

## UK Motor Finance Cases: Court of Appeal Decision Impacts UK Credit Brokers and Lenders

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*On 11 December 2024, the Supreme Court granted Close Brothers and FirstRand Bank permission to appeal the Court of Appeal's decision. The Supreme Court has said that the case would be heard before the end of March 2025. Given the expedited timeframe within which the Supreme Court has granted permission and is seeking to hear the appeal, we envisage that the Supreme Court may also hand down judgment relatively promptly following the hearing.*

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### At a Glance

The English Court of Appeal recently handed down judgment on three linked appeals concerning the use of discretionary commission arrangements in the motor finance industry. The court's claimant-friendly ruling includes several findings that will directly impact brokers and lenders of motor finance and may have broader effect on businesses that offer credit finance to personal or business customers, for both regulated and unregulated products.

The court upheld all three appeals in favour of the customer claimants, and in doing so held:

1. acting as credit broker, the car dealership owed (i) a "disinterested duty" (i.e., a duty to provide information and advice on an impartial or disinterested basis) and

- (ii) an “*ad hoc fiduciary duty*” (i.e., requiring them to act with loyalty and avoid conflicts of interest), to their customers;
2. lenders and brokers are expected to disclose clearly and fairly to consumers the amount of any commission which may be paid and the basis on which it is calculated;
  3. lenders can no longer rely on “*partial disclosure*” by way of a clause in their terms and conditions unless there is clear evidence that this has been brought to the attention of the borrower, who has given fully informed consent to the payment of the commission; and
  4. lenders would be liable as principal where a secret commission is paid to the broker in breach of the “*disinterested duty*” and as “*accessories*” for procuring the broker’s breach of fiduciary duty where only partial disclosure was made.

The decision has impacted lenders’ share prices, sparked concerns about the availability of motor financing options in the market and opened the door to swathes of future mis-selling claims.

The judgment goes beyond the FCA’s existing rules on the disclosure of commissions. The FCA published a short [statement](#) indicating it is considering the court’s decision carefully.

The Court of Appeal refused permission to appeal; the defendant lenders are now expected to petition the Supreme Court for permission to appeal.

The judgment is [here](#).

## Background

In each case, the claimant customers were assisted by the dealership to obtain third-party finance to fund the purchase of a car. In turn, the dealerships received commission – at a rate of interest that they had some discretion to set – from the defendant lenders.

- In one case, *Hopcraft*, there was no reference to any commission in the documents provided to the customer.
- In the other two cases, the terms and conditions disclosed the possibility that commission may be paid but did not indicate the amount. There was no evidence to prove that the consumers were made aware of the commission, let alone consented to it.

# Decision

The court established that the car dealers who sold motor finance were credit brokers, and the nature of this role gave rise to several duties, including:

1. to provide information, advice or recommendation on an impartial or disinterested basis to the customer (as borrower) in relation to the credit available (the "*disinterested duty*");
2. to seek informed consent for the receipt of commission to avoid a conflict of interest; and
3. a fiduciary duty when locating finance for unsophisticated borrowers.

These duties would apply unless it was made clear to the customers that they did not apply or that the brokers were not able to act impartially.

1. **Commission kept entirely secret** – If the commission is kept entirely secret from the customer, the lenders (and brokers) will have primary liability to the customers for breach of the disinterested duty as payer of the commission. The court held that a statement in the terms and conditions that a commission may or will be paid does not necessarily have the effect of negating secrecy, as "*burying such a statement in the small print which the lender knows the borrower is highly unlikely to read will not suffice*".
2. **Commission kept partially secret** – For brokers to receive the commission without breaching their duties, the borrowers must have provided fully informed consent to the payment of the commission. This could only be the case if the brokers disclosed all material facts that might have influenced a borrower's decision to enter the financing arrangement (e.g., the amount of the commission).

To establish accessory liability on the part of a lender when a commission is paid to a broker, it will be necessary to show that the lender had: (i) knowledge of the existence of the fiduciary relationship between customer and broker; and (ii) not satisfied itself that the borrower had given their fully informed consent. The Court of Appeal noted that these "*circumstances will inevitably arise if the disclosure is partial, particularly if the lender has encouraged partial disclosure*".

In *Johnson* only, the court found that, in accordance with section 140A Consumer Credit Act 1974, there was an unfair relationship due to: (i) the very high commission (being 25% of the sum advanced); and (ii) the lack of disclosure regarding the

relationship between the lender and broker. This was a fact-sensitive finding of unfairness due to, among other things, the very high rate of commission compared to the amount borrowed.

## Implications for the lending market

Lenders and purchasers of consumer debt will need to assess the extent of their liability following this decision. Before providing further loans, lenders will need to review their policies and procedures. Lenders will also need to review historic practices.

Issuers of securitisations will want to understand any risk in respect of prospectuses containing disclosures relating to undisclosed commissions. Sellers of receivables in motor finance funding structures will want to assess risk relating to buyback and/or indemnity claims for losses suffered by the relevant issuer arising in respect of commission arrangements.

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## Related Services

Practices

- Litigation

## Suggested Reading

- 13 December 2024 ABA Antitrust Developments in Trade Associations Webinar
- 10 December 2024 Press Release Kirkland Advises Permian on Divestiture of Gathering Systems to Kinetik for \$180 Million
- 10 December 2024 Press Release Kirkland Advises Gen Digital on Acquisition of MoneyLion for \$1 Billion Plus CVR

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