Browne Jacobson

‘What if…?’: How the ‘FirstRand’ commissions case could affect insurance: Part 3: Duties, liability and remedies

08 July 2025 Jeremy Irving

First published on Thomson Reuters.

This is the third in the series about ramifications for the insurance industry from the motor finance commission disclosure cases brought against credit brokers and lenders by the claimants Hopcraft, Johnson and Wrench.

Appeals were heard in the Supreme Court (“**SC**”) 1-3 April 2025, following the Court of Appeal (“**CA**”) October 2024 Judgment (“**CA Judgment**”).

If the SC were to adopt the CA Judgment in full, could insurance intermediaries, and/or insurers, face similar liabilities to credit brokers and lenders?

While an intermediary’s role in concluding insurance contracts has the potential to include different activities stipulated in the Financial Services and Markets Act 2000 (“**FSMA**”) Regulated Activities Order 2001 / 544 (the “**RAO**”), this series will focus on the activity under RAO Article 25(1) of “making arrangements for another person (whether as principal or agent) to buy, sell, subscribe for or underwrite” an insurance contract.

The CA Judgment's analysis

Core principles

A key feature of the CA Judgment is its approach to Wood v Commercial First Business Ltd [2021] EWCA Civ 471 as an *“orthodox application of settled principles pertaining to bribes*”, which include “*secret commissions*”. The foundational proposition is that “*the law has … long … set its face against bribery as a corrosive practice*”.

Disinterested duty

As per the first article: “*The dealers were the sellers of … cars, but … also acting as credit brokers on behalf of the claimants ... They therefore owed the claimants the "disinterested duty"…*”

In particular, the CA found, quoting Wood:

"*… even where an agent … simply proposes or arranges [emphasis added] a … contract, there is "at the very least an implied representation that the proposed contract was "competitive" … thereby resulting in the principal reposing trust and confidence in the agent and … a fiduciary relationship …"*

In Hopcraft, the CA found that a disinterested duty arose when the claimant told the broker “*how much money she was hoping to pay each month*” and it became “*the broker's task … to select the lender based on what she said she was looking for*”.

In the cases of Johnson / Wrench, disinterested duties arose because:

“[even] *where the brokers were tied into an arrangement to give FirstRand first refusal …* [they] *were … in a position to determine, or at least influence, the rate of interest charged and to adjust it in a manner which would affect the rate of commission they were to receive.*”

Relative vulnerability leads to fiduciary duty

"… [T]*he claimants needed the finance … 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 ...* [emphasis added]

… because the brokers were in a position to take advantage of their vulnerable customers and [the customers had] *a reasonable … expectation that* [the brokers] *would act in their best interests,* [the brokers] *owed them fiduciary duties.*"

No or partial disclosures

Because there was no disclosure as to commission in Hopcraft, the commission was "*secret*" and in effect "*a bribe*".

There were commission-related disclosures in Johnson / Wrench, so liability turned on these being sufficient to –

- "*negate secrecy*" and
- elicit "*informed consent*" to the commission's payment.

These factors had to be considered against the decision in Hurstanger Ltd v Wilson [2007] EWCA Civ 299 that:

"*when the commission is not secret, but … there has not been fully informed consent to its payment, a fiduciary duty is required to found accessory liability on the part of the lender …"*

In Wrench, the CA found that:

"*the statement that a commission may be paid to the broker was "hidden in plain sight". It was tucked away in a sub-clause of the lender's standard terms and conditions, under the heading "General" …*

the prospect that the borrower would read [that statement] *was negligible*", especially because –

- the terms referred to the recipient of commission as "*the broker who introduced the transaction to us*", which
- "*an unsophisticated consumer would not necessarily understand … as being a reference to the car dealer.*"

As "*there was no "disclosure" in any meaningful sense*", Wrench was "*a fully secret case.*"

In Johnson, the claimant had conceded that there had been partial disclosure because of a statement in a 'Suitability Document' that: "*we may receive a commission from the product provider*".

Findings on liabilities and remedies

Hopcraft and Wrench involved a disinterested duty and secret commission:

"*it is a breach of that duty for the fiduciary to accept a secret commission or the offer* [thereof] *… and … the payer* [/] *offeror will be procuring or assisting a breach of fiduciary duty …* [entailing] *a range of remedies: accounts of profits, compensation for loss* [including "disgorging of the secret commission"] *and rescission of transactions* ["subject to counter-restitution"]."

The CA did not specify the practical effects of the above, but they are indicated by the equitable remedies ordered against FirstRand for being liable to Johnson as an "*accessory … for breach of fiduciary duty*" in respect of the broker's partial disclosure of commission and its failure to obtain informed consent to payment:

- "*the amount of the commission* [£1,650] *…*
- *interest from the date …* [the commission] *was paid* [involving APRs at one or both of: *"18.1% on a hire-purchase* [loan] *of £4803.69 and 15.1% on an associated personal loan of £1595.31] …*
- *["and interest on the total of those two elements at an appropriate commercial rate from the date of the agreement, 29 July 2017* [to be agreed, failing which, ordered]."

As to any potential rescission, this was held not to be appropriate: "*Given the length of time … since the transaction … and …* [since] *Mr Johnson … sold the car …*"

Insurance perspective

The key risk propositions for the insurance market are that:

- an intermediary simply 'arranging' a contract can be subject to an 'implied representation' that a particular product is 'competitive', leading in turn to the imputation of trust and confidence in the customer relationship, and so a disinterested duty on the part of a broker,

with a consequential fiduciary relationship;

- even intermediaries subject to exclusive arrangements can be so subject, especially where they can influence the price charged to the customer and their own commission;
- specific fiduciary duties for an intermediary arise where the customer is vulnerable or disadvantaged relative to others – this goes beyond stated regulatory positions on 'characteristics of vulnerability' (eg low financial resilience, adverse health conditions / life experiences, and lower capability / confidence in product purchasing – see the FCA March 2025 webpage on Firms' treatment of customers in vulnerable circumstances and the 2024 Vulnerability review); and
- putting customers 'on notice' of the possibility of the receipt of commission is, in particular for consumers, and especially those with less purchasing sophistication or resource, insufficient to obtain informed consent to the commission;
- either a total or a partial failure to disclose can have the same the practical effects in terms of remedies which could be ordered against either intermediaries or insurers:
  - disgorgement of commission, plus any interest which had accrued from the commission (eg under a premium finance arrangement), and interest on top of such principal and interest; and potentially
  - rescission of the insurance (with counter-restitution accounting for claims payments).

The next article will discuss how insurance intermediaries and insurers can mitigate and manage the risks arising from disinterested duty and informed consent obligations.

Contact

Jeremy Irving

Partner

jeremy.irving@brownejacobson.com

+44 (0)20 7337 1010

Related expertise

Complaint handling

Motor finance commission

Regulatory