GOUGH SQUARE CHAMBERS' CONSUMER CREDIT COLUMN: MARCH 2017

James Ross, Ruth Bala, Thomas Samuels and Lee Finch are all specialist consumer credit counsel at Gough Square Chambers. On a regular basis, they share their views with Practical Law Financial Services subscribers on topical developments or key issues relating to consumer credit.

In the March column, James Ross considers recent commission cases relating to credit brokers, agency and fiduciary duties.

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BROKER COMMISSIONS - TIME TO PICKUP THE PIECES

Introduction

Despite repeated warnings by senior judges, the law relating to breach of fiduciary duty "has been bedevilled by unthinking resort to verbal formulae" (see, for example, *Bristol and West Building Society v Mothew [1998] Ch 1 at 16C*). This is especially so with regard to fiduciary duties owed by credit brokers in relating to commission payments, where a number of recent appellate decisions have left the law in a state of confusion. This month's column summarises the recent commission cases relating to credit brokers, agency and fiduciary duties.

Are credit brokers properly categorised as agents of the borrower or the lender?

In the context of credit agreements regulated by the Consumer Credit Act 1974 (CCA), it is important to remember that section 56 of the CCA provides that where antecedent negotiations for debtor-creditor-supplier agreements are conducted by certain credit brokers, the negotiations are "deemed to be conducted by the negotiator in the capacity of agent of the creditor as well as in his actual capacity". However, outside the statutory agency provisions in section 56, a credit broker is not generally considered to be the agent of the creditor. This point was decided by the Supreme Court in *Plevin v Paragon Personal Finance Ltd [2014] 1 WLR 4222*, where it was held that the broker did not act as agent "on behalf of" the creditor for the purposes of the unfair relationships provisions in section 140A of the CCA.

Lord Sumption JSC also went on to state that the broker was in fact the "agent" of the debtor in that case (see paragraph 33 of the judgment) and subsequent appellate decisions have also described the broker as the "agent" of the debtor (see *McWilliam v Norton Finance (UK) Ltd [2015] CTLC 60 and Nelmes v NRAM plc [2016] CTLC 106*). However, it is important to be careful about what is meant by the term "agent" in this context. At common law, an agent typically has authority to affect the legal relations of their principal, for example by entering into contracts with third parties on their behalf. Such "full-blooded" agency obviously tends to give rise to the fiduciary obligation of single-minded loyalty, given the agent's direct ability to influence their principal's affairs.

By contrast, consumer credit brokers do not tend to be "agents" in this traditional sense. Section 61 of the CCA provides that regulated consumer credit agreements must be signed by the debtor, rather than by an agent. Consumer credit brokers are therefore usually characterised as agents only in the looser sense of "canvassing" or "introducing" agents. In a typical case, the credit broker will have existing relationships with a number of lenders and may well have access to their detailed underwriting criteria and standard credit documentation. The broker's

primary function will be to identify the lender willing to offer the most favourable terms to a particular borrower and then forward the completed credit application to the lender.

It is not possible to state in general terms whether such a broker acts as agent either of the borrower or the lender, as everything will depend on the circumstances of each particular case. It could be said that the broker acts as agent of the lender for the limited purpose of holding its standard forms, or the agent of the borrower for the purpose of submitting the completed forms to the lender. However, for most practical purposes, the concept of agency does not really come into it (see *Branwhite v Worcester Works Finance Ltd [1969] 1 AC 552*).

Do credit brokers owe fiduciary obligations to borrowers in relation to commission payments?

As with the existence of any agency relationship, the separate but related question of whether a credit broker owes fiduciary duties to a borrower will depend on the particular circumstances of each case. The fact that the broker acts as the "agent" of the borrower for certain purposes may be relevant but should not be decisive. In *Hurstanger Ltd v Wilson [2007] 1 WLR 2351*, it was conceded that the credit broker owed fiduciary obligations to the borrowers, apparently simply on the basis that the credit broker was the borrowers' agent. It is submitted that this concession was wrongly made: it was at least arguable that no such fiduciary obligations were owed in circumstances where it had been disclosed to the borrowers in writing that the lender paid commissions to brokers.

In broker commission cases, it is useful to consider two questions in turn:

- Did the broker owe any fiduciary duty to the borrower?
- Was the disclosure of the commission received by the broker sufficient to avoid breach of the fiduciary duty?

The extent of commission disclosure is clearly relevant to the second stage but it is also highly relevant to the first stage. The fiduciary obligation of loyalty will not arise unless the circumstances of the case are such that the borrower reposed such trust and confidence in the broker that they were entitled to expect the broker's single-minded loyalty. If a borrower approaches a broker because it has existing relationships with lenders, and there is disclosure of the fact that the broker will receive commission from the lenders (even if the amount is not specified), there is a strong argument that the borrower is not entitled to expect the broker's single-minded loyalty or subsequently complain that there was a conflict of interest. By contrast, if the borrower pays the broker a substantial fee for its services and there is no disclosure of any commission from the lender, there is a strong argument that the broker owed (and breached) a fiduciary duty of loyalty to the borrower.

Recent decisions illustrate the above distinction. In the *Nelmes* case referred to above, the commission received from the lender by the broker was kept secret from the borrower and the Court of Appeal concluded that there had been a breach of fiduciary duty. By contrast, in the decision of HHJ Raynor QC, sitting as a High Court judge, in *Commercial First Business Limited v Pickup & Vernon* (*unreported, Manchester District Registry, 6th December 2016*) it was held that there was no agency or fiduciary relationship in circumstances where the fact that commission would be paid was disclosed in writing to the borrowers.

What is the status of the decision in McWilliam v Norton Finance (UK) Ltd?

There does appear to be some tension between the decision in the *Pickup* case and the Court of Appeal decision in the *McWilliam* case. In the latter case, it was held that a fiduciary relationship arose notwithstanding that a declaration on the loan application form above the borrowers' signatures acknowledged that the broker would receive commission from the lender if the loan completed and that the borrowers consented to the broker retaining the commission. It is submitted that the decision in the *McWilliam* case should not be followed in future cases for the following reasons:

- Paragraph 9 of the judgment in *McWilliam* stated, "It is said that the case raises issues of principle applicable to many other cases. If so this appeal is a very unsuitable vehicle for the resolution of those issues, since the liquidators [of the Respondent] made clear that they would take no part and have been unrepresented. The court has had to resolve difficult and contentious issues without the assistance of adversarial argument".

- The court in *McWilliam* stated in paragraph 48 of the judgment that it was bound by the decision in *Hurstanger* to find that the relationship was a fiduciary one. However, as set out above, it was conceded without argument in the *Hurstanger* case that there was a fiduciary relationship, albeit Tuckey LJ did comment (without any explanation) that the relationship was "obviously a fiduciary one".

- In all known similar cases where the court has heard legal argument from both sides on the existence of a fiduciary relationship, the court has concluded that no such relationship arose for the reasons set out above (see the *Pickup* decision and the county court decisions in *Yates*, *Flanagan* and *Sealey*, which are summarised in *Article, Gough Square Chambers' consumer credit column: June 2016*).

Nevertheless, the *McWilliam* decision was a judgment of the Court of Appeal and it remains to be seen how it will be approached in future cases: it was not referred to in either the *Nelmes* or the *Pickup* judgments. The only certainty at present in the law relating to fiduciary duties owed by credit brokers is that we badly need an appellate decision that gives clear guidance on the relevant principles following proper argument from both sides.

Gough Square Chambers' consumer credit columns

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