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

Frequently asked questions document

5 November 2024 (*Updated on 14 November 2024***)**

Important Information

This note (the FAQ note) is intended solely as a summary of responses to some of the frequently asked questions identified by the BVRLA in respect of the Judgment. The purpose of this FAQ note is to provide high-level generic information in light of the Judgment. It does not contain a full analysis of the law nor does it constitute an opinion of any Norton Rose Fulbright[1] entity on the points of law discussed, or as to the application of the Judgment to the circumstances of any person.

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If you require any further information in respect of this FAQ note, please speak to your usual contact at the BVRLA.

1 Introduction

1.1 This document has been prepared to provide high-level, generic responses to some of the frequently asked questions that have been identified by the BVRLA in connection with the Judgment. Market participants will need to consider how the principles articulated in the Judgment may apply in the context of their own specific business models, contractual arrangements, control frameworks and risk tolerances.

2 Does this Judgment just apply to regulated hire-purchase agreements in the motor finance sector?

2.1 No. All of the claims which were the subject of the Judgment concerned hire-purchase agreements/regulated credit agreements within the motor finance sector. However, the English common law principles relating to disinterested and fiduciary duties articulated in the Judgment may apply in other 'agency' situations where party A is considered to owe some form of impartial duty or trust and confidence relationship with party B, whilst at the same time receiving a benefit from party C which would affect party B's ability to act impartially/in the best interests of party A (similar to the way in which the car dealers carried out credit broking for individual borrowers in the facts of these cases whilst receiving a benefit from the relevant lenders).

[1] References to 'Norton Rose Fulbright', are to one or more Norton Rose Fulbright members or to one of their respective affiliates (together 'Norton Rose Fulbright entity/entities').

2.2 Accordingly, the common law principles on which the Judgment is founded are applicable in both regulated and unregulated lending scenarios.

2.3 These principles could also extend to commercial/B2B arrangements which involve a broker or intermediary, and therefore where a 'disinterested duty' (that is, a duty provide information, advice or recommendation on an impartial or disinterested basis) or 'fiduciary duty' may arise. The existence and the exact nature of such duties will be dependent on the relevant facts and circumstances.

2.4 In addition to considering claims on the basis of the payment of a secret commission and disinterested and fiduciary duties, the Court of Appeal also considered a claim by one of the claimants that an '*unfair relationship*' had arisen as a result of the circumstances in which commission was paid. This type of claim is only applicable to '*credit agreements'* within scope of the CCA (which would include regulated lending as well as certain types of unregulated lending).

3 Does this mean that there is now a blanket ban on commission payments to brokers/intermediaries?

3.1 No. This Judgment does not introduce a blanket ban in respect of commission arrangements for brokers/intermediaries including car dealers.

3.2 However, brokers and/or lenders may be liable to refund commission to customers where the broker owes a disinterested duty or fiduciary duty to a customer, receives some form of remuneration (such as a commission) that would conflict with that broker's duties to the customer (under common law), and where that remuneration is not disclosed at all or it has been partially disclosed but the customer has not provided their fully informed consent to the broker's receipt of that commission.

3.3 The Judgment means that transparency on commission payments is likely to be key for brokers and lenders where they owe a 'disinterested duty' or 'fiduciary duty' to a customer.

4 What do I need to disclose to customers (as a broker and/or dealer) to comply with this Judgment/defend any customer claims? What is 'informed consent'?

4.1 The Judgment confirms that lenders need to ensure that borrowers understand and consent to the payment of commission by the lender to a broker (that is, providing 'informed consent'). This will need to include the amount of commission, and the material facts relating to the commission payment.

4.2 The disclosure required, in order to evidence that the commission is not secret and that a customer has provided their fully informed consent, will depend upon the underlying factual circumstances, including but not limited to the nature of the customer and whether they are vulnerable/unsophisticated.

4.3 In respect of one of the claims, the Court of Appeal noted that the material facts relevant to the commission payments (which were not disclosed to an unsophisticated customer) included:

(a) the rate of the commission,

(b) the basis on which the commission was calculated;

(c) the "tie" between the dealer and lender, including the obligation to give the particular lender first refusal, and

(d) that, for one of the hire purchase agreements, the commission was partly based on a discretionary commission arrangement.

4.4 The Judgment confirms that the concept of '*informed consent*' is not just about what is disclosed, but also how it is disclosed. For example, firms will need to consider:

(a) when the disclosures are made within the context of the overall customer journey (recognising that customers need time to read and understand the disclosures);

(b) in what medium the disclosures are provided, noting the different distribution channels that may apply for certain products;

(c) how the disclosures are made (for example whether they are in clear English and the extent to which they are signposted or given prominence in order that the customer's attention is specifically drawn to them); and

(d) whether customers will be required to provide a form of confirmation that they have received the relevant disclosures and/or understand the commission arrangements (for example by providing a signature).

4.5 Firms within the regulated sector will also need to consider how their disclosures are consistent with requirements within CONC and the Consumer Duty (in particular the Consumer Understanding and Consumer Support outcomes).

5 Is this just a lender problem? Do the dealers / brokers need to do anything?

5.1 The three claims considered by the Court of Appeal were against the relevant lenders in those transactions. However, this does not mean that the common law principles around secret commissions and fiduciary duties are only applicable in the context of a customer / lender relationship.

5.2 The claimants in these cases could have brought claims directly against the brokers, for example for breaching a fiduciary duty owed to the customer claimants.

5.3 As such, it is important that both lenders and brokers review their commission arrangements and consider how they may obtain informed consent from customers.

5.4 The Judgment makes clear that, if a lender relies upon a broker to obtain informed consent and this is not in fact procured, the lenders will not be able to assert that there has been 'informed consent' in any claim brought by a customer against the lender. As such, the Court of Appeal noted that lenders may wish to consider taking a more active role in the disclosure of the commission to customers directly. In order to manage their own risk effectively, lenders may therefore also wish to consider their involvement in, and/or oversight of, disclosures made to the customer by brokers/intermediaries. This will have implications for the organisation of distribution models, systems and controls in a range of lending sectors.

6 What is considered as 'commission' for these purposes?

6.1 The Judgment does not provide a definition of '*commission'*.

6.2 However, the principles within the Judgment are likely to apply to situations in which any form of remuneration or benefit is paid by a product provider to a broker or intermediary, which gives rise to a risk of a conflict of interest for the broker in meeting any disinterested duty or fiduciary duty which they owe to the customer.

6.3 Whilst it will depend on the specific circumstances and nature of each business model, any commission payments received by brokers, even if they are by reference to overall volumes rather than per customer, could be within scope of the principles outlined in this Judgment.

6.4 Firms should therefore review their remuneration/commission arrangements more generally to consider whether any monies or non-monetary benefits received from/or paid to third parties could cause any potential conflict of interest in the context of any duties owed to customers.

7 Are fixed commission arrangements out of scope of this Judgment?

7.1 No. Whilst the Court of Appeal notes that brokers may be more likely to have an inherent conflict of interest where they are remunerated via a discretionary commission arrangement, the Judgment appears to apply equally to fixed and discretionary models.

7.2 In *Wrench*, the customer entered into two hire purchase agreements: one subject to a fixed commission model and another subject to a discretionary commission arrangement. The Court of Appeal found that the commission payments for both agreements were in breach of the common law principles outlined in the Judgment.

7.3 In terms of obtaining informed consent, a discretionary commission agreement may require a greater level of disclosure by the broker, given the increased potential for this model to lead to a potential of conflict (i.e. there may be greater emphasis placed on the customer fully understanding the nature of this commission arrangement given the nature of the conflict this may cause for the intermediary/broker). Of course, discretionary commission models in regulated motor finance were banned in 2021 by the FCA.

8 Are vulnerable customers in the Judgment the same as 'vulnerable customers' in the FCA sense/context?

8.1 No, there is a difference between the way that the Court refers to vulnerabilities in the Judgment, and how the FCA defines vulnerable customers in its own guidance.

8.2 The Judgment considers vulnerability in the context of how '*vulnerable'* the customers are within the relevant facts of the transaction and takes into account the fact that all of the customers were financially unsophisticated and relied upon the brokers to source the finance, and could not have purchased the vehicles without access to finance from the lenders introduced to them.

8.3 On the other hand, the FCA's guidance on vulnerability is more focused on particular customer characteristics, that may render an individual '*vulnerable'* (either in the long term or for a short period of time), though they may be coterminous. For example, the FCA's definition of vulnerability include reference to circumstances, such as temporary financial difficulties, life events (i.e. divorce), health issues, disabilities, etc.

8.4 The FCA's guidance on vulnerability may be relevant in the context of considering the type of duties that brokers may owe to a customer. A disinterested duty or fiduciary duty may be more likely or more expansive in nature where the customer is more vulnerable (both in the context of the transaction or more generally) and the nature of the vulnerability may also impact on the level and form of any disclosures that may be required to obtain '*informed consent*'.

9 How should brokers/lenders deal with complaints?

9.1 Firm should consider implementing a co-ordinated and consistent communication strategy taking into account the nature of the complaints and the information available and the resources needed to deliver such a strategy. Early consideration should be given to record retention and organisation, so as to effectively respond to anticipated requests for information.

9.2 Where customers submit complaints which would fall within scope of the Financial Ombudsman Service's perimeter, for the period of time until the FCA introduces any specific measures to the contrary, firms should continue to deal with complaints in accordance with their usual complaints handling procedures and regulatory requirements. Firms will need to consider whether any complaints fall within scope of the current FCA 'pause' related to discretionary commission arrangements within the motor finance sector.

9.3 Where any complaints or requests for information do not fall within scope of the Financial Ombudsman's perimeter, firms may wish to consider their disclosure obligations including by reference to contractual arrangements and/or their own internal policies and procedures.

10 How does this Judgment impact on historic deals or in-flight deals that have not yet been concluded?

10.1 The Judgment represents the Court of Appeal's decision on three claims involving loans dating back to 2014 and 2017 by reference to certain common law principles which apply to those transactions. It is, effectively a statement of the law as applied to the facts of these cases. It is not 'new law' in that sense, but an explanation of the law as it existed at the time of the Judgment. This means that it has relevance to historic loans (and does not simply create forward-looking principles which only need to be applied from now on).

10.2 As such, it is possible that customers (or their representatives) could bring claims in respect of historic transactions. The success of such claims may depend in part on the application of relevant time-bar rules or limitation periods. This is a complex area but the usual time limits for bringing certain claims can be extended in some circumstances (such as where facts have been concealed from the claimants). In practice, there may also be practical difficulties in bringing and defending historic claims due to, for example, loss or destruction of historic data/information.

10.3 Firms may wish to review their historic practices to understand the scope and nature of their potential exposure as a result of this Judgment. For firms within the regulated sector, the FCA may request details on financial resilience which may include a request for information on the potential exposure for firms, and the extent of their financial and operational resources to deal with potential complaints / claims.

10.4 In terms of in-flight deals, brokers and lenders may wish to assess to what extent they can still provide disclosures to customers in respect of any commission arrangements, such that they can demonstrate that they have obtained 'informed consent'. This could involve putting customers back through elements of the customer journey (suitably updated to reflect the Judgment) or creating ad-hoc procedures to accommodate such disclosures.

11 How does this fit in with the FCA's motor review and the FOS complaints cases?

11.1 The common law principles considered in this Judgment go beyond the considerations related to the recent FOS complaints concerning to discretionary commission arrangements (known as 'DCAs').

11.2 The FCA had previously noted that it would delay setting out its next steps in relation to 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.

11.3 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.

11.4 The FCA introduced a pause on complaints that fall within scope of its motor finance review until December 2025. The FCA has noted – in response to this Judgment - that it has received calls from market participants to widen this pause to include complaints within the motor finance sector that will arise due to this Judgment.

11.5 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 and operational resilience in the context of potential further customer claims).

11.6 If (as is currently anticipated) there is a significant number of historic claims made against brokers/lenders, in addition to any extension of its existing pause, the FCA may consider whether it is necessary (in order to provide certainty of outcomes for customers and firms, and from the perspective of market integrity) to bring such complaints or claims within scope of a separate industry-wide redress scheme – or to extend the scope of its ongoing work on discretionary commission arrangements within the motor finance sector. The FCA may consider this course of action if, for example, there are inconsistent approaches to settling claims and/or the number of privately funded claims via CMC's causes market instability (particularly when compared relatively to the impact of an FCA led redress scheme).

12 What are the next steps in the litigation?

12.1 We are aware that 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.

12.2 This means that the lenders will need to make a permission application to the Supreme Court itself. The lenders/defendants are required to make this application within 28 days of the Judgment, which is c.22 November 2024.

12.3 If such applications to the Supreme Court are made, in the normal course, we would 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, subject to any expedition being granted, the hearing of the appeals might then be expected to take place in 2026. In the meantime, pending any appeal, this Judgment reflects the current legal position.

13 What can lenders and brokers do now?

13.1 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 in the lending sector involved in an intermediated distribution chain should undertake an impact assessment in respect of:

(a) their own business models,

(b) contractual arrangements across the distribution chain including communications between brokers and lenders,

(c) policies, procedures and practices, and

(d) the extent to which any changes should be made in light of the Judgment.

13.2 The findings of fact concerning the nature of the three borrowers in these cases included that they were less financially sophisticated and relatively vulnerable. Not all customers will share those characteristics and careful analysis is required to determine what disclosure is required in order to establish that any particular customer type has provided '*informed consent*' and how that maps across to the disclosure that was actually provided in the documentation or otherwise.

13.3 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).

13.4 Firms will also need to review their operational capacity for dealing with increased levels of customer complaints and/or requests for information.

13.5 As noted above, market participants may also need to undertake an assessment of their potential financial exposure for any potential complaints or claims and consider any related implications such as, for example, how this may impact on the firm's financial resources from a regulatory and/or market disclosure perspective.

14 Which customers are sophisticated? (*updated – 7 November 2024*)

14.1 The Judgment does not provide a definition of '*sophisticated*' or '*unsophisticated*' customers. The individual claimants (a student nurse, postman and factory supervisor) were viewed by the Court of Appeal as being relatively financially unsophisticated and vulnerable, partly because they needed finance to buy the car they wanted (and could not pay cash).

14.2 The approach taken in the Judgment suggests that relative "sophistication" should be considered as one of the factors when determining the nature of any 'disinterested duty' and/or 'fiduciary duty', and, the level of disclosure that such duty may require. The more unsophisticated / vulnerable a customer is, the more likely it is that the customer reposed trust and confidence in the agent (i.e. the dealer / broker) and the more fulsome will be the disclosure required when obtaining informed consent (because, for example, there is less of an expectation on the customer to ask questions).

14.3 The Court contrasted two previous cases: one involving '*wealthy experienced investors*' being introduced to a financial institution to trade in complex derivative products, where the fiduciary duty did not extend to requiring disclosure of the amount of commission[2]; the other involving two individual unsophisticated borrowers in the 'non-status lending market' taking out a second

[2] *Medsted*

mortgage, where disclosure of the amount of the commission is *"likely to be necessary to bring home to such borrowers the conflict of interest"*[3].

14.4 Whether a customer is '*sophisticated'* or not will therefore depend on the underlying circumstances including the nature of the transaction, the market and the customer. There is no black or white line dividing customers into a categorisation as either sophisticated or unsophisticated. Notwithstanding this, in practice we would typically expect that large corporate entities are likely to be considered as '*sophisticated customers'* for the purposes of interpreting and applying the principles outlined in this Judgment.

15 Am I out of scope if I only have more sophisticated customers? (*updated – 7 November 2024*)

15.1 No. More sophisticated customers may still be owed a duty and may require some level of disclosure in order to obtain informed consent to the payment of commission (or some other benefit giving rise to a potential conflict).

15.2 In the case cited in the Judgment which involved wealthy experienced investors, the broker had disclosed to the individuals the fact that commission would be paid but not the amount. The court analysed the scope of the duty owed and decided that, in the circumstances, the duty did not extend to a requirement to disclose the amount. Once the customers were on notice that their broker would receive a commission from the relevant third-party provider, they could be expected to request full details on the commission if they wished to do so.

15.3 Accordingly, even where customers are relatively sophisticated, there may still be some degree of disclosure obligation on brokers/intermediaries who act as agents for customers. There is no blanket exclusion for firms dealing solely with sophisticated customers from the principles set out in this Judgment.

16 What steps should brokers/funders consider in circumstances where there is a 'disinterested' or 'fiduciary' duty owed by the broker to the customer? (*updated – 14 November 2024*)

16.1 The Judgment makes clear that in circumstances where brokers or intermediaries owe a 'fiduciary' duty to the customer, then if they wish to receive (and lenders wish to pay) a commission or similar benefit, they must obtain informed consent to that payment by the customer. The customer will need to be told, in a way which facilitates their understanding, all material facts including the amount of the commission; and then consent to the payment will need to be given by the customer. Even where there is no fiduciary duty owed to the customer, but there is a 'disinterested duty' owed to the customer by a broker, the Judgment confirms that information about the commission needs to be appropriately communicated to the customer (in order to negate secrecy).

16.2 Whether or not a broker owes a disinterested or fiduciary duty to the customer or not will depend on the facts of the case, and it could be the case that such an arrangement might not result in the broker owing a disinterested or fiduciary duty to the customer. In the context of the Hopcraft claims, the Court said that: '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. There was obviously reliance on them to act in good faith…' It is important to note, however, that a fiduciary duty can arise even where the customers are 'financially sophisticated'. In such a case, however it may be possible to conclude that such customers have provided 'informed consent' to a commission payment where more limited disclosure has been made that commission is to be paid (but without necessarily including all material facts relating to it – on the basis that financially sophisticated customers could be expected to ask for such information if they require it).

16.3 Where a broker is subject to a fiduciary duty to the customer they will need to act in the customer's best interests. This may be the case where the broker works with a single product provider or a panel. In these cases, the Court found that the brokers' roles involved the exercise of judgment, namely in sourcing and selecting a lender who offered the most advantageous (or, in one case, at least competitive) and suitable terms and they owed fiduciary duties to the customers in that regard. The Judgment is clear, however that it is possible for parties to establish arrangements in such a way as to make clear to the customer that the broker or intermediary is not acting in their best interests, and to organise relationships in such a way that they do not give rise to a 'fiduciary' or 'disinterested duty'. However, it would be important to ensure that the operation of these arrangements in practice does not give rise to a fiduciary relationship in a particular setting or context, for example as a result of things said or done by or on behalf of the broker (e.g. such as representations as to the 'competitiveness' of the offer sourced for the customer etc.).

END

[3] *Hurstanger*