MOTOR FINANCE & 'HOPCRAFT':

What does the Supreme Court Judgment mean for BVRLA members?

Frequently Asked Questions

6 August 2025

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 Supreme Court's judgment in: Johnson v FirstRand Bank Limited, Wrench v FirstRand Bank Limited and v Close Brothers Limited* [2025] UKSC 33 delivered on 1 August 2025 (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 FAQ note 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.

1.2 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.

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Supreme Court Judgment: Overview

2 At a high level, what did the Supreme Court decide?

2.1 The Court of Appeal upheld claims by three customers against two lenders on three grounds: (i) assisting a breach of fiduciary duty by the dealers; (ii) bribing the dealers; and (iii) an unfair relationship (in one case).

2.2 The Supreme Court:

(a) upheld the appeals on breach of fiduciary duty and bribery, finding in favour of the lenders; and

(b) dismissed the appeal on an unfair relationship, finding in favour of the claimant (Johnson).

2.3 In broad terms, the Supreme Court concluded that the claims for bribery and for breach of fiduciary duty could only succeed if the dealers owed a fiduciary duty to the customers and that this was not the case. They described the process of financing the purchase of a car as a tripartite transaction in which all three parties (the customer, the lender and the dealer) are acting in their own interests throughout. The dealer's interest is in selling a car and it is with this objective[2] in view that the dealer plays a part in the financing arrangements. Throughout the tripartite transaction, the dealer is acting in its own interests, not acting with single minded loyalty to the customer (to the exclusion of its own interests).

2.4 However, the Supreme Court upheld the claim that the relationship between the lender and the customer in respect of one of the cases was unfair (under s.140A, Consumer Credit Act 1974 (**CCA**)). Key factors in this determination were: (i) the size of the commission (55% of the total charge for credit); (ii) the failure to disclose the commission (having regard to the lack of prominence given in documentation to a reference that commission may be paid and the customer's lack of sophistication); and (iii) the concealment of the commercial tie between the dealer and the lender.

3 To whom is the Supreme Court judgment relevant? Does it apply to funders and brokers in the leasing and rental sector?

3.1 The Supreme Court judgment is helpful to funders and brokers in terms of assessing the extent to which:

(a) any of their relationships may give rise to fiduciary duties to customers in the specific context of their business model, taking into account the factors at **paragraph 6.4** below;

(b) they may be susceptible to claims of unfair relationships to the extent applicable to their agreements taking into account the factors covered in question 8 below; and

(c) they have complied with regulatory requirements in the FCA Handbook regarding the disclosure of commission (set out in CONC).

(a) Fiduciary duties

3.2 The Supreme Court's judgment in relation to fiduciary duties and bribery concerns principles of English common law which are relevant across all elements of the market.

[2] (para 268): "*Neither the parties themselves nor any onlooker could reasonably think that each of the participants to such a negotiation was doing anything other than considering their own interests*"

3.3 However, as set out above, helpfully, the Supreme Court has clarified that fiduciary duties are not typically owed by intermediaries in the usual tripartite transactional structure within the UK motor finance sector where the dealer has its own commercial interest in selling the car and the broking activity is ancillary.

3.4 It has also provided further guidance on when such duties may be owed in commercial relationships (outside the recognised fiduciary relationships such as trustee/beneficiary, director/company, solicitor/client etc.). A key ingredient is that one of the parties undertakes to put aside his or her own interests and act altruistically in the interests of another.

3.5 Where transactions within the leasing and rental sector are structured similarly to those within the motor finance market (i.e. tripartite transactions, where the provision of finance is an ancillary service for the broker and the broker does not undertake to put aside its own interests), it is likely that funders/brokers are not in a fiduciary relationship and no fiduciary duty is owed to the customer.

3.6 Where transactions within the leasing and rental sector have different structures compared to those contemplated by the court (such as where the sourcing of the finance package is the core service provided by the intermediary to a customer), then the relevant intermediary (and funder) may need to assess whether a fiduciary relationship may arise (see question 6 below).

(b) Unfair relationships (s.140A, CCA)

3.7 The Supreme Court's findings on unfair relationships will only be relevant to the leasing and rental sector to the extent that finance agreements are within scope of s.140A, CCA.

3.8 In summary, agreements will be in scope where they are 'credit agreements' provided to individuals, which includes:

(a) 'regulated credit agreements' (e.g. personal loans, hire purchase); and

(b) 'certain exempt credit agreements' (e.g. business purposes loans, high-net worth loans).

3.9 Agreements which are **not** in scope include: 'consumer-hire agreements' (e.g. PCH); and unregulated loans (e.g. business-to-business loans, where the borrower is a corporate).

(c) FCA rules (CONC)

3.10 The leasing and rental sector is subject to elements of CONC in the FCA Handbook.

3.11 In considering whether one of the lender/customer relationships was unfair, the Supreme Court took into account compliance with CONC and this is relevant to all funders and brokers within scope of CONC in determining compliance with such provisions (as further discussed below).

3.12 These provisions also give rise to a private right of action by borrowers which allows them to bring claims against firms in the event that they suffer loss as a result of a breach.

4 Does the Supreme Court decision mean we are now back in the same place as pre-October / pre-CoA judgment?

4.1 Broadly, yes. The Supreme Court judgment has reversed the most controversial elements of the Court of Appeal judgment on the scope of claims in bribery and equity relating to 'secret or partially disclosed' commission arrangements.

4.2 If anything, in the context of possible compensation claims for bribery/breach of fiduciary duties, the motor finance sector may in a better place than pre-October / pre-Court of Appeal, as the Supreme Court has provided greater certainty on when fiduciary relationships may generally be

considered to arise in commercial transactions. This should mean that this potential avenue for successful claims, both within the context of the specific tripartite relationships in a motor finance transaction, and more generally in other commercial transactions is either closed off to borrowers or is likely to be restricted to more limited scenarios (e.g. where an intermediary owes a single minded loyalty to their customer, putting aside their own personal interests).

4.3 Otherwise, the Supreme Court (with reliance on submissions from the FCA) has sought to give much greater clarity on when a credit agreement may be unfair for the purposes of s.140A, CCA in the context of motor finance transactions. This clarity is a double-edged sword in that:

(a) from a forward looking perspective, it is likely that the factors given by the Supreme Court (influenced by the FCA) will help to give some degree of certainty for lenders (and brokers) in how to structure and disclose their commission arrangements such that they are less likely to be viewed as '*unfair'* to borrowers under s.140A, CCA – thereby reducing the potential for successful claims in the future; but

(b) from a historic liability perspective, there is greater clarity as to when historic arrangements may be '*unfair'* under s.140A, CCA. While the overall quantum for liabilities under this claim will be much lower than if the Supreme Court had followed the broader heads of claim in equity/bribery put forward by the CoA, these may still be significant.

4.4 As further detailed in questions 20-23 below on the FCA's proposed redress scheme, it appears that the FCA are likely to bring potential claims under s.140A, CCA for historic agreements within scope of their redress scheme. The FCA intend to consult on the scope of their redress scheme, which will provide greater certainty on whether it is limited to '*regulated credit agreements'*, or may also include '*regulated consumer hire agreements'* (notwithstanding that these are not within scope of s.140A, CCA).

5 Is this only relevant to discretionary commission arrangements?

5.1 No, the Supreme Court judgment is relevant to both discretionary and fixed commission arrangements:

(a) the nature of the commission arrangements was not a relevant factor in deciding that no fiduciary duty was owed and no unlawful bribery had occurred (and both could potentially arise in relation to either a fixed commission arrangement or a discretionary commission arrangement); and

(b) although the nature of the commission arrangement is <u>one</u> of the factors that may be relevant in considering whether a lender/customer relationship is unfair. The Supreme Court agreed with the FCA that the 'nature of the commission' is relevant '*because, for example, a discretionary commission may create incentives to charge a higher interest rate*' (para 319) <u>but</u> there are many other factors (no discretionary commission was paid by the lender in relation to the customer whose claim of an unfair relationship was upheld by the Supreme Court).

5.2 Given the relevance of the nature of the commission to consideration of fairness, the FCA may provide further clarity on this point within their upcoming consultation on their proposed redress scheme.

Fiduciary Duties / Relationships

6 Does this mean that an intermediary can never owe a fiduciary duty to a customer or that a lender can never be guilty of bribery?

6.1 The Supreme Court identified various instances where there are recognised fiduciary relationships in which a fiduciary duty is owed (e.g. trustee and beneficiary, partner in a partnership, company and director). Outside those relationships, the Supreme Court reiterated that, in accordance with existing case law, **"***fiduciary duties arise where a person consciously assumes (or undertakes) responsibility in relation to the management of the property or affairs of another, in circumstances where he or she knows or ought to appreciate that this carries with it the expectation that he or she will act with loyalty to that other in that regard".*

6.2 Helpfully, the Supreme Court stated (para 110) that:

(a) "As a general rule, outside well-established fiduciary relationships, such as company director, partner, or agent, in a commercial context "it is normally inappropriate to expect a commercial party to subordinate its own interests to those of another commercial party";

(b) where a person provides an ancillary service to their main commercial interest then – "*Such a commercial transaction or arrangement, in which one party has a personal financial interest, known or apparent to the other party, in bringing the transaction into fruition, is not one in which an undertaking of undivided loyalty and altruism can readily be implied into a contract or such a duty recognised by equity";* and

(c) "The existence, in a commercial context, of trust and confidence between parties to a transaction is not of itself sufficient for equity to impose fiduciary duties" (para 97).

6.3 As such, whilst a fiduciary duty could arise in certain relationships involving intermediaries, this would need to be where the intermediary "*consciously assumes (or undertakes) responsibility in relation to the affairs of another*" and owes "*a single minded-loyalty*" to that other person to the exclusion of their own interests. Simply because a customer places trust and confidence in an intermediary doesn't automatically mean that there is a fiduciary duty owed to them. Similarly, the fact that a person has assumed responsibility giving rise to duties in contract or tort to act to protect the interests of another is not sufficient to give rise to a fiduciary duty.

6.4 The Supreme Court's analysis that a fiduciary duty was not owed in the tripartite motor finance transactions in these cases took into account the following factors (paras 268 – 275):

(a) the **relevant intermediary was objectively considered to be acting in its own interests** and engaged to pursue its own separate commercial objectives;

(b) the **intermediary's activities of brokerage were ancillary to its primary objective** of the sale of the car;

(c) there was no **express undertaking or assurance by the intermediary to put its commercial interest aside in providing the service for the customer** in relation to obtaining finance (a statement by the dealer to the customer that it would seek the most suitable finance package for the customer does not amount to an undertaking of fiduciary loyalty or to act altruistically, although such statements could give rise to other issues such as misrepresentation);

(d) the intermediary did not undertake **any agency for the customer**, having no authority to enter into legal relations on behalf of the customer.

6.5 The Supreme Court also considered that a relationship of trust and confidence, and the characteristic of vulnerability in the person to whom a duty is owed, is the consequence and not the cause of a fiduciary duty. An element of dependency upon or vulnerability to the intermediary affecting the customer in relation to the services provided will not create a fiduciary relationship in the absence of an undertaking of loyalty.

Unfair Relationships – s.140A, CCA

7 What type of finance arrangements could give rise to an unfair relationship (within scope of s.140A, CCA)?

7.1 The Supreme Court upheld the claim in *Johnson* that there was an '*unfair relationship'* between the borrower and lender. This claim was made under the provisions in s.140A, Consumer Credit Act 1974 relating to '*unfair relationships*'.

7.2 A borrower may bring a claim under s.140A, CCA in respect of a '*credit agreement*'. For the purposes of s.140A, a '*credit agreement*' is defined as *'any agreement between an individual (the 'debtor') and any other person (the 'creditor') by which the creditor provides the debtor with credit of any amount'* (s.140C CCA). This means that **the following are within scope**:

(a) regulated credit agreements (including hire-purchase agreements);

(b) certain exempt credit agreements (e.g. business purpose, high-net worth loans);

but the following are not within scope:

(c) consumer hire agreements (e.g. PCH); and

(d) loans that do not meet the definition of a 'credit agreement' (e.g. unregulated loans where a corporate entity is the borrower).

7.3 It is important to note that different parts of the CCA have different scopes of application. There is a specific scope for s.140A as compared to other elements of the CCA, as evidenced by the fact that regulated consumer hire agreements are subject to certain requirements under the CCA (i.e. information requirements, termination rights, etc), but are not within scope of s.140A, CCA.

8 When will an unfair relationship arise for the purposes of s.140A, CCA? What are the factors that the Court will consider for a s.140A, CCA claim?

8.1 The Supreme Court reiterated that the test of unfairness is stated in general terms which permits the court to take account of a very broad range of factors and the application of the test in each case will be a "highly fact-sensitive exercise". This exercise involves taking a holistic view having regard to a number of factors and taking into account all matters the court considered relevant and so it is not possible to state a precise or universal test for unfairness. The burden is on the lender to show that the relationship is not unfair. The factors in the following non-exhaustive list will normally be relevant:

(a) the size of the commission relative to the charge for credit;

(b) the nature of the commission (because for example a discretionary commission may create incentives to charge a higher interest rate);

(c) the characteristics of the consumer;

(d) the extent and manner of the disclosure; and

(e) compliance with the regulatory rules.

8.2 Although the claimant did not seek to rely on this point in his claim under s.140A, the Supreme Court also noted that the supply of a vehicle at an inflated price (i.e. a price higher than its market value) could be a highly relevant factor in considering unfairness (for the purposes of s.140A, CCA) in other cases (in addition to the factors listed above).

8.3 For the purposes of the specific facts in the case of *Johnson*, the Supreme Court considered that the following factors were particularly key in determining that the relationship was unfair:

(a) **the size of the commission** amounting to 55% of the total charge for credit which would have been a "major consideration" in the customer's mind had he been made aware of it at the time of entering into the arrangements and would be to any similar customer, noting that the commission was recovered by the lender in the form of interest paid by the customer (it is not necessary for the customer to provide that they would not have proceeded with the transaction if they had known the amount);

(b) **the failure to disclose the existence of the commission** which was a breach of FCA rules at the time:

(i) CONC 4.5.3R provided that disclosure must be made where knowledge of the existence or amount could affect the broker's impartiality or have a material impact on the customer's decision);

(ii) the commission was not disclosed to the customer orally and he was not aware of it because he did not read the documents in which reference was made to the fact that commission might be paid (his evidence was that the whole process was rushed and he did not feel he could take time to read the paperwork); and

(c) **there was a tie between the lender and the dealer and this was not disclosed** to the customer:

(i) it was a term of the agreement between the lender and the dealer that the dealer would introduce applicants to the lender and would not refer them to any other lender unless the lender declined (effectively a right of first refusal or 'contractual tie');

(ii) the lender did not require the dealer to disclose this contractual tie to the customer, and it was not disclosed in any document provided to the customer, an omission which the court described as "a suppression of the truth"; and

(iii) the customer was given the false impression in the documentation that the dealer was offering products from a listed panel of lenders and these statements were made by the dealer in its capacity as agent of the lender as well as in its own capacity (under section 56(2) CCA) and were in breach of relevant FCA rules (CONC 3.3.1R and 3.7.3R).

8.4 The Supreme Court determination on the existence of an '*unfair relationship*' and the failure to disclose the commission was made despite the fact that the customer failed to read any of the documents provided by the dealer before concluding the agreements or during the 14 day withdrawal period. In the context of this point, the Supreme Court noted that:

(a) Mr Johnson was "commercially unsophisticated";

(b) "it must be questionable as to what extent a lender could reasonably expect a customer to have read and understood the detail of such documents";

(c) no prominence was given to relevant statements about the possibility of commission in the documents as the clause was "surrounded by a mass of other terms" and no attention was drawn to it (unlike a certain other clause);

(d) a term of such importance is required to be "displayed more prominently and the customer's attention expressly drawn to it"; and

(e) even if he had read the documents, they would not have alerted him to the tie (but would have received a false impression that the dealer had access to a panel of lenders).

9 What are the consequences of the successful unfair relationship claim under s.140A, CCA?

9.1 The Supreme Court's judgment (with reliance on submissions from the FCA) has provided greater clarity on when a credit agreement may constitute an '*unfair relationship*' in the context of motor finance transactions for the purposes of s.140A, CCA (see question 8 above) which may:

(a) assist market participants in structuring and disclosing their commission arrangements in future; and

(b) give rise to exposure to claims and/or potential redress obligations in respect of historic arrangements to the extent these created '*unfair relationships*' (on the basis of the factors set out in the Supreme Court judgment).

9.2 In terms of remedy, the Supreme Court considered that the commission (of £1,650.95) should be paid to the customer with interest at an appropriate commercial rate from the date of the agreement (29 July 2017). The commission payable to this customer (£1,650.95) was higher than the three lots of commission paid in the other two cases (£183.26, £179.85 and £408.98) because the lender paid a revenue share of 25.8% of the total amount of credit.

9.3 While the overall quantum of liabilities under this claim is likely to be much lower than if the Supreme Court had followed the broader heads of claim in equity/bribery put forward by the CoA on the basis that the number of potential claimants is likely to be reduced, these may still be significant. Please see question 12 for further information on the steps that brokers / lenders may wish to consider in the context of historic liabilities from an unfair relationship perspective.

9.4 Please see questions 20-23 for further information on how historic liabilities for '*unfair relationships*' may be addressed by the FCA's proposed redress scheme.

FCA Handbook: CONC related consequences

10 Does this have any potential impact if the agreement is outside the scope of s.140A, CCA (e.g. for consumer hire arrangements)?

10.1 In upholding the unfair relationship claim under s.140A CCA, the Supreme Court considered whether any regulatory requirements (such as those in CONC) had been breached.

10.2 In particular, the Supreme Court considered that the failure to disclose the existence of the commission was a breach of the FCA requirement to disclose the existence of commission where knowledge of the existence or amount could affect the impartiality of the broker or have a material impact on the customer's decision (in CONC 4.5.3R) (para 329). Although the Supreme Court does not provide any rationale for this conclusion, within the same paragraph of the judgment, it appears to have reached its view on the basis that the disclosures that were made in the documents were not sufficient taking into account the size of the commission.

10.3 In terms of the documentation:

(a) the customer was provided with a Suitability Document that stated that the broker '*may receive a commission*' from the lender;

(b) the customer signed the hire-purchase agreement which included a declaration that his attention had been drawn to clause 10 of the lender's standard terms and conditions and that he had read the pre-contract information;

(c) clause 10 of the lender's standard terms and conditions (provided separately) was a liability clause and nothing to do with commission; and

(d) clause 13.6 of the standard terms and conditions ("surrounded by a mass of other terms" and to which attention was not expressly drawn) stated that a commission may be payable to the broker.

10.4 However, the Supreme Court also took into account:

(a) the customer's evidence that the commission was not disclosed orally; he did not read the documents; he was handed "an enormous amount of paperwork" and the whole process felt '*very rushed*'; he didn't feel he could take time to read the paperwork;

(b) the customer was financially unsophisticated and it must be questionable to what extent a lender could reasonably expect a customer to have read and understood the detail of such documents particularly where no prominence was given to the relevant statements; and

(c) the customer's evidence that, if he had been told that the overwhelming cost of the agreement to him was just a commission payment, he would have walked away and, even allowing for some exaggeration in this evidence, it was clear that the amount would have been a major consideration in the customer's mind if he had been made aware of it.

10.5 As such, it appears that, where disclosure is required under CONC 4.5.3R, a firm will breach this requirement where:

(a) the customer is 'unsophisticated',

(b) insufficient prominence is given to the disclosure of the commission in the contractual documentation provided to the customer,

(c) such terms are not expressly drawn to the customer's attention (which could involve a broker orally drawing the terms to the customer's attention); and

(d) the size of the commission is such that it would have been a significant factor in the customer's decision – there is no hard rule or specific tipping-point as to when the size of a commission will trigger this requirement (although the Supreme Court appears to consider that this is triggered where the commission is 55% of the total charge for credit).

10.6 This is an important finding, as CONC 4.5.3R is applicable to both credit agreements **and** consumer-hire agreements and a customer is entitled to bring a private right of action against a firm under s.138D, FSMA where they have suffered loss as a result of a breach of CONC 4.5.3R.

10.7 As such, whilst the Supreme Court decision in relation to unfair relationships is confined to 'credit agreements' within scope of s.140A, this determination on the level of disclosure required to comply with CONC 4.5.3R may have broader implications for firms within the consumer hire market.

10.8 It is unclear to what extent this determination will be addressed by the FCA in their upcoming redress process for the motor finance sector (particularly given the FOS complaints relating to this provision of CONC for DCAs, which will be directly covered by the redress scheme). As further set out in questions 20-23 below, on the basis of the FCA statement provided on 3 August 2025, the proposed redress scheme appears to be principally focused on DCA arrangements (related to the FOS decisions) and '*unfair relationships*'.

10.9 Firms will therefore need to closely review the FCA's upcoming consultation paper on the scope of the redress scheme to understand if it will also take account of breaches of regulatory requirements (outside of these two heads of claim).

11 Is 'informed consent' still required? Are changes to systems made in view of the CoA judgment still necessary?

11.1 It is still the case that an intermediary which owes a fiduciary duty must seek *'[fully] informed consent'* from the principal in respect of a payment from a third party which would otherwise be in breach of its fiduciary duty.

11.2 As such, firms will only need to seek '*informed consent*' from customers where they owe them a fiduciary duty. As noted above, in view of the Supreme Court judgment, a fiduciary duty is unlikely to arise in commercial transactions in the motor finance sector where the intermediary acts in its own interest and does not undertake to put such interest aside in favour of the customer.

11.3 However, while the requirement to obtain '*informed consent*' may no longer be strictly required for the purpose of avoiding a breach of fiduciary duty, to the extent that firms have already built this into their systems and controls / customer journeys, this may provide evidence for brokers / lenders that the customer has had their attention drawn to the existence of the commission and the broker / lender has complied with CONC 4.5.3R (see question 10 above), and act as a helpful factor in defending any claim for an unfair relationship under s.140A, CCA.

11.4 In line with this, the FCA's statements on 3 August 2025 noted that "*updated practices* [relating to the disclosure of commissions as a result of the CoA judgment] *are contributing to better consumer outcomes*", and therefore may assist firms in demonstrating their compliance with the Consumer Duty.

11.5 As such, any enhancements following the CoA judgment in October may still be helpful to meet regulatory requirements (under CONC and the Consumer Duty) and in defending any claim for unfair relationships under s.140A, CCA (and also breach of fiduciary duty / bribery in the event that a fiduciary relationship may arise on the facts). These considerations are only relevant to the extent that the relevant agreements are subject to these requirements (i.e. regulated credit agreements, consumer hire agreements) or where the relevant relationship arises. For wholly unregulated arrangements (e.g. such as corporate-to-corporate business transactions) where no fiduciary relationship is formed, 'informed consent' may no longer be necessary.

Impact Assessment and Practical Next Steps

12 What does this mean for redress (broker / lender historic liabilities)?

A) Fiduciary relationships

12.1 Brokers and funders may wish to still assess (and confirm) whether there is a fiduciary relationship for any of their intermediated relationships / as part of their business models.

12.2 This may be done by reference to similarities with the tripartite transactions considered in *Hopcraft* and/or by reference to the fiduciary relationship factors noted within the Judgment. The key element is for brokers/lenders to assess whether the intermediary owes a '*single minded loyalty'* to the customer, having made an undertaking to act altruistically, or whether they are objectively acting for their own personal interest.

12.3 To the extent that this assessment determines that the intermediaries:

(a) do **not** have a fiduciary relationship with a customer, then the brokers/funders can take comfort from the fact that they would be able to defend any claim in equity for breach of a duty or for bribery from a customer; or

(b) may have a fiduciary relationship with a customer, then the broker/funders will need to assess whether:

(i) the customer provided their 'informed' consent to the payment of any commission to that intermediary, such that any claim for breach of the duty/bribery is unlikely to be successful; or

(ii) if no 'informed' consent was provided, whether customers might pursue claims for bribery/breach of the duty.

12.4 It is important to note that this assessment broadly reflects the position in law pre-October, but with the benefit of the views/factors outlined in the Supreme Court judgment on when a fiduciary relationship may arise.

B) Unfair relationships (s.140A CCA)

12.5 Brokers and funders should assess to what extent their business falls within scope of s.140A, CCA (see question 7 above):

(a) if the relevant business / agreements are **not** within scope, a customer is not entitled to redress in this context;

(b) if the relevant business / agreements **are** within scope, brokers / funders will need to assess whether the commission arrangements for those agreements are likely to constitute an '*unfair relationship*'. This assessment will need to be made in the context of the factors set out in the Supreme Court judgment (as set out in question 8 above).

12.6 Notwithstanding this assessment, the level of redress actually payable for any unfair relationship is likely to be subject to the terms of the FCA redress scheme for motor finance. Please see questions 20-23 below for further information on the redress scheme.

12.7 The scope of the FCA's motor finance redress scheme will be important, as it may not include all agreements within scope of s.140A CCA (i.e. if they are outside of the definition of the '*motor finance sector'*). As such, customers outside the redress scheme may still be able to make complaints and bring claims, and firms may need to consider remediation exercises in this regard. As per the above, we expect that this point will be closely considered by the FCA as part of their redress scheme and will become clearer once the FCA publishes their consultation on the redress scheme by early October 2025.

C) FCA Handbook: CONC

12.8 Under s.138D, FSMA, a customer may bring a claim against a firm where they have suffered loss as a result of a breach of regulatory requirements (such as CONC 4.5.3R). As part of his claim for compensation, Mr Johnson had made such a claim in respect of a breach of CONC 4.5.3R and certain other CONC rules[3]. This claim appears to have been dropped or subsumed into the claim under s.140A, CCA in respect of an '*unfair relationship*'.

12.9 As set out in question 10 above, in determining whether there had been an '*unfair relationship*' under s.140A, CCA, the Supreme Court considered compliance with regulatory requirements to be one of the relevant factors and concluded that there had been a breach of CONC 4.5.3R. At the relevant time, this rule provided that the existence of commission must be disclosed where knowledge of it may affect the impartiality of the broker or have a material impact on the customer's decision. The Supreme Court decided that the failure to disclose the commission to Mr Johnson was a breach having made certain factual findings including in relation to the lack of prominence given to the commission disclosure, Mr Johnson's lack of commercial sophistication (which was relevant to whether it was reasonable to expect him to read and understand the documents); and the size of the commission which would have been a major consideration in his mind if he had been aware of it. This judgment therefore provides an example of circumstances in which commission disclosures may fail to comply with CONC 4.5.3R.

12.10 The Supreme Court judgment also noted that several provisions in CONC 3 relating to financial promotions to customers had been breached as a result of the dealer's failure to disclose the existence of the tie between them and the lender.

12.11 There is therefore a possibility that a customer who does not have a claim under s.140A, CCA (e.g. as they have a consumer hire agreement), may instead bring a claim under s.138D, FSMA in relation to a breach of CONC 4.5.3R (or other elements of CONC) due to non-compliant disclosures or other relevant requirements. There is uncertainty as to whether the FCA's Consumer Redress Scheme may cover such claims (to the extent that they have, or will, arise).

12.12 In order to inform any response to the FCA on the scope of the Consumer Redress Scheme and to understand potential historic liabilities, firms with business that falls within scope of CONC, but not within s.140A, CCA, may wish to assess the potential for and quantum of possible claims. In order to do so, firms would need to assess:

(a) the nature of their customer base (e.g. to assess if their customers would be considered as *'commercially unsophisticated',* which is likely to be relevant for the purposes of understanding whether the nature and extent of any disclosure was sufficient); and

(b) the nature and extent of any disclosure taking into account the size of the commission (e.g. whether the terms relating to the disclosure are sufficiently prominent within the documentation provided to the customer and/or whether the disclosure of the commission was otherwise brought to the customer's attention such as through oral disclosures) and if there is any evidentiary record of the customer acknowledging and agreement to the commission payment).

[3] As further detailed in paragraph 299 of the Supreme Court judgment, and which included reference to CONC 1.2.2R, CONC 2.3.2R, CONC 2.5.8(13)R, CONC 3.3.1R, CONC 3.7.4G, CONC 4.5.2G and CONC 4.5.3R

13 How does this impact on finance arrangements in the motor finance sector going forwards? What can funders/lenders and brokers do now?

A) Fiduciary relationships

13.1 In addition to determining any potential historic liabilities, brokers and funders may also wish to use the assessment on fiduciary relationships (see question 12 above) to determine whether they can make any adjustments / enhancements to existing agreements / business models to better evidence / demonstrate that the broker does not owe a fiduciary duty to the customer.

13.2 For example, this may involve a review of:

(a) **Contractual documentation** (between both the broker and customer, and broker and funder) to include an express provision which states that the broker is not acting with single minded loyalty for the customer, and is acting in their own interests, and that there is no fiduciary relationship between the parties and/or ensuring that informed consent is obtained for any payments;

(b) **Policies and procedures**, to ensure that these include operational safeguards that may prevent a broker from assuming a fiduciary duty towards the customer (i.e. clearer advice on what employees/staff may or may not say to customers, not taking on legal authority for the customer to enter into legal relations, etc); and

(c) **Training to staff**, to ensure that staff are appropriately trained on the risks of creating a fiduciary relationship with the customer, and the relevant safeguards that the firm has put in place.

B) Unfair relationships

13.3 In addition to determining any potential historic liabilities, brokers and funders may also wish to use the assessment on '*unfair relationships*' for their existing (and historic) commission arrangements to make adjustments going forwards with a view to being able to successfully defend an unfair relationship claim from a customer.

13.4 For example, this may involve a review of the broker and funder business model, including:

(a) **Contractual documentation**, including:

(i) the agreed level of commission (relative to the total charge for credit), which is payable to the broker (although it is not possible to provide a precise threshold, commission above 50% is more likely to indicate 'unfairness' and more likely to require disclosure of the amount);

(ii) obligations between the brokers and funders relating to the extent and manner of disclosure of the commission to the customer;

(iii) the terms of business between the broker and customer, to ensure that there is sufficient disclosure of the commission.

(b) **Policies and procedures**, which may include:

(i) varying the extent and nature of any disclosures according to the characteristics of the consumer (e.g. a less sophisticated customer base or higher levels of commission may require more prominent disclosure of the commission);

(ii) reviewing audit / compliance monitoring programmes to ensure that they also monitor the disclosure of commissions, and any broader disclosures that may contradict the commercial service being provided to the customer (i.e. whole market vs tied agent of a particular finance provider); and

(c) **Training to staff**, to ensure that they are aware of the relevant enhancements / adjustments to contractual documents / policies and procedures.

C) FCA Handbook: CONC

13.5 Brokers and lenders should also assess their conduct to date against the determinations made by the Supreme Court on compliance with CONC.

13.6 In particular, brokers / lenders may wish to consider their approach to disclosure of commissions and whether this meets the relevant standards for the purposes of CONC 4.5.3R (taking into account the size of commission and the nature and extent of the disclosure (e.g. prominence) in view of the sophistication of the firm's customer base).

13.7 This process may impact on internal systems and controls (i.e. policies and procedures, staff training, compliance monitoring) as well as the contractual documentation between the broker and customer, and broker and funders.

13.8 We understand that firms may have already enhanced their systems and controls for these purposes after the Court of Appeal judgment in October 2024 such that they require '*informed consent*' from customers to any commission arrangements. In addition to demonstrating compliance with CONC 4.5.3R, the FCA have also noted in their recent statements on the *Hopcraft* judgment that such enhancements are also likely to help in evidencing compliance with the Consumer Duty.

14 What does this mean if I fund/broker credit agreements?

14.1 This question is relevant if you fund or broker 'credit agreements'. This includes both '*regulated credit agreements*' and '*exempt credit agreements*' (e.g. credit agreements for over £25,000 which are provided for business purposes to individuals or small partnerships).

14.2 For firms which fund or broker credit agreements, you may wish to undertake the following impact assessments (from a historic and forward-looking perspective, as well as in the context of the upcoming FCA Consumer Redress Scheme):

(a) **Historic considerations:**

(i) Assess potential for historic fiduciary relationships and claims for breach of duty (see Q12A above);

(ii) Assess potential for unfair relationship claims under s.140A, CCA (see Q12B above), which would also involve a consideration of potential historic breaches of CONC;

(b) **Forward-looking considerations:**

(i) Consider adjustments / enhancements to contractual documentation, policies and procedures and staff training to better evidence / demonstrate that there is no fiduciary duty owed to the customer by the broker[4] (see Q13A above);

(ii) Review and consider adjustments to existing business models, contractual documentation (including both customer T&Cs and broker-funder arrangements), and systems and controls to improve your ability to successfully defend an unfair relationship claim from a customer and evidence compliance with CONC (see Q13B and Q13C above);

(c) **FCA Consumer Redress Scheme:**

(i) Consider how you may wish to respond to the FCA's Consumer Redress Scheme (i.e. in terms of determining the scope, methodology for redress, operational delivery of redress, etc) (see Questions 20-23 below).

[4] To the extent that a firm considers that there is a fiduciary relationship with a customer, it will need to ensure that it has their [fully] informed consent to the payment of the commission in order to negate a claim for bribery.

15 What does this mean if I fund/broker consumer hire agreements?

15.1 This question is relevant if you fund or broker '*consumer hire agreements*. This includes both '*regulated consumer hire agreements*' and '*exempt consumer hire agreements*' (e.g. consumer hire agreements for over £25,000 which are provided for business purposes).

15.2 For firms which fund or broker consumer hire agreements, you may wish to undertake the following impact assessments (from a historic and forward-looking perspective, as well as in the context of the upcoming FCA Consumer Redress Scheme):

(a) **Historic considerations:**

(i) Assess potential for historic fiduciary relationships and claims for breach of duty (see Q12A above);

(ii) Assess potential for claims relating to a breach of CONC under s138D, FSMA(see Q12C above);

Note: Consumer hire agreements are not within scope of the unfair relationship provision s.140A, CCA and so the question of an unfair relationship does not arise (although that is not to say the customers will not bring unmeritorious claims).

(b) **Forward-looking considerations:**

(i) Consider adjustments / enhancements to contractual documentation, policies and procedures and staff training to better evidence / demonstrate that there is no fiduciary duty owed to the customer by the broker[5] (see Q13A above);

(ii) Review and consider adjustments to existing business models, contractual documentation (including both customer T&Cs and broker-funder arrangements), and systems and controls to improve your ability to successfully evidence compliance with CONC (see Q13C above); and

(c) FCA Consumer Redress Scheme:

(i) Assess the number and nature of claims/complaints made by customers in relation to consumer hire agreements and the extent to which these could give rise to claims for a breach of CONC;

(ii) On the basis of the information collated in (i) and further details from the FCA consultation scheme, consider how you may wish to respond to the FCA's Consumer Redress Scheme (i.e. in terms of determining the scope – which may not include 'consumer hire' as it is outside of s.140A, CCA, methodology for redress, operational delivery of redress, etc) (see Questions 20-23 below).

[5] To the extent that a firm considers that there is a fiduciary relationship with a customer, it will need to ensure that it has their [fully] informed consent to the payment of the commission in order to negate a claim for bribery.

16 What does this mean if I fund/broker unregulated loans/hire agreements (e.g. BCH)?

16.1 This question is relevant if you fund or broker unregulated loans/hire agreements. By '*unregulated loans/hire agreements*', we mean agreements that do not fall within the definition of a '*credit agreement*' or '*consumer hire agreement'* (regulated or exempt). For example, business contract hire arrangements solely between corporate entities will be an 'unregulated hire agreement' for these purposes.

Note: For business purposes credit/hire, which is '*exempt*' (e.g. it is credit/hire that relies on the business purposes exemptions for credit or hire as it is for more than £25,000), please see questions 14 and 15 above.

16.2 For firms which fund or broker unregulated loan/hire agreements, you may wish to undertake the following impact assessments (from a historic and forward-looking perspective, as well as in the context of the upcoming FCA Consumer Redress Scheme):

(a) **Historic considerations:**

(i) Assess potential for any historic fiduciary relationships and breach of duty (see Q12A above);

Note: Unregulated loans/hire agreements are not within scope of s.140A, CCA or CONC.

(b) **Forward-looking considerations:**

(i) Consider adjustments / enhancements to contractual documentation, policies and procedures and staff training to better evidence / demonstrate that there is no fiduciary duty owed to the customer by the broker[6] (see Q13A above); and

(ii) Consider the extent to which any enhanced disclosure requirements established since October 2024 are still necessary / helpful to the extent that '*informed consent*' requirements arising from the Court of Appeal judgment may no longer be needed if no fiduciary relationships arise/exist.

(c) FCA Consumer Redress Scheme:

(i) Monitor the FCA's consultation on its upcoming FCA Redress Scheme to confirm whether it will apply to unregulated loans/hire agreements (on the basis that customers would not have a claim under a DCA arrangement, s.140A, CCA or CONC/FSMA basis (see Questions 20-23 below).

[6] To the extent that a firm considers that there is a fiduciary relationship with a customer, it will need to ensure that it has their [fully] informed consent to the payment of the commission in order to negate a claim for bribery.

Miscellaneous

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

17.1 The FCA paused their work on a redress scheme for customers as a result of FOS complaints concerning discretionary commission arrangements (**DCAs**) to await the outcome of the Supreme Court judgment (which had a wider scope of application).

17.2 The FCA released preliminary statements on 3 August 2025 relating to the proposed scope and nature of their redress scheme for customers within the motor finance sector. From these statements, it appears that the redress scheme will apply to DCAs (which would fall within scope of the FOS decisions to date), and to unfair relationship claims under s.140A, CCA (as per the claim that was upheld by the Supeme Court).

17.3 Please see questions 20-23 below for further information on the FCA's proposed redress scheme.

18 Are there any further steps in litigation relating to motor finance?

18.1 The cases of *Hopcraft, Wrench* and *Johnson* are now resolved. The Supreme Court did not remit any elements of the claims in these cases back to the District Courts for determination.

18.2 Outside of these cases, we are aware that the Court of Appeal has scheduled a hearing on 16-18 September 2025 to hear an appeal from Clydesdale Finance Services Ltd (**CFS**) against a decision of the Administrative Court in favour of the Financial Ombudsman Service (**FOS**). CFS had sought to judicially review the FOS's decision to uphold customer complaints relating to historic DCA arrangements. The Administrative Court found that the FOS had not erred in law in reaching its conclusions or acted in a manner that was procedurally unfair to the parties.

18.3 Unlike in *Hopcraft,* it appears that the FCA does not consider that it needs to await the outcome of this Court of Appeal case in order to move forward with any redress scheme for the motor finance sector.

19 Is there any time limit on claims? How far back could liabilities go?

Unfair relationship (s.140A CCA)

19.1 The Supreme Court has previously held that the limitation period for unfair relationship claims (as per s.9 of the Limitation Act 1980) is six years from the end of the credit relationship between the lender and borrower even if the relevant conduct that caused the 'unfairness' (i.e. the commission payments) occurred more than six years before the claim was brought, although delay could be a factor in some circumstances (see *Smith and another v Royal Bank of Scotland [2023] UKSC 34*).

19.2 As such, on the face of it, lenders may be able to rely on the Limitation Act 1980 to resist any claims for historic liabilities relating to agreements with customers that concluded prior to 2019 (i.e. more than six years ago). However, any concealment of relevant facts (such as non-disclosure of commission payments) could have the effect of stopping the 'limitation clock' such that the six year period has not yet started to run. In addition, the courts are afforded a very broad discretion under s.140B CCA in relation to 'unfair relationships' and relevant time periods are likely to be considered as part of the FCA redress scheme.

19.3 The FCA's preliminary statements on their redress scheme indicate that it will cover agreements going back to 2007 (as this covers the period when customers could bring claims to the FOS). However, it is unclear if this time-period will be subject to any limitation periods (as discussed

above). Firms will need to closely monitor the upcoming consultation papers from the FCA on the scope of the redress scheme in respect of this point.

Fiduciary relationships

19.4 To the extent that customers can still successfully argue that there was a fiduciary relationship and they did not provide their fully informed consent to any commission arrangement, 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.

FCA Consumer Redress Scheme

20 What details have the FCA given to date on the proposed redress scheme?

20.1 On 3 August 2025, having considered the Supreme Court's judgment in Hopcraft, the FCA issued a statement (the **August 2025 Statement**) confirming that it will consult on an industry-wide scheme to compensate motor finance customers who were treated unfairly.[7]

Principles of the FCA's redress scheme

20.2 The FCA set out the principles it will consider when consulting on a motor finance consumer redress scheme in a statement in June 2025, which include:

(a) **comprehensiveness** so that the scheme covers as wide a range of complaints as possible, so consumers don't have to go elsewhere, like court;

(b) **fairness** to ensure the approaches to determining breaches and calculating redress are fair to consumers and firms;

(c) **certainty** to give consumers and firms finality;

(d) **simplicity** and **cost effectiveness** to ensure that it is easy for consumers to participate in and the cost of delivering the scheme is proportionate for firms;

(e) **timeliness** to ensure that the majority of claims are resolved within a reasonable timeframe;

(f) **transparency** to ensure that consumers receive clear explanations of decisions and have access to publicly available data highlighting the progress of the scheme to provide confidence; and

(g) **market integrity** to ensure that the scheme supports the ongoing, long-term availability of high quality, competitively-priced motor finance.

Scope and design of redress scheme

20.3 In the August 2025 Statement, the FCA explained that the consultation will cover how firms should assess whether the relationship between the lender and borrower was unfair for the purposes of the scheme and if so, what compensation should be paid.

20.4 The FCA considers that in *Hopcraft* and in its review of past practices, the unfairness to consumers has arisen from the non-disclosure of particular features of the commission arrangements. The FCA stresses that many of these features are not themselves unfair and explains that the Supreme Court said that non-disclosure or partial disclosure of the commission will not necessarily make the relationship unfair.

20.5 As such, the FCA consultation will need to consider how a range of factors must be assessed together when deciding on whether the relationship was unfair. The FCA will consider if and how factors such as the non-disclosure of the nature and size of the commission, tied commercial relationships and customer sophistication should be factored in.

[7] The FCA may make rules requiring firms to establish and operate consumer redress schemes under s.404, FSMA. In order to do so, the FCA must conclude that there has been a widespread or regular failure to comply with requirements such that:
(a) consumers have suffered (or may suffer) loss or damage for which a court would grant a remedy or relief, and
(b) the FCA considers it desirable to establish a consumer redress scheme compared to other routes by which consumers could obtain redress.
It appears that the FCA consider that this test has been met in view of their proposals to consult on rules for a consumer redress scheme for customers within the motor finance sector.

Timeframe

20.6 The FCA considers that the scheme should cover agreements dating back to 2007. This is to:

(a) be consistent with the complaints the FOS can consider, and

(b) to ensure the scheme is comprehensive enough to preclude consumers from having to use other routes to secure compensation and prevent large numbers of ongoing disputes in the courts.

20.7 The FCA are consulting with the Government to identify the best approach to deliver this outcome.

What types of agreements will the redress scheme cover?

20.8 The FCA is proposing that the scheme:

(a) will include **DCAs**– where the broker could adjust the interest rate offered to a customer if they were not properly disclosed (i.e. which reflects the claims upheld by the FOS); and

(b) may include **non-discretionary commission arrangements** – i.e. on the basis of claims that would be upheld on the basis of the Supreme Court's judgment in *Hopcraft.*

20.9 The current rules in DISP relating to the pause on motor finance related complaints apply to:

(a) '*regulated credit agreements*' for DCA related complaints, and

(b) to '*regulated credit agreements'* **and** '*regulated consumer hire agreements'* for non-DCA related complaints.

20.10 To the extent that the redress scheme for non-DCAs is limited to consideration of claims that would otherwise be successful under s.140A, CCA, this may therefore be limited to '*regulated credit agreements'* (or '*credit agreements'*) only – as '*regulated consumer hire agreements'* are not within scope of s.140A, CCA.

20.11 However, the FCA could consult on including '*consumer hire agreements'* within the non-DCA element of the consumer redress scheme on the basis that customers with such arrangements would have a private right of action (under s.138D, FSMA) and could bring claims for breaches of regulatory requirements (such as CONC 4.5.3R), and so could otherwise bring complaints to FOS. The FCA may consider its redress scheme provides a better route for the market and consumers in providing redress for such complaints.

20.12 Firms in the rental and leasing sector will therefore wish to carefully monitor the proposed scope of the redress scheme in the FCA's consultation paper in early October, which will provide greater clarity on this point.

How firms should calculate redress

20.13 The FCA have confirmed that their methodology for calculating redress will be informed by the degree of harm suffered by the consumer and the need to ensure consumers continue to be able to access affordable loans for motor vehicles.

20.14 The FCA will consider the decision in *Hopcraft* that the appropriate remedy was the payment of the commission as one option alongside alternative approaches. The FCA considers it unlikely that any alternative would lead to higher remedies overall than full repayment of commission and suggests that some could lead to lower payments.

20.15 The FCA will consult on whether there should be a de minimis threshold to be eligible for compensation payments.

Interest

20.16 The Supreme Court provided redress to Mr Johnson by reference to a '*commercial interest rate'*. It appears that the FCA do not intend to follow this approach.

20.17 Instead, the FCA plans to consult on an interest rate for each year of the scheme based on the average base rate that year plus 1%, suggesting that this will amount to a simple interest rate of 3% per annum.

Unfair relationship & high commissions

20.18 In Hopcraft, the Supreme Court found that the high and undisclosed commission of 55% of the total cost of the credit was '*a powerful indication*' of an unfair relationship. The Supreme Court also found that the failure to disclose this commission was a breach of CONC 4.5.3R, as disclosure of so high a commission would have had a '*material impact*' on the customer's decision (and therefore would have triggered the disclosure requirement in CONC 4.5.3R). Please see question 10 above for further consideration of this issue.

20.19 The FCA intend to consider, and will consult on, what size of commission in the context of the overall finance arrangements may point towards unfairness if not disclosed.

Total cost of redress

20.20 The FCA has not provided a precise estimate of the total cost to industry of the scheme at this stage and stresses that any estimates are highly indicative and susceptible to change.

20.21 The FCA has stated that the final cost will also depend on the take-up rate, the methodology to calculate redress and the mix of discretionary and non-discretionary arrangements ultimately included.

20.22 At this stage, the FCA thinks it is unlikely that the cost of any scheme, including administrative costs would be materially lower than £9bn and it could be materially higher. While there are plausible scenarios which underpin estimates of a total cost as high as £18bn, the FCA does not consider those scenarios to be the most likely and analyst estimates in the midpoint of this range are more plausible.

20.23 The FCA currently estimates that most individuals will probably receive less than £950 in compensation.

'Opt-in or opt-out' for consumers

20.24 In the August 2025 Statement, the FCA stated that it had not yet decided whether to propose an opt-in or opt-out scheme and will explore the pros and cons of each through the consultation. The differences between an *'opt-in'* or *'opt-out'* scheme are as follows:

(a) Under an 'opt-in' redress scheme, customers would have to confirm to their firm by a certain date that they wish to be included.

(b) Under an 'opt-out' redress scheme, customers are automatically included unless they opt out.

Next Steps

20.25 The FCA aims to publish the consultation by early October and for it be open for 6 weeks. The FCA have stated that no final decisions have yet been taken in relation to the scheme. The FCA aims to finalise the rules such that the scheme can launch in 2026, with consumers starting to receive compensation next year.

20.26 Firms currently do not have to provide a final response to relevant motor finance complaints before 4 December 2025. The FCA will consult on further extending this deadline to align with the timetable for compensation payments of the proposed redress scheme.

21 What steps may firms wish to take between now and the FCA consultation?

21.1 In the interim, firms may wish to undertake an assessment of potential liabilities to ensure that they comply with prudential rules requiring regulated firms to maintain adequate financial resources and to refresh their estimates, ensuring they cover both liability for compensation and the administrative costs.

21.2 Please see questions 12 to 15 above for further information on the next steps that brokers/lenders may wish to consider, which include how they may wish to approach assessing historic liabilities for any potential redress scheme.

22 How would the FCA redress scheme work in practice?

22.1 Under s.404, FSMA, the FCA has the power to make rules for a consumer redress scheme. These rules would form part of the Consumer Redress Scheme sourcebook in the FCA Handbook[8]. Firms within scope of this proposed Consumer Redress Scheme would need to comply with the rules and guidance in this new part of the FCA Handbook in the same manner as other regulatory requirements.

22.2 The Consumer Redress Scheme would set out when redress will be payable (i.e. its scope), the methodology for calculating the redress (e.g. relevant period, interest rates, etc), and how the redress should be delivered by firms (e.g. operational methodology for communications with customers and timelines for the payment of monies to consumers). The FCA rules would also prescribe whether the consumer redress scheme will operate on an 'opt-in' or 'opt-out' basis for consumers.

22.3 Firms within scope of the new Consumer Redress Scheme would therefore be required to comply with these operational requirements in order to communicate with consumers, and deliver to them remediation. There may also be reporting obligations to the FCA in connection with the delivery of the scheme. The FCA may set rules which provide a deadline for claims under the redress scheme.

22.4 Firms would be expected to bear the cost of the operational delivery of the redress scheme to customers (alongside the actual redress amounts payable to consumers).

22.5 The FCA may also operate an industry awareness campaign for consumers to make claims under the consumer redress scheme (which would be paid for by the industry, potentially through a levy).

22.6 The FCA statements to date have encouraged consumers to make claims directly to firms, rather than through claims management companies or law firms.

[8] There are existing examples of Consumer Redress Schemes within this Sourcebook (relating to the Arch cru Consumer Redress Scheme and the British Steel Consumer Redress Scheme).

23 What are the advantages and disadvantages of falling within scope of the FCA's proposed Consumer Redress Scheme?

23.1 The FCA's proposed Consumer Redress Scheme would be designed in view of the following principles:

(a) **comprehensiveness** so that the scheme covers as wide a range of complaints as possible, so consumers don't have to go elsewhere, like court;

(b) **fairness** to ensure the approaches to determining breaches and calculating redress are fair to consumers and firms;

(c) **simplicity** and **cost effectiveness** to ensure that it is easy for consumers to participate in and the cost of delivering the scheme is proportionate for firms;

(d) **timeliness** to ensure that the majority of claims are resolved within a reasonable timeframe;

(e) **transparency** to ensure that consumers receive clear explanations of decisions and have access to publicly available data highlighting the progress of the scheme to provide confidence; and

23.2 The relative merits of falling within, or outside of the scope, of the Consumer Redress Scheme will vary from firm to firm depending on its specific business model, customer base and the specific nature of the proposals that the FCA proposes as part of the consultation for the Consumer Redress Scheme.

23.3 However, within this context, the relative advantages and disadvantages of falling within scope of the Consumer Redress Scheme are likely to be influenced by a number of factors such as:

(a) the level of exposure and/or number of claims/complaints that a firm has in relation to a specific issue, for which the redress scheme may provide greater certainty and finality, as to the level and extent of claims for that issue. If the numbers of claims are higher, firms may prefer the certainty afforded by the redress scheme as to the amount of redress to be payable and as to its scope and operation;;

(b) costs for the delivery of the redress may be lower or higher than the equivalent cost of dealing with claims/complaints through the Financial Ombudsman Service and/or the Courts. This factor is likely to be influenced by the simplicity and nature of the proposed Consumer Redress Scheme and the number of complaints/claims that the firm may receive (e.g. the simpler the redress scheme and higher the number of claims, the more benefit a firm may derive from participating in the Consumer Redress Scheme);

(c) a redress scheme may provide a timeline as to which claims are included historically, and provide a deadline for future claims. A redress scheme may also provide benefit to customers in evidencing the nature of their claims.

High level summary of the impact of the Supreme Court judgment to different forms of agreements:

Type of loan	Fiduciary Relationship	Unfair relationship: s.140A applies?	CONC 4.5.3R applies?
Regulated credit agreement (which may include personal loans and hire-purchase)	Unlikely to apply unless there is a clear undertaking and/or agency relationship	Yes	Yes
Exempt credit agreements (e.g. 25k+ & business purposes with individuals or small partnerships)		Yes[9]	Yes
Exempt hire agreements (e.g. £25k + business purposes)		No	Yes
Regulated Consumer Hire (e.g. PCH)		No	Yes[10]
Other unregulated loans/hire agreements (e.g. BCH between corporate entities)		No	No

Key:

'No' *means that the relevant type of agreement does not fall within the scope of these provisions (i.e. s.140A or CONC).*

'Yes' *means that the relevant type of agreement does fall within scope of this provision of CONC and firms may need to consider the potential for historic liabilities for breach of the relevant requirements (see Q12 above), and consider enhancements/adjustments to their business from a forwards-looking perspective (see Q13 above).*

[9] S.140A, CCA does not apply to 'credit agreements' which are exempt as they fall within the definition of '*bounce back loans'* or '*regulated mortgage contracts*'.

[10] As set out in the FAQs, the Supreme Court also found that other elements of CONC had been breached in *Johnson* (including in respect of CONC 3). Please note that there is a different scope between the provisions in CONC, such that certain rules/guidance only apply to '*regulated credit agreements'* and/or exempt credit agreements, whereas other rules/guidance will also apply for consumer hire agreements (e.g. CONC 3.3.1). While CONC 4.5.3R may be the primary provision relating to the disclosure of commissions, firms should also consider whether any of the other rules cited in the Supreme Court in relation to CONC apply to their business for the purposes of assessing potential historic liabilities and/or making enhancements/adjustments from a forward-looking perspective.