Expect Complex Ruling From UK Justices In Car Dealer Case

By **Tom Grodecki** (May 1, 2025)

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On April 2, The U.K. Supreme Court heard arguments in the joined test cases of Johnson v. FirstRand Bank Ltd., Wrench v. FirstRand Bank Ltd and Hopcraft v. Close Brothers Ltd.

At issue were findings by the Court of Appeal.

- A car dealer also acting as credit broker may well owe a fiduciary duty to their customer.
- In the absence of full disclosure of the amount and nature of commission paid by the lender to the broker, the lender could be liable to the customer for the sum of commission paid.
- This amount could be claimed regardless of the level of loss actually suffered by the customer.
- Customers could also rescind the contract with the lender as of right, thereby recovering interest paid under the agreement, subject to counter-restitution for the benefits received under the contract.

This cut across established lending practices based on the existing financial regulatory regime.

The legal issues are complex and without clear precedent. The Supreme Court's findings as to lender liability consequent to the existence of a fiduciary duty owed by a broker dealer to their customer, in the context of an otherwise arm's-length transaction, will have significant implications for the consumer lending market as a whole, as well as financing and commercial transactions more broadly.

Questions from the Supreme Court to counsel during the recent hearing provide some indications as to the conclusions that the court may draw. Firms expecting to be affected by the forthcoming judgment may be assisted by considering the Supreme Court's interventions and subsequent exchanges in more detail.

The Supreme Court has indicated that its judgment will be handed down in July at the earliest.

Background

Each of the three claimants purchased a car on finance arranged by a car dealership. In the Hopcraft case, it was accepted that there had been no disclosure of the commission. In the Wrench and Johnson cases, the relevant contractual documentation stated that commission may be payable.

The Court of Appeal considered that in each case there had been inadequate disclosure of the commission. It held that there was a fiduciary relationship between the dealers and the customers, and that the payment of commission to the dealer introduced a conflict of

interest that could be overcome only by disclosure of the commission arrangements in the most clear and prominent terms.

For the underlying lenders, the consequences were significant and included the following:

- Liability as primary wrongdoer for the secret payments made in the Hopcraft and Wrench cases, meaning that the claimant was entitled to the full amount of the commission without any adjustment to reflect their actual loss, as well as rescission of the contract (subject to the possibility of counter-restitution); and

- Accessory liability for having assisted the broker's breach of fiduciary duty, by paying commission to the brokers, entitled the claimant to equitable compensation for loss, taken to be the amount of the bribe, unless evidence proved otherwise, and the ability to request (at the discretion of the court) that the contract be rescinded.

These findings exceeded regulatory requirements, and the government expressed concern at the effect of the judgment on the stability of the motor finance industry. The Court of Appeal's findings also sparked notes of caution on the effect such requirements could have on the willingness of lenders to provide car finance to consumers.

Key Issues Before the Supreme Court

Against this backdrop, a few key issues were argued before the Supreme Court.

First, were the brokers in the Hopcraft, Wrench and Johnson cases fiduciaries, or alternatively, did they have a lesser so-called disinterested duty to provide advice, information or a recommendation on an impartial basis?

Close Bros. and First Rand, the appellants, argued that the car dealer's obvious financial interest in the sale of the car was incompatible with the finding of such duties, and that there was no point at which the brokers had clearly undertaken duties of this nature.

The appellants made the memorable argument that while brokers may have said that they would secure a rate of interest that was competitive or suitable for the customer's needs, that statement carried no more duties of loyalty than an assertion by a sommelier that they would provide a customer with the wine most suitable to their taste.

Second, if such duties do exist, did the lenders' level of knowledge make them dishonest, as required for the lenders to be liable as accessories to the broker dealers' breaches of duty?

The position of the respondents, i.e. the consumer claimants, was that the lenders' mere knowledge that the car dealer was acting as credit broker was sufficient, while the appellants argued that dishonesty required knowledge that the dealer owed a fiduciary duty.

Third, did insufficient disclosure of the commissions result in a situation in which the relationship between the customer and the lender was unfair within the meaning of the Consumer Credit Act 1974? The act includes unfairness arising from anything done or not done on behalf of the creditor.

The appellants argued that this issue should be remitted to the lower courts, with the respondents arguing that failure to fully disclose the amount of the commission unfairly deprived the customer of the opportunity to make an informed decision as to whether to

enter into the credit agreement.

Fourth, the appellants submitted that the court should reconsider the remedies for secret payments, in particular the recovery of the full amount of the commission, which the appellants argued reflected an incorrect understanding or flawed development of the law.

FCA's Submissions

The Financial Conduct Authority appeared as an intervener, i.e. an interested third party, and gave submissions that will be of interest to market participants. Regarding the relationship between private law rights and remedies, and the FCA regulatory regime, the FCA argued that while the latter did not exclude the court's jurisdiction in this area, it should nonetheless be taken into account by the Supreme Court in reaching its decision.

The FCA's submissions also included the following:

- FCA regulations did not presume that regulated firms owed fiduciary duties.
- The standards of disclosure contained in the Consumer Credit Sourcebook were less exacting than those required by the Court of Appeal's judgment.
- While lenders bore some responsibility for the conduct of brokers, the FCA and statutory schemes did not treat the lender as a primary wrongdoer.
- The current regulatory framework was well-balanced.

As to any duty owed by the broker to the customer, the FCA supported a third way, with broker dealers typically owing a disinterested duty, as referred to by the Court of Appeal, but not fiduciary duties.

The FCA seemingly based this conclusion on the need for private law remedies for conflicts of interest that were consistent with the obligations of broker dealers to manage conflicts of interest fairly, as per Principle 8 in the FCA handbook, and to deliver good outcomes for retail customers, as per Principle 12.

However, the appellants objected that any disinterested duty would in practice have to collapse into a finding of a fiduciary duty, if the court were to award the remedies sought.

Firms interested in the most likely scope of any FCA redress scheme may wish to examine the FCA's written submissions in full.

Impact of Supreme Court decision

The implications of the Supreme Court's ruling are of particular importance to the motor finance and consumer lending sectors, especially where the broker was also the seller of a good or service being purchased with the finance. As the Court of Appeal noted, the services provided in the Hopcraft, Wrench and Johnson cases were "materially the same as that provided by other credit brokers of consumer finance."

Market participants wishing to prepare for the Supreme Court's judgment, as noted, expected in July at the earliest, do not have a simple task. While we have a view of where the court is coming out on a number of the points argued, the application of the Supreme

Court's decision will inevitably be both nuanced and fact-sensitive.

It is unlikely, for example, that the Supreme Court would determine that there are no circumstances in which a car dealer could be found to have fiduciary duties to the customer. It will be a question of degree. Moreover, various interventions by the justices in this month's hearing suggest that if the Court of Appeal's decision is upheld, it may be on the basis of materially different reasoning.

The ruling is also of significance to the FCA's ongoing review of historical motor finance discretionary commission arrangements, which it commenced in January 2024, and any redress scheme that it might impose.

The FCA has acknowledged that its approach to a redress scheme will be dependent on the findings of the Supreme Court. That is, in part, because before the FCA can propose any redress scheme, it is required to consider other causes of action available to consumers, e.g., private law claims, and have regard to the type and amount of relief that a court would award.

The FCA has stated that it will confirm within six weeks of the Supreme Court's decision if it plans to implement a redress scheme. It has already announced that any suggested redress scheme would require firms within scope to proactively identify customers that may have suffered loss, and approach them with an offer of compensation.

Conclusion

The decision of the Court of Appeal sent shock waves through the auto finance sector, and the Supreme Court's forthcoming judgment may have an even greater impact. Allowing recovery of full commissions without the requirement to prove loss would mark a significant departure from prior practice, redefining liability in the context of the wider consumer credit sector and significantly increasing litigation risk for brokers and lenders.

Whatever the Supreme Court decides, the application of the decision is unlikely to be clear-cut, and consumer credit market participants will wish to move rapidly to audit past lending agreements and other documentation to assess liability risk.

Consumer finance lenders should be ready to revise disclosure practices and broker agreements, as required, to meet the minimum standards that may be inferred from the Supreme Court's decision.

Tom Grodecki is a partner at Cadwalader Wickersham & Taft LLP.