

Motor Commission Litigation

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LITIGATION UPDATE

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Overview

Widespread bulk County Court litigation/ complaints to FOS following an FCA review of motor finance discretionary commission models and disclosure

3 areas of danger/ spaces to watch:

- 1. FCA, section 166 FSMA review**
- 2. FOS JR**
- 3. Court of Appeal – secret commissions**

Query: Do dealers need to worry or is this a lender problem?

LITIGATION UPDATE

FCA

1 March 2019 – FCA publish, “Our work on motor finance – final findings

“We are concerned that the way commission arrangements are operating in motor finance is leading to to consumer harm on a potentially significant scale.”

“Some customers are paying significantly more for their motor finance because of the way that lenders choose to remunerate their brokers.”

“In particular we are concerned about the widespread use of commission models which link the broker commission to the customer interest rate and allow brokers wide discretion to set the interest rate”.

Consultation Paper CP19/28 (October 2019) – Motor finance discretionary commission models and consumer credit commission disclosure

– FCA proposes ban on discretionary models.

LITIGATION UPDATE

Policy statement, PS20/8 - Feedback on the consultation, sets out final rules

From April 2021: FCA ban discretionary commission models

**11 January 2024, Section 166 Financial Services and Markets Act 2000
(“FSMA”), FCA to review of historical motor finance commission arrangements
and sales across several firms:**

“If we find widespread misconduct and that consumers have lost out, we will identify how best to make sure people who are owed compensation receive an appropriate settlement in an orderly, consistent and efficient way and, if necessary, resolve any contested legal issues of general importance.”

What does this all mean for dealers/credit brokers and lenders?

LITIGATION UPDATE

FOS

- **20,000 open complaints related to motor commission**
- **11 January 2024, FOS publish, first representative, final decisions, goes against lenders: <https://www.financial-ombudsman.org.uk/decision/DRN-4326581.pdf>**
- *“As a preliminary point, I note the requirement under CONC 4.5.3R was to disclose the existence of commission payable to the Broker by Barclays PF relating to the particular conditional-sale agreement Miss L was entering. The requirement was not to disclose that it was likely that the Broker would receive a commission payment because lenders typically pay fees. The language of the provision suggests the Broker was required to make a more specific disclosure than it did in this case.” [130]*
- **April 2024, Clydesdale Financial Services Limited, trading as Barclays Premier Partner Finance, started judicial review proceedings.**
- **Hearing to take place**

LITIGATION UPDATE

Court of Appeal

1. *Wrench v FirstRand Bank*
2. *Johnson v FirstRand Bank*
3. *Hopcraft v Close Brothers*

Issues: secret commissions, fiduciary duties – not looking at unfair relationship. Claims brought by Claimants against finding that dealers will not typically owe customers a fiduciary duty

Query: What does this mean? What happens if lenders lose?

Latest intel: due to be heard in July 2024 with an expedited Judgment, backstop June 2025



TYPICAL CLAIMS

TYPICAL CLAIMS

Secret commission vs. half secret commission

Secret (non-disclosure of the fact and amount of commission)

Lead case: *Wood v Pengelly* – see the disinterested duty.

Half-secret (disclosure of the fact of commission but not the amount)

“we may receive commission or some other benefit in respect of the finance introduction”

LJ Tuckey, para 43, *Hurstanger v Wilson* [2007] 1 WLR 2351, where broker said a commission may be paid:

“Did it negate secrecy? I think it did. If you tell someone that something may happen and it does, I do not think that the person you told can claim that what happened was a secret. The secret was out when he was told that it might happen...”

TYPICAL CLAIMS

Half secret commission

Key point to note: burden of proof on claimant!

Claimant (“C”) must prove:

- 1. Credit broker (the dealer) owes C a fiduciary duty [see next slide]**
- 2. That the fiduciary duty has been breached**
- 3. That the lender is a knowing accessory to that breach**
- 4. Defence of informed consent?**

TYPICAL CLAIMS

Half-secret commission

What is a fiduciary?

Key case: *Bristol and West Building Society v Mothew* [1998] CH 1

“A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single minded loyalty of his fiduciary.

Johnson v FirstRand, HHJ Jarmon KC, Cardiff County Court, 6 July 2023, paragraph 19

...the dealer was wearing two hats, one when it was selling the car, and one when it was dealing with the finance. In my judgment this is the essential distinction with the broker cases, where brokers do not themselves offer what their client wants, but offer the service of obtaining it, namely finance. It is difficult to see how in practice or in principle a car dealer could offer a single minded loyalty to a customer when dealing with the finance, but not when selling a car to the same customer which gives rise to the need for finance. Finance is incidental to the purchase of the car for those who need to borrow.

TYPICAL CLAIMS

Breach of statutory duty – CONC issues

Section 138D(2) Financial Services and Markets Act 2000 (“FSMA”) provides:

A contravention by an authorised person of a rule made by the FCA is actionable at the suit of a private person who suffers loss as a result of the contravention, subject to the defences and other incidents applying to actions for breach of statutory duty (emphasis added).

Therefore, C must prove:

1. Breach of a rule made by the FCA; **and**
2. Loss as a result of the contravention.

TYPICAL CLAIMS

Breach of statutory duty – CONC issues

CONC 4.5.3 R provided (from 1 April 2014 to 27 January 2021):

[a] credit broker must disclose to a customer in good time before a credit agreement or a consumer hire agreement is entered into, the existence of any commission or fee or other remuneration payable to the credit broker by the lender or owner or a third party in relation to a credit agreement or a consumer hire agreement, where knowledge of the existence or amount of the commission could actually or potentially: (1) affect the impartiality of the credit broker in recommending a particular product; or (2) have a material impact on the customer's transactional decision.

TYPICAL CLAIMS

Breach of statutory duty – CONC issues

CONC 4.5.4 R provided (from 1 April 2014 to 27 January 2021):

At the request of the customer, a credit broker must disclose to the customer, in good time before a regulated credit agreement or a regulated consumer hire agreement is entered into, the amount (or if the precise amount is not known, the likely amount) of any commission or fee or other remuneration payable to the credit broker by the lender or owner or a third party.

TYPICAL CLAIMS

Unfair relationships

Section 140A of the CCA 1974 provides:

“140A Unfair relationships between creditors and debtors

(1) The court may make an order under section 140B in connection with a credit agreement if it determines that the relationship between the creditor and the debtor arising out of the agreement... is unfair to the debtor because of one or more of the following–

(a) any of the terms of the agreement or of any related agreement;

...

(c) any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement).

(2) In deciding whether to make a determination under this section the court shall have regard to all matters it thinks relevant (including matters relating to the creditor and matters relating to the debtor)...”

TYPICAL CLAIMS

General guidance was given by the Supreme Court in *Plevin v Paragon Personal Finance Ltd* [2014] 1 WLR 4222:

*“10 Section 140A is deliberately framed in wide terms with very little in the way of guidance about the criteria for its application, such as is to be found in other provisions of the Act conferring discretionary powers on the courts. It is not possible to state a precise or universal test for its application, **which must depend on the court’s judgment of all the relevant facts...***

Relevant considerations: pre-contractual information, disclosures, affordability, relationship between dealer and customer, size of commission, good deal[?]

Key point: s.140A CCA cannot give rise to claim against dealer/credit broker, only lender!



LIMITATION DEFENCE

LIMITATION

How far back can claimants go/ where do we draw the line for claims?

Primary limitation period

See. Limitation Act 1980

Breach of CONC/ secret commission: 6 years from cause of action

- Usually when the commission is paid/ full disclosure not given
- i.e. shortly after inception of agreement
- i.e. check dates, if claim issued 6 years after agreement entered into may be out of time

Unfair relationships: 6 years from the end of the agreement

- See Supreme Court: *RBS v SMITH*

LIMITATION

Secondary limitation period – can C extend time

Section 32 Limitation Act

“(1) ... where in the case of any action for which a period of limitation is prescribed by this Act ..

(a) ...; or

(b) any fact relevant to the plaintiff’s right of action has been deliberately concealed from him by the defendant

(c) ...;

the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it..”

Top tip: check the pleadings – reliance on s.32 must be pleaded!

LIMITATION

What is deliberate concealment?

*“the defendant must have considered whether to inform the claimant of the relevant fact and decided not to” **Canada Square v Potter** [2023] UKSC 41 at paragraph [207]”*

What is the relevant fact? Argue - the fact of commission and not the amount!

Key point:

If the fact of commission is disclosed in the dealer’s initial disclosure document (IDD), or in the agreement terms and conditions, arguably no deliberate concealment

LIMITATION

Reasonable diligence

Paragon Finance v Thakerar [1999] 1 All ER 400, CA, cited in *Hussain v Mukhtar* [2016] EWHC 424 (QB) at [40]) Millett LJ observed at 418:

“The question is not whether the Plaintiffs should have discovered the fraud sooner; but whether they could with reasonable diligence have done so ... They must establish that they could not have discovered the fraud without exceptional measures which they could not reasonably have been expected to take .”

Key point to note: test is what the reasonably diligent consumer would have done, burden of proof on C!

If the limitation defence succeeds the claim will be struck out without the need to consider the arguments on secret commissions, breach of CONC etc.

Quantum

If the Judge finds against you and it turns to remedies:

Typical outcomes:

- 1. “Refund” of the commission (a sum equivalent to the commission)**
- 2. Difference between interest charges (i.e. the charge for credit and what it would have been at the bottom of the sliding scale)**
- 3. Rescission (a complete unravelling of the agreement – how does counter-restitution work?)**

Compensatory interest:

- 1. Arguments about the rate of interest to be applied**
- 2. Over what period?**

QUESTIONS

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Do let us know if you have any questions?

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