Browne Jacobson

‘What if …?’: How the ‘FirstRand’ commissions case could affect insurance (Part 1)

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This is the first article in a series on the ramifications for the insurance industry of the motor finance (consumer credit) commission cases where the claimants were Johnson, Wrench and Hopcroft, and the defendants were FirstRand Bank and Close Bros.

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

This series does not seek to predict the outcome of the SC hearing but considers how the CA Judgment, were it to stand in full, could affect the disclosure of commissions in the insurance market – in particular, whether the CA Judgment could support arguments that an insurance intermediary, and/or an insurer, could be legally liable for failing to disclose fully to an insured the full amount of remuneration which the intermediary has received or will receive in respect of the policy which the intermediary helped to conclude.

While an intermediary’s role in concluding 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 insurance context

The CA Judgment cites two payment protection insurance (“**PPI**”) cases: Plevin v Paragon Personal Finance [2014] UKSC 61 and McWilliam v Norton Finance UK [2015] EWCA Civ 186. Paragon was a consumer credit lender but also an intermediary for PPI; while the insured was “*taken as knowing the fact that a commission was payable to intermediaries out of the premium before it reached the insurer*”, Paragon’s failure to disclose the amount of commission it received made the lending relationship unfair for the purposes of the Consumer Credit Act 1974. McWilliam was a case where failure to disclose the actual amount of commission, notwithstanding explicit disclosure of the fact that commission would be paid, was a breach of the intermediary’s duties.

Of course, different intermediaries may have business models which involve them at one time or another in acting for the insured or the insurer in arranging insurance policies. This particular article will focus on activities conducted on behalf of insureds, using the term ‘broking’ for such conduct.

The essentials of the CA judgment

“*The dealers were the sellers of … cars, but … were also acting as credit brokers on behalf of the claimants* [and the dealers’] *task was to search for and offer the customer a finance deal from* [the dealers’] *panel of lenders which* [deal would be] *suitable for* [the customer’s] *needs and competitive ... They therefore owed the claimants the "disinterested duty" [“… to provide information, advice or recommendation on an impartial or disinterested basis ...* [Wood v Commercial First Business Ltd [2021] EWCA Civ 471”]].”

The CA also found a “*parallel fiduciary duty*”, but this article will focus on ‘disinterested duties’, with a separate one looking at fiduciary duties (such as in McWilliam). Similarly, the CA Judgment placed considerable weight on aspects of the regulatory framework for consumer credit, and the ramifications of the regulatory position on insurance will be separately considered.

Even in respect of the disinterested duty alone, the CA found "*… there was a conflict of interest and no informed consent by the consumer to the receipt of … commission ...*" by the dealers from the lender.

Disclosing a 'conflict of interest' so as to secure "*fully informed consent*" from the customer in respect of the conflict and its resolution was central to the CA Judgment. 'Fully informed' means "*with full knowledge of all the material circumstances and of the nature and the extent of [the intermediary's] interest*" (per Hurstanger Ltd v Wilson [2007] EWCA Civ 299).

Distilling and transposing the above for insurance, the key concepts for this article are:

- a representation by a broker to a customer that an insurance product is suitable for the customer;
- the payability, and payment, of commission to the broker by an insurer; and
- the non-disclosure of the amount of commission – before or after its payment.

The insurance intermediary's duty

As per Colinvaux's Law of Insurance, 13th Ed, Ch 16, s 4: "*the practice [of "allowing a broker to receive commission from the insurer in the form of a deduction from the premium"] has long been recognised by the English courts …*"

The foundational authority for the above is usually cited as Great Western Insurance ["**GWI**"] v Cunliffe (1869) L.R. 9 Ch. App. 525. (There are two first instance cases on agents' commissions from the same year, but only one of which addresses insurance commissions, and, even so, only on the briefest basis).

The pertinent issue was that Cunliffe had retained 5% brokerage (also referred to in the case as a "*discount*") on each reinsurance contract for GWI – which amount GWI accepted it knew about – and 12% by way of 'profit commission' across all the reinsurances with any given reinsurer. GWI argued that as it did not know about the 12%, Cunliffe must pay it to GWI. The court held:

"*… the person who is the agent for the merchant or anybody else, by a well-established practice obtains the insurances, and receives a discount of 5 per cent …He is paid by the underwriter instead of by his principal …*

And then, by a practice … recognised by everybody connected with the business … [and] t*he Courts … there is another thing … a gratuity … being 12 per cent …* [from] *the underwriter … upon the whole result of transactions which the broker has introduced … during the whole year. That is the established remuneration which a broker receives for effecting* [author's note: 'arranging' under FSMA] *that business, and … is as right a thing as the 5 per cent …"*

However, despite the dicta in Cunliffe that a broker "*is paid by the underwriter*", this is not settled law. For instance, the CA in Carvill America v Camperdown UK [2006] Lloyd's Rep. I.R. 1 declined to give summary judgment on the point.

If the correct analysis is that commission is paid by the policyholder, this would suggest increased importance for disclosing the full context and detail (as per Hurstanger) of brokerage.

A further issue with Cunliffe is if any greater amount than 5% or 12% might be taken. Colinvaux states that: *"the deduction* [must be] *normal for the type of insurance …* [and if it] *exceeds the usual rate … must be disclosed to the assured ...*" The authority for this proposition is cited as Green & Son Ltd v Tunghan & Co (1913) 30 T.L.R. 64. However, this case was decided on evidence of the broker's misrepresentation to the customer that certain marine insurance premiums were "*net*" of an implied 5% commission when the premiums were actually "*gross*" of an additional 10% and in some cases a further 25%. These misrepresentations led to the broker forfeiting all commissions. The court did not rule on what was "*the usual rate*" for any particular insurance market or line of business.

Conclusion

There is much yet to explore in the CA Judgment for arguments as to insurance commission disclosures. The starting point however is that traditional arguments for making no, or limited, disclosures are not incontrovertible.

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