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Gough Square Chambers' consumer credit column: July 2023

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Lee Finch, Sabrina Goodchild and George Spence-Jones 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 July 2023 column, George Spence-Jones considers the issue of finding a fiduciary relationship for a dealer in the context of commission paid on motor finance commission and vehicles purchased on finance following the County Court appeal decision of HHJ Jarman KC in *Johnson v FirstRand Bank Ltd (unreported), 6 July 2023, (Cardiff County Court)*.

Motor finance commission and fiduciary relationships

HHJ Jarman KC has recently given his judgment in *Johnson v FirstRand Bank Ltd (unreported), 6 July 2023, (Cardiff County Court)*. The case primarily concerned the issue of finding a fiduciary relationship for a dealer in the context of motor finance commission and vehicles purchased on finance. It is just one of the many hundreds and thousands of similar cases currently going through the County Courts.

A possible reason for the huge number of these cases is that, in the past three years, there has been a wave of litigation concerning the non-disclosure of commission payable under PPI policies, due to the *Plevin UKSC* decision and then the FCA consumer redress scheme. Similar arguments are now being trotted out in the context of commission payable under motor finance hire-purchase agreements that are regulated under the Consumer Credit Act 1974 (CCA). As with the *Plevin* litigation, claimants are seeking either repayment of all sums paid or, in the alternative, an award of the commission amount.

In this month's column, I consider *Johnson v FirstRand* in more detail.

Background

In summary, the facts of *Johnson v FirstRand Bank Ltd* are that:

- The customer, Mr Johnson (C), purchased a vehicle from a car dealership, The Trade Centre Wales Ltd (the Dealer).
- C purchased the vehicle on finance, borrowing £4,800 at a flat rate of 8% repayable over five years. The finance was provided by FirstRand Bank Ltd (D).
- By clause 13.6 of the agreement, it was stated that the Dealer may be paid a commission in respect of the hire-purchase.
- The fact that a commission of £1,650.45 would be paid, pursuant to an agreement between the Dealer and D, was not drawn to C's attention.

C principally alleged:

- The commission was fully secret (that is, a bribe at common law).
- Alternatively, the commission was "half-secret", and without C's informed consent being obtained on its amount, the Dealer breached their duty to C. ("Half-secret" refers to where the existence of commission is disclosed but not the amount: see *Hurstanger v Wilson [2007] 1 WLR 2351*.)

The principal issues at trial and dealt with on appeal concerned:

- Whether there was sufficient disclosure of the existence of commission to negate secrecy.
- If yes, whether the Dealer was the fiduciary agent of C.
- If so, whether the Dealer breached their fiduciary duty.

Fully secret commission

DDJ Sandercock, at first instance, had no hesitation in finding that the existence of commission was sufficiently disclosed by clause 13.6 of the agreement, which noted that a commission "may" be paid in respect of the

purchase. Therefore, the argument that there was a fully secret commission failed.

The appeal against this finding was abandoned.

Comment

The abandonment of this contention is unsurprising. The language in clause 13.6 mirrors the threshold test for disclosing the existence of commission set out in *Hurstanger v Wilson* at [43]:

> "43 Did it negate secrecy? I think it did. If you tell someone that something may happen, and it does, I do not think that the person you told can claim that what happened was a secret. The secret was out when he was told that it might happen. …".

Further, the FCA is seemingly also of the view that this is the threshold test, given that at [3.25] of their report, Our work on motor finance – final findings, which was published in March 2019, it notes:

> "3.25 We found that only a small number of brokers disclosed to the customer, during the mystery shopping visit, that a commission **may** be received for arranging finance …" [emphasis added].

Although *Johnson v FirstRand* is not binding, this decision is in accord with the prevailing and intuitive view that "may" is a sufficient disclosure to negate a finding of a fully secret commission.

"Half-secret" commission and the fiduciary relationship

What was pursued on appeal, however, was the "half-secret" commission case. This had two strands:

- The Dealer was an agent of C and simply owed C a duty to provide impartial or disinterested advice such that that duty was breached by the acceptance of the commission, such commission reflecting partiality by the Dealer.
- Alternatively, the dealer was the fiduciary agent of C, such that the Dealer owed C a duty of single-minded loyalty throughout the transaction and that, by accepting a commission from the finance company under the transaction without obtaining the customer's informed consent, they had breached their fiduciary duty.

On appeal, HHJ Jarman KC rejected both contentions:

- First, HHJ Jarman KC considered the relevant authorities put before the court: *Hurstanger v Wilson, McWilliam v Norton Finance [2015] EWCA Civ 186*, *Medsted v Canaccord [2019] EWCA Civ 83*, *Wood v Commercial First [2021] EWCA Civ 471*.
- Then, HHJ Jarman KC confirmed that in order to pursue a "half-secret" commission case, C needed to prove that there was a fiduciary relationship. It was not sufficient to argue that the Dealer was merely an agent of C and that there was simply a duty on the part of the Dealer to give impartial or disinterested advice.
- Then, HHJ Jarman KC upheld the approach of DDJ Sandercock to look at the classic formulation of a fiduciary duty set out by Millet LJ in *Bristol and West Building Society v Mothew [1998] Ch 1*.
- Finally, taking into account the above, HHJ Jarman KC concluded, at [19], that the Dealer was not a fiduciary, upholding DDJ Sandercoc's decision:

> "19. Mr Butters, accepted that the dealer was wearing two hats, one when it was selling the car, and the other when it was dealing with the finance. In my judgment this is the essential distinction with the broker cases, where brokers do not themselves offer what their client wants, but offer the service of obtaining it, namely finance. It is difficult to see how in practice or in principle a car dealer could offer single minded loyalty to a customer when dealing with the finance, but not when selling a car to the same customer which gives rise to the need for finance. Finance is incidental to the purchase of the car for those who need to borrow."

Comment

Although unsurprising, it is welcomed that HHJ Jarman KC confirmed that David Richard LJ in *Wood v Commercial First* had preserved the position that in order to argue a "half-secret" commission case, there needs to be a finding of a fiduciary relationship which carries with it a duty of single-minded loyalty. It is not sufficient to argue that there was merely agency and a duty on the part of the dealer to give impartial or disinterested advice.

The finding that the Dealer was not the fiduciary agent of the customer in this context of a vehicle purchased on finance is also welcomed. Such a view is intuitive; it is certainly a tall order to construe an obligation of single-minded loyalty on the part of the Dealer to the consumer in this context when they start the transaction on the opposite side of the negotiating table for selling the car. Further, there is the clear distinction between what service an independent broker is performing for a customer, as in the mortgage broker cases put before the court in this appeal, and what instead a dealer is doing in this context.

By HHJ Jarman KC noting that "It is difficult to see how in practice **or in principle** a car dealer could offer single minded loyalty to a customer …" [emphasis added], this

decision is likely deployable in all similar motor finance commission cases, as they all likely involve the same principle.

This outcome is also in accord with prevailing case law as previous decisions dealing with the three-party hire-purchase transaction situation, albeit not in a commission context, note that the starting point is that the dealer is neither party's agent but is a party in their own right: see *Mercantile Credit v Hamblin [1965] 2 QB 242* at 269. So, if the dealer is not even an agent of the customer, it is highly unlikely that they could be found to be a fiduciary agent.

Conclusion

In summary, the following practical points arise from the decision:

- A clause in a hire-purchase agreement which contains a disclosure to the effect that the dealer "may" be paid a commission is very likely sufficient to negate a finding of a fully secret commission.
- As to the alternative cause of action, a "half-secret" commission, it is necessary to prove that the dealer was the fiduciary agent of the customer. It is not sufficient to argue that there was simply agency and a duty to provide impartial and disinterested advice.
- The car dealer in the context of a hire-purchase transaction is not a fiduciary. This applies both to the facts of this case and more widely as a matter of principle.
- Although not binding, County Courts dealing with similar motor finance commission cases and arguments will likely welcome the points articulated by HHJ Jarman KC on the above issues.

Gough Square Chambers' consumer credit columns

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