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Johnson et al v FirstRand Bank: Judgment sends warning across financial services intermediation

26 November 2024 Jeremy Irving

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This is the first in a series of articles on ramifications from the judgment handed down on October 25 in the conjoined appeals involving Johnson, Hopcraft and Wrench. Matters identified but not explored in detail below will be covered in further articles.

In a speech on October 29, the Financial Conduct Authority (FCA) said of the judgment that the Court of Appeal had:

"… ruled that it was unlawful for car dealers to receive a commission from a lender providing motor finance to a customer unless it was disclosed to the customer and they gave informed consent to the payment.

… the case … relates to our work to determine whether motor finance customers have been overcharged … [by means] of discretionary commission agreements [DCA] …"

The FCA had previously announced an extension to the DCA complaint-handling pause.

The FCA's headline position is that it is "carefully considering" the judgment and has "been in close contact with the firms involved, the wider sector and the government to … analyse the impact … and identify what action is required," subject to any appeal allowed to the Supreme Court (status unknown at the time of writing).

Ramifications across the financial services industry

On one analysis, the judgment is a consumer credit matter where the effects of the decision are confined to particular facts from some seven to 10 years ago. In the above-mentioned speech, the FCA said:

"The … ruling was rooted, not in the FCA's rules, but the longstanding common law principle of fiduciary duty which meant that the broker — the car dealer here — must act in the best interests of the customer and not put themselves in a position of conflict."

Whatever the FCA's intended meaning of "rooted", the financial services regulatory framework and various current and historic rules were vital factors in the judgment. As highlighted below, regulatory factors informed the Court of Appeal's analysis of the "secret commissions" question as a body of law in itself. The law here, in turn, affects the framing and interpretation of regulatory rules.

As such, it is important that the Court of Appeal accepted that the law of secret commissions more broadly — although not the matters specifically covered by the judgment — requires more authoritative analysis, being:

"… a definitive pronouncement … by the Supreme Court about the circumstances in which the payment of a commission by a third party to another person's agent or fiduciary will give rise to a liability (whether as principal wrongdoer or an accessory) on the part of the payer."

The judgment has important implications for financial services markets in general, in addition to consumer credit, and for regulated conduct — notably customer treatment — in particular.

In relation to specific sectors, the judgment's reference to Plevin v Paragon Personal Finance Ltd 2014 UKSC 61 has ramifications for insurance. Since the Plevin decision, which addressed a fact scenario from 2006, there have been profound changes in the UK regulatory regime. The judgment also touched on commissions for investment intermediation by reference to Medsted Associates Ltd v Canaccord Genuity Wealth (International) Ltd 2019 EWCA Civ 83.

Above all, the judgment raises important considerations for Consumer Duty and the fair treatment of vulnerable customers. It is worth noting that all the dealers in issue were authorised firms except for one appointed representative. The difference in regulatory status for the intermediaries did not affect the Court of Appeal's findings on the legal significance of dealing with customers who have attributes of vulnerability (emphasis added):

"the claimants needed the finance to be able to afford to acquire the car they wanted, *which made them more vulnerable than someone who might have had the choice* to pay in cash …

… because the [dealers, who were also credit] brokers were *in a position to take advantage of their vulnerable customers* and *there was a reasonable and understandable expectation that [the brokers] would act in [the customers'] best interests … they owed them fiduciary duties*."

The fact that one of the dealers was an appointed representative, but not of the authorised lender whose products it handled, raises considerations about the FCA's heightened scrutiny of principals and appointed representatives.

Key findings in the judgment

In Hopcroft, the dealer received about £180 for a credit advance of just under £9,000 with a 12.3% APR. In Wrench, there were two transactions. One resulted in some £180 commission from just under £6,000 advanced with an APR of 19.3%; the other resulted in a £409 commission from just under £9,000 advanced with an APR of 10.2%. In Johnson, the commission was £1,651 from just over £6,300 advanced in two parts with a combined APR of more than 16%.

"In all three cases there was a conflict of interest and no informed consent by the consumer to the receipt of the commission," the Court of Appeal said.

The keystone proposition for the judgment was:

"The dealers were the sellers of the cars, but they were also acting as credit brokers on behalf of the claimants … In some cases, they undertook to find the best deal or the one which was most suitable for the customer. They therefore owed the claimants the 'disinterested duty' ['a duty to provide information, advice or recommendation on an impartial or disinterested basis … held in Wood v Commercial First Business Ltd 2021 EWCA Civ 471']. The relationship was also a fiduciary one …"

Drawing on the definition of a "credit broker" "in the FCA CONC handbook and Article 36A of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001), the Court of Appeal referred to the dealers' acts in introducing a prospective borrower as "a role they undertook on behalf of the claimants they were introducing to the lenders."

The above finding meant that as to the potentially contrary provision in section 56 of the Consumer Credit Act 1974 that "a credit broker is deemed to be the agent of the lender for certain purposes, including the purposes of negotiating the terms of the credit agreement …," the Court of Appeal could conclude:

"There is no reason in principle why the same person cannot act on behalf of one putative contracting party for certain purposes and act on behalf of the other party for other purposes. The question is not whether the brokers owed fiduciary duties at large; it is whether they owed such duties in relation to the specific tasks they undertook on behalf of the claimants."

For Johnson, the Court of Appeal also found that under s 140A of the Consumer Credit Act:

"… the relationship between the lender and [claimant] … was unfair … because of things done (or not done) by, or on behalf of, the lender … (either before or after the making of the agreement or any related agreement). Fairness in this context is a matter of degree, and the fact that the commission to the broker was 25% of the sum advanced is a key fact …"

Immediate practical outcomes

The Court of Appeal made several points about the limited evidence available about the operation of the finance arrangements. This has significant implications for firms' systems and controls, and motor finance lenders and brokers should accelerate their collation and

securing of data and documentation.

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