’” given “their task was to search for and offer the customer a finance deal from their panel of lenders which was suitable for their needs and competitive...”, “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.”⁵ The Court noted that a broker could do this by making a disclosure that is sufficient to bring home to the borrower the fact that the person he is engaging to find an offer of finance is free to promote his own self-interest at the customer’s expense.
- 4.6 However, the Court found that the brokers in these cases did not make any such statements / disclosures to the customers and so a disinterested duty was found to exist in all cases.
- 4.7 The Court noted that it was irrelevant, for these purposes, whether the customer had requested assistance in seeking finance for the car purchase, or if it had been offered by the dealer. The Court considered that the interests of the dealer and customer are aligned following the agreement of the car price and found that in all of the cases the dealers made statements, or acted in a manner that is consistent with the disinterested duty.

B. Secret commission

- 4.8 Whether the commission is ‘secret’ or not is a question of fact, depending on the nature of any disclosures to the customer.
- 4.9 Given the historic nature of these cases and that there was unlikely to be a clear recollection of what was said at the time, the Court viewed this question in the context of any disclosures that were made in the relevant terms and conditions/documentation provided to the customers in the three cases.
- (a) In *Hopcraft*, the parties agreed that there was no disclosure of the commission arrangements and so it was accepted by the lender that this was a ‘secret commission’.
 - (b) In *Wrench*, the lender had included a statement that commission may be payable to the dealer within a sub-clause of its standard terms and conditions (under the heading ‘General’). The Court considered that in the context of the law on ‘secret commissions’, “there was no “disclosure” in any meaningful sense and that the provision buried in the small print [of the lender’s] standard terms was not enough to negate secrecy.”⁶ The Court therefore considered that the commission in *Wrench* was ‘secret’.⁷
 - (c) In *Johnson*, the parties agreed that there had been some form of partial disclosure which meant that it should not be considered as a ‘secret commission’.⁸
- 4.10 The Court of Appeal noted that partial disclosure may not be sufficient to prevent a commission being regarded as secret commenting that “**the presence of a term in either the lender’s or the broker’s terms of business which makes reference to the possibility that a commission may be paid by the lender to the broker is not necessarily fatal to a finding that the commission**

⁴ Para 9, Judgment

⁵ Para 87

⁶ Para 119

⁷ Para 119

⁸ Para 112

was secret. The question in each case will be whether enough was done to bring the salient facts to the attention of the borrower in a way which made their significance apparent.⁹

C. Outcomes

- 4.11 As such, for the purposes of claims relating to ‘*secret commissions*’ the Court held in respect of each claim that:
- (a) **Hopcraft** – the Court held there was a disinterested duty and the parties agreed that there was a secret commission, and so the lender was found liable as ‘*primary wrongdoer*’.
 - (b) **Wrench** – the Court found that there was a disinterested duty and the disclosures made were not sufficient to prevent the commission from being described as ‘secret’, which meant that the lender was found liable as ‘*primary wrongdoer*’.
 - (c) **Johnson** – Although the Court found that there was a disinterested duty, the parties had agreed (as a common matter of fact within the case) that there had been some of ‘*partial*’ disclosure made to *Johnson* in respect of the commission, which meant that the commission could not be regarded as ‘secret’. As such, any ‘*secret commission*’ claim could not succeed.

5 Hurstanger / Accessory liability for breach of fiduciary duties & partial disclosure

- 5.1 Under English common law, a person may bring a claim against another person (with whom they are in a fiduciary relationship) for a breach of that fiduciary duty. A third party may be liable as an accessory where they have procured the breach, acting dishonestly.
- 5.2 As such, in order for any borrower’s claim to succeed against a lender, the following criteria need to be met:
- (a) There was a *fiduciary duty* owed by the dealer to the borrower;
 - (b) That the fiduciary duty had been breached – due to a lack of *informed consent* from the customer for the commission; and
 - (c) That there was *accessory liability* for the lender as it was dishonest in the sense that the lender knew or turned a blind eye to the breach on the basis that it had knowledge of the payment of the commission and there was nothing to suggest that informed consent had been given by the borrower in respect of such payment.
- 5.3 It is important to note that as the Court had found in favour of *Wrench* and *Hopcraft* in their ‘*secret commission*’ claims, it did not fully consider whether they would have also succeeded on these grounds. As such, this element of the judgment is primarily focused on the facts of *Johnson*, where it was accepted by all parties that there had been some form of partial disclosure, and so the grounds for a ‘*secret commission*’ were not met.

⁹ Para 118

A. Fiduciary duty

- 5.4 The Court held that the dealers did owe a ‘fiduciary duty’ to the customers in these cases, as “*it is precisely 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, that they owed them fiduciary duties*”.¹⁰
- 5.5 In reaching this view, the Court found that:
- (a) the [dealers] ‘*were not carrying out a purely ministerial function*’, in that they did not simply just effect an introduction between the customer and lender and then leave it to them. Instead, the Court found that “*their relevant role, which they willingly undertook, related to sourcing and selecting a lender who offered the most advantageous, (or at the very least, in Miss Hopcraft’s case, competitive) and suitable terms*”;¹¹
 - (b) the brokers in these cases: ‘*communicated with lenders and entered into any necessary discussions or negotiations with them on behalf of the customers with a view to finding the most suitable lender from their panel of lenders to provide the finance which would enable the customers to purchase the cars they wanted at the prices the dealers were asking. The [customers] had no direct contact with the lending panel or with the chosen lender. They 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*’;¹²
 - (c) there was ‘*obviously reliance on them [i.e. from the customers to the dealers] to act in good faith*’;¹³
 - (d) “*these relatively financially unsophisticated individuals undoubtedly placed trust and confidence in the brokers to secure an agreement which was affordable and which was, at the very least, competitive*”;¹⁴ and that
 - (e) “*even where an agent gives no advice or recommendation but instead simply propose or arranges a particular contract, there is “at the very least an implied representation that the proposed contract was “competitive” thereby resulting in the principal reposing trust and confidence in the agent and, accordingly, giving rise to a fiduciary relationship*”.¹⁵
- 5.6 The Court noted that the extent and scope of the fiduciary duty owed to a customer may be different depending on the relevant facts.
- 5.7 For example, the Court cited a case (*Medsted*) in which the customers were financially sophisticated, and unlike any of the customers in these cases, had been told that commission was payable to the brokers by a financial institution to whom the brokers had introduced them, but where the customers did not know how much the commission would be. Although the Court in *Medsted* also held that there was a fiduciary duty between the sophisticated customers and the broker, this “*did not extend to expressly informing the clients how much commission the broker would be paid. They could be expected to have asked, if they wished to know*”.¹⁶

¹⁰ Para 100

¹¹ Para 93

¹² Para 93

¹³ Para 100

¹⁴ Para 95

¹⁵ Para 97

¹⁶ Para 100

- 5.8 Equally, the Court also cited the case of *McWilliam*, where it was established that the brokers (who acted as pure credit brokers – rather than also as dealers for the relevant goods/services that were subject to the finance), owed a fiduciary duty to the relevant borrowers in that case as the brokers “acted in a capacity which involved the repose of trust and confidence by the borrowers, who were people of relatively modest means with a history of credit problems, and vulnerable in that they had substantial debt and needed assistance in finding a loan which would ease the burden of servicing that debt.”¹⁷
- 5.9 In light of the views reached by the Court in this Judgment (and the relative comparisons made to the facts in *Medsted* and *McWilliam*), market participants will need to consider what level of disclosure should be made to customers in respect of any commission arrangements taking into account their relative circumstances (including their vulnerability and financial sophistication). This point is particularly important as, in the event of customer claims for breach of fiduciary duty, the burden will be on brokers and/or lenders to demonstrate that sufficient disclosure was made to the customers in order to provide an effective defence on the basis of informed consent.
- 5.10 The Court’s reference to *Medsted* (which involved the introduction of financially sophisticated individuals to an investment firm in respect of derivative products) is also a reminder that principles within this Judgment including in relation to the nature of a fiduciary duty, are not restricted to motor finance involving unsophisticated customers but could be applied to other types of broking and agency arrangements, potentially therefore also including loans brokered between commercial entities.

B. Breach of the fiduciary duty / Informed consent

- 5.11 The Court stated that “receiving a commission without informed consent is a breach of fiduciary duty”¹⁸ and considered what would amount to sufficient disclosure for the purposes of obtaining informed consent, commenting that “putting the principal on inquiry would not be sufficient. Borrowers in this non-status lending market are likely to be vulnerable and unsophisticated and in this context a statement of the amount their broker is to receive is likely to be necessary to bring home to such borrowers the conflict of interest”.¹⁹
- 5.12 Whether informed consent is given “will depend on what exactly [is] disclosed and on all the circumstances”.²⁰
- 5.13 Although the Court had already ruled in favour of *Hopcraft* and *Wrench* on the grounds of a ‘secret commission’, the Court noted that “there was a conflict of interest and no informed consent by the consumer to the receipt of the commission” in all three of the cases it had considered.²¹
- 5.14 More particularly, the Court considered that there was no ‘informed consent’:²²
- (a) in *Wrench* (notwithstanding that it had found that there had been a ‘secret commission’), as the material facts were not disclosed. The ‘material facts’ for these purposes were considered to include: the “rate of the commission, the basis on which it was calculated, the “tie” between the dealer and lender, including the obligation to give [the lender] first refusal, and that [for one of the hire purchase agreements], at least, the commission was partly based on a [discretionary commission] arrangement”²³; and

¹⁷ Para 64

¹⁸ Para 57

¹⁹ Para 58

²⁰ Para 77

²¹ Para 18

²² The Court did not express a view on whether informed consent had been obtained in *Hopcraft*, but it is assumed that it would not have been on the basis that all parties had accepted that there had been no disclosure of the commission to the borrower.

²³ Para 123

- (b) in *Johnson*, as he was not told about the commission in terms which made it clear that he was being asked to consent to its being paid, and there was no warning statement to the effect that its payment to the broker might mean that the broker was not in a position to give impartial advice or information.

5.15 In line with the Court's observations that informed consent will differ depending on the relevant circumstances, the Court noted that, in *Medsted*, the disclosures which put the sophisticated wealthy customers on notice that they could request details of the commission payable would constitute '*informed consent*'. The Court contrasted this with the financially unsophisticated customers in these three cases where "*there was an obligation to tell the claimants the amount of the 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 the brokers on request.*"²⁴

5.16 As noted above, careful consideration will need to be given, in light of the Judgment, as to:

- (a) the level of disclosure that is required to obtain '*informed consent*', including whether disclosure of the amount of the commission would be sufficient on its own for the purposes of '*informed consent*' from '*financially unsophisticated*' and '*vulnerable*' customers, or whether disclosures need to go further and include details on how the commission is calculated (including the nature of the commission arrangement – i.e. fixed vs discretionary) and the relationship between the dealer and lender; and
- (b) what processes will be sufficient for these purposes (i.e. what practices will dealers/lenders have to evidence to demonstrate that they have brought such disclosures sufficiently to the customer's attention, and that the customer has understood the disclosures and nature of the commission arrangements).

5.17 Lenders/brokers within the regulated sector will also need to be mindful of their disclosure obligations under CONC and consider broader regulatory expectations under the Consumer Duty – such as the Consumer Understanding Outcome – in the context of obtaining '*informed consent*' from customers.

5.18 Finally, although these cases specifically consider breaches of a fiduciary duty in the context of the non- or partial-disclosure to customers of commission payments to brokers, consideration will need to be given to the extent to which the principles set out in the Judgment may be relevant to other elements of any broker/dealer relationship with a customer (including where no direct commission is payable to the broker or where disclosure is only made in respect of the commission but not in relation to other matters). For example, non-disclosure of a "*tie*" between the broker and lender (such as the lender receiving first refusal on all brokered loans) may also be relevant to consideration of a breach of a fiduciary duty, to which the lender could have accessory liability. It may therefore be necessary for brokers and lenders to consider what elements of their relationship (i.e. such as '*first refusal*' rights) should be disclosed to customers.

C. Accessory liability

5.19 In order for the lender to have accessory liability for the breach of the fiduciary duty, *Johnson* had to demonstrate that the lender was dishonest in the sense that it knew of, or deliberately turned a blind eye to, the breach of fiduciary duty on the basis that it paid the dealer the commission in circumstances in which, as a matter of fact, there was a failure to obtain the borrower's informed consent.

²⁴ Para 100

- 5.20 In these circumstances, the Court considered that the lender ‘*undoubtedly knows*’²⁵ of the agency relationship which gives rise to the fiduciary duty. The Court therefore considered that where a dealer takes “*a commission from the lender for effecting the introduction of the business to them [it] would plainly put the credit broker in a position of conflict and the lender would know that.*”²⁶ The Court therefore considers that the nature of these arrangements put the lender on notice that the dealer will be in breach of its fiduciary duty unless it has received informed consent from the customer.
- 5.21 In line with this, the Court noted that it would be a defence to any claim against a lender if they could evidence that ‘*informed consent*’ had been obtained from the customer. The same would apply if a claim was brought directly against a dealer.
- 5.22 In assessing how a lender may demonstrate whether there has been informed consent or not, the Court stated “*the lender cannot assume that there has been full disclosure of the commission simply because the lender (or even the regulator) requires the broker to make such disclosure. If the lender does not take it upon itself to give full disclosure to the consumer, it deliberately takes the risk that the broker will not do so, and that is what happened in these cases.*”²⁷
- 5.23 As such, the Court noted that “*the only way for the lender to be certain that the consumer is aware of all the salient facts pertaining to the payment of the commission is for the lender to provide the information to them itself and, preferably, to require confirmation that the consumer has understood the position and consented to it*”.²⁸ The Court did not expect this approach to pose any hardship for lenders, as they are already seeking to enter into a direct contractual relationship with the customer, and can readily spell out the commission arrangements in finance documentation or a cover letter which the customer may then countersign.
- 5.24 This commentary must however be placed in the context of the Court’s broader commentary on how ‘*informed consent*’ will be viewed in the context of the relevant facts and circumstances, which will include *how* a customer is made of the relevant disclosure/salient facts about the commission.
- 5.25 The Court concluded in *Johnson* that the lender had the means of telling customers about the size of the commission and how it would be calculated, but failed to do so. The Court found, in view of the related facts, that the lender ‘*could not have expected*’ Mr. *Johnson* to have read the standard terms and conditions, and so any reference to commission arrangements within that document would not constitute informed consent (and were unlikely to even negate ‘*secrecy*’ (see above)). The Court also found that the lender in this case “*took no steps whatsoever to satisfy itself that the broker/dealer had obtained fully informed consent*” from the customer.²⁹
- 5.26 As such, the Court concluded that the lender was on notice (or turned a blind eye) to the fact that Mr. *Johnson* had not given his fully informed consent to the commission payment, but made it nonetheless and so the lender was found to have ‘*accessory liability*’ to the dealer’s breach of its fiduciary duties.³⁰
- 5.27 The Court found that the following particular facts in *Johnson* supported the conclusion that ‘*informed consent*’ had not been obtained from the customer in this case:
- (a) the broker had provided a ‘*Suitability*’ document to the borrower, which the Court found contained “*a number of materially untruthful and misleading statements*” to the effect that the dealer was providing impartial advice, and that the lender in this case had been

²⁵ Para 133

²⁶ Para 133

²⁷ Para 128

²⁸ Para 138

²⁹ Para 140

³⁰ Para 142

selected as the most suitable lender from a panel (rather than as a result of a contractual arrangement between the dealer and the lender).³¹ The Court noted that even if the lender was not aware of this document, “*it was effectively turning a blind eye to the dealer painting an entirely misleading picture of its role to the consumer simply by appearing to act as an ordinary credit broker. Most people would regard that as dishonest*”,³² and

- (b) the Court considered that the contractual documentation in *Johnson* “*buried*” the relevant clauses relating to commission within the standard terms, “*whilst deliberately drawing [the borrowers’] attention*” to certain declarations that the borrower needed to make before signing the document.³³ In the context of the contractual provisions used by the same lender in *Wrench*, the Court noted that “*it is difficult to reach the conclusion that this [approach] was anything other than deliberate, bearing in mind the distraction of the specific reference to [a clause on the lender’s liability and related declarations]. It [i.e. the clause in the standard terms relating to commission] was not meant to be known or seen*.”³⁴ The Court considered that the lender appeared “*to have gone out of its way to try and ensure that the statement about commission made [within the standard terms] was as inconspicuous as it could be*.”³⁵

6 Unfair relationships

- 6.1 In *Johnson*, the Court considered whether or not there was an ‘*unfair relationship*’ within the meaning of s.140A/B, CCA 1974. The Court found that there was. It held that ‘*fairness in this context is a matter of degree*’. The Court found held that ‘*a relationship will not necessarily be unfair for the purposes of the 1974 Act simply because a broker receives a commission from the lender and the borrower is not actually aware of that fact. The court is required to consider all the facts and to weigh their importance*’.³⁶
- 6.2 The Court found that the following were ‘*key facts*’ in *Johnson*:
- (a) the commission to the broker was 25% of the sum advanced;
 - (b) the sum borrowed and paid to the dealer was more than the car was worth;
 - (c) the fact that this ‘*very bad bargain*’ arose from a relationship between the broker and the lender which was ‘*falsified by the broker, and not disclosed by the lender, is also critical*’ (this being a reference to the ‘*false*’ Suitability Document and the lender’s Dealer Terms of Business).³⁷
- 6.3 If the commission is ‘*very high*’ in relation to the sum borrowed then that ‘*may, in itself be enough to make the relationship unfair where nothing, or nothing of substance, has been done to disclose the relationship between the lender and the broker*’.³⁸
- 6.4 In *Johnson*, the Court found that it was not necessary to develop the analysis further, because the commission was ‘*very high*’, and ‘*the true nature of the relationship between the lender and the broker was not disclosed by the lender and actively concealed by the broker (acting as agent of the lender, per s.56, CCA 1974)*.’ It was said to be a ‘*very clear case*’.³⁹

³¹ Para 48

³² Para 134

³³ Para 139

³⁴ Para 115

³⁵ Para 113

³⁶ Para 170

³⁷ Para 169

³⁸ Para 170

³⁹ Para 170

Citations

'Wood'; *Wood v Commercial First Business Ltd* [2021] EWCA Civ 471; [2022] Ch 123

'Hurstanger'; *Hurstanger Ltd v Wilson* [2007] EWCA Civ 299; [2007] 1 WLR 2351

'Medsted'; *Medsted Associates Ltd v Canaccord Genuity Wealth (International) Ltd* [2019] EWCA Civ 83, [2019] 1 WLR 4481

'McWilliam'; *McWilliam v Norton Finance UK Ltd* [2015] EWCA Civ 186, [2015] 1 All ER (Comm) 1026