

# Gough Square Chambers' consumer credit column: October 2024

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In the October 2024 column, George Spence-Jones considers the issues of disclosure to negate secrecy and fiduciary relationships in the context of motor finance commission and vehicles purchased on finance through dealerships. This follows the Court of Appeal's recent decision in *Johnson v FirstRand Bank Ltd [2024] EWCA Civ 1282*.

## Disclosure of motor finance commissions: negating secrecy and establishing a fiduciary relationship

The Court of Appeal has recently published its decision in *Johnson v FirstRand Bank Ltd (London Branch) t/a Motonovo Finance [2024] EWCA Civ 1282 (25 October 2024)*.

The case considered the subject of disclosure to negate secrecy and fiduciary relationships in the context of motor finance commission and vehicles purchased on finance through dealerships. This month's column examines the key issues raised.

### Background

In the joint appeals of *Johnson*, *Wrench* and *Hopcraft*, the Court of Appeal has now attempted to provide guidance on some of the issues that typically feature in the large number of motor finance commission claims that are presently going through the County Courts.

In general terms, the factual background to the three appeals (as in many of these cases) involved:

- A consumer who purchases a vehicle from a dealership.
- The vehicle is purchased on finance.

- The dealer arranges the finance.
- The finance company pays the dealer a commission.
- There is often a document or statement disclosing that the dealer may be paid a commission in respect of the finance (except there was no disclosure in *Hopcraft*).
- Neither the amount or calculation method of the commission is disclosed during the sales process.

The consumer brings a claim, alleging:

- The commission was "fully secret" (that is, a common law bribe).
- Alternatively, the commission was "half-secret" and without the consumer's informed consent being obtained on its amount, the dealer breached their duty to the consumer and the finance company was liable as an accessory. (Half-secret commission is where the existence of a commission is disclosed but not the amount (*Hurstanger v Wilson [2007] 1 WLR 2351*)).
- Payment of a commission in these circumstances was unfair for the purposes of section 140A of the Consumer Credit Act 1974 (CCA).

The core issues at trial often, but not always, include:

- What constitutes disclosure of the existence of the commission to negate secrecy.

- Whether the dealer was the fiduciary agent of the consumer.
- Whether there was a breach of such a duty.
- The accessory liability of the lender to the breach of fiduciary duty by the dealer.
- Whether there was any unfairness due to the circumstances of non-disclosure of the commission.

Although the Court of Appeal addressed all issues, the focus of this column is the first two, as they have drawn particular debate in the County Courts so far.

### Secret commission: disclosure to negate secrecy

The Court of Appeal began by noting that something is either a secret or not, so phrases such as “fully secret” and “half secret” that are being adopted in these cases are undesirable. Instead, secrecy is either negated or not by disclosing the existence of the commission. If the existence of the commission is disclosed but not the amount, secrecy is negated, but there is then “partial disclosure”.

The test for disclosure of the existence of a commission remains that which was set out by Tuckey LJ in *Hurstanger*:

“109 ... We cannot fault the logic of Tuckey LJ’s observation in *Hurstanger* at [43] that:

“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.”

The Court of Appeal also provided guidance on disclosure statements that are in signed documents, either the finance agreement itself or documents that are designed to be read as part of the sales process:

“110. We also accept that in general terms the person concerned cannot claim “this information was kept secret from me” if the information in question would be clearly and openly conveyed to any reader in a document that they deliberately do not read, especially if that document is designed for that purpose, they were directed to read it carefully, and they signed it.”

However, the Court of Appeal seemed to proceed on the basis that none of the appeal cases of *Johnson*, *Wrench* and *Hopcraft* contained

disclosure statements that were incorporated by signature. So, the analysis fell back on the assessment of whether there was sufficient disclosure as a matter of fact. As to those assessments:

- In *Hopcraft*, there was no written or oral disclosure of the existence of the commission. It was, therefore, a secret commission.
- In *Wrench*, there were standard terms and conditions, but they were seemingly not expressly incorporated into the signed hire purchase agreement. Those terms included a disclosure clause with the use of “may” at clause 12.6, which stated “A commission may be payable by us to the broker who introduced this transaction to us. The amount is available from the Broker on request”.
- However, there was no evidence that steps were taken to draw the clause specifically to the attention of the consumer. The hire purchase agreement directed the consumer’s attention to clause 10 of the terms and conditions, but not clause 12 (where clause 12.6 would be found). Therefore, the Court of Appeal found that the first instance judge was right to find that the commission was secret.
- In *Johnson*, as in *Wrench*, there was disclosure with the use of “may” in an unsigned document. It was conceded in the first appeal that there was “partial disclosure”, so the Court of Appeal did not go behind this concession. However, they indicated that they might have reached a similar conclusion to that in *Wrench*.

### Comment

Unsurprisingly, the starting point remains that “may” or “might” is sufficient to disclose the existence of a commission and negate secrecy. So, the key question is whether any such statement has been “disclosed” to the consumer.

The Court of Appeal approached that question by setting out that “disclosure in this context means taking reasonable steps to ensure that the fact actually comes to the attention of the consumer in a way which makes its significance apparent”. Although there is no citation for this test, this appears to be a modified form of the test from Bingham LJ in *Interfoto Library v Stiletto* [1989] QB 433 in relation to incorporation of contractual terms without signature, and which was recently applied (by Andrews LJ also) in relation to online gambling terms in *Parker-Grennan v Camelot* [2024] EWCA Civ 185. However, the final words at least, “which makes its significance apparent”, appear to be adding gloss to the test.

Paragraph [105] of *Johnson* states that “The key question in each case is whether sufficient disclosure was made to make it clear that the broker was free to prefer his own interests to those of the consumer”. In this author’s view, it appears therefore that the “significance” being referred to above is how the actions of the dealer in arranging finance are prima facie affected by the commission they might receive which reflects their own financial interest in the deal.

The corollary from this (applying the Court of Appeal’s reasoning) would be that disclosing the existence of a commission is also part of the assessment of negating a finding of a fiduciary relationship. Intuitively, this might seemingly be because a dealer who discloses the existence of their financial interest is prima facie not disinterested but is, instead, partial. So, there arguably would need to be further specific facts upon which the consumer can legitimately claim that the prima facie partial dealer had actually undertaken to act in their best interests with “single-minded loyalty” as a fiduciary.

As to a commission disclosure statement incorporated by signature, that arguably remains sufficient for the test, even if the consumer does not read the actual statement. This appears to flow from the Court of Appeal’s decision at [110], and that guidance is nonetheless consistent with both intuition and established case law in relation to the incorporation of statements by signature in contractual-type documents. However, it is unclear what the Court of Appeal considers to be sufficient incorporation by signature in the circumstances.

Providing a consumer with a disclosure statement that is not incorporated by signature appears to be sufficient for the test, if the evidence can also show that “reasonable steps” were taken to draw the clause to the consumer’s attention. For example, in *Wrench*, instead of the finance agreement just referring to clause 10 of the unsigned terms and conditions, if there had also been a specific reference to clause 12 (where clause 12.6 and the “commission may be payable” statement was found), it appears that that might have been a sufficient “reasonable step”.

The assessment of a “reasonable step” depends on the context of the transaction. From *Parker-Grennan v Camelot* [2024] EWCA Civ 185, that must, at least, include providing “sufficient opportunity to read”:

”46. Besides, the question is not whether the trader has done everything in its power to try to make the other contracting party read the terms. One cannot force someone to

read the terms and conditions if they cannot be troubled to do so. The trader only needs to take reasonable steps to bring the terms and conditions to their attention, which in my judgment necessarily involves giving them a sufficient opportunity to read them. Depending on the facts and circumstances of the particular case, a sufficient opportunity may be afforded by providing a hyperlink to the terms or a drop down menu which the consumer can click (or not) as they choose. The fact that the trader might have taken different or further steps to bring the terms and conditions to their attention, does not mean that the steps that he did take were insufficient or unreasonable.”

What constitutes a “reasonable step” and a “sufficient opportunity to read” in the hire-purchase transaction context remains to be determined in each case.

### Duties owed by motor dealers

The Court of Appeal confirmed that secret commission bribe cases (the old “fully secret” cases) only require the disinterested duty to be established, set out in [102] of *Wood v Commercial First* [2021] EWCA Civ 471, rather than the finding of a fiduciary. However, “partial disclosure” cases still require the higher threshold of there being a fiduciary duty.

As to whether dealers in secret commission cases generally owe the *Wood*-style “disinterested duty”, the Court of Appeal found that they can, and on the facts in the three appeals, they all did.

As to whether a dealer can be a fiduciary for “partial disclosure” cases, the answer is yes, and on the facts in the three appeals, they all were. The Court of Appeal drew an analogy with the case of *McWilliam v Norton* [2015] EWCA Civ 186:

”93. The brokers were not carrying out a purely ministerial function. They did not simply effect an introduction and leave it to the lender and borrower to contract between themselves. Their relevant role, which they willingly undertook, related to sourcing and selecting a lender who offered the most advantageous, (or at the very least, in Miss Hopcraft’s case, competitive) and suitable terms. It was indistinguishable from the role of the brokers in *McWilliam*.”

The Court of Appeal went on to reject the prevailing view of the County Courts that motor finance dealers cannot owe fiduciary duties, holding that all lower instance judges were wrong.

### Comment

The starting point is that the assessment of a dealer's status should always be fact specific. For "secret" commission cases, it possibly remains open that a dealer can disavow the apparent starting point of owing a "disinterested duty" by sufficient status disclosure or evidence, but what that might look like in reality remains to be seen.

For a fiduciary, the test remains that which was set out in *Bristol and West Building Society v Mothew* [1998] Ch 1:

"90 ... The question is whether the broker was acting on behalf of the customer in a capacity which involved an obligation of loyalty and the repose of trust and confidence in him in relation to the specific duties he was tasked to perform: see the well-known passage in the judgment of Millett LJ in *Mothew*."

Understandably, dealers technically remain free to set out to consumers that they do not act as a fiduciary or provide any such commensurate duty:

"105. In our judgment, as in *Wood*, in this particular context the dealers/credit brokers would owe both a disinterested duty and a fiduciary duty of loyalty to their customers, **unless they made it clear that they did not accept such duties**" [emphasis added].

Again, however, what that looks like in reality remains to be seen.

There is also a lack of clarity in relation to the factors that were deployed by the Court of Appeal to support its decision. In particular, the Court of Appeal found at [91] that the "distinguishing obligation of a fiduciary" of loyalty, from *Mothew*, is actually just "inherent in the disinterested duty". This is an unusual conclusion, given that the Court of Appeal earlier approved *Mothew* and confirmed that the two duties are different in substance. If both duties have this obligation of loyalty which distinguishes a fiduciary, what more from a "disinterested duty" is needed for a fiduciary duty?

### Conclusion

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

- The test from *Hurstanger* for negating secrecy by disclosing the existence of a commission with the language of "may" or "might" remains.
- As to disclosure, that now appears to require "taking reasonable steps to ensure that the fact

actually comes to the attention of the consumer in a way which makes its significance apparent".

- Disclosure in a statement that is incorporated by signature seems to still be sufficient for this test and following *Hurstanger* and *Wood*, it seemingly should be. Indeed, counsel for the appellant in *Johnson* seemingly thought so, hence the concession in the County Court. However, following the Court of Appeal decision in *Johnson*, it does not appear so straightforward.
- For disclosure in an unsigned document, demonstrating "reasonable steps" is highly contextual and remains to be determined on a case-by-case basis.
- As to the duties:
  - for "secret" (old "fully secret") commission cases, the starting point is that a dealer likely owes a *Wood*-style "disinterested duty" in arranging finance. This means that there will likely need to be sufficient disclosure to the consumer to the effect that the dealer is not disinterested in order to counter this finding; and
  - for "partial disclosure" (old "half-way house") cases, a dealer can be a fiduciary. The test remains that from *Mothew*, but the Court of Appeal does not make clear how to approach that assessment. Part of that assessment might be to look at whether "sufficient disclosure was made to make it clear that the broker was free to prefer his own interest to those of the consumer". For that, applying the Court of Appeal's reasoning, the starting point appears to be that disclosing the existence of a commission to make the case "partial disclosure" is possibly sufficient to establish this test. So, a consumer might need something more to prove that such a dealer was their fiduciary. However, given the factors that the Court of Appeal relied on, and the apparent conflating of the two duties, there is an undesirable lack of clarity in the decision for practical purposes.
- The Court of Appeal have attempted to set out the legal tests for the various common issues that feature in motor finance commission cases. However, there are certainly question marks over those tests and judges now dealing with these cases are likely to face even more legal arguments about which Court of Appeal authority to follow, as all remain binding and applicable.

It is understood that *FirstRand* are seeking permission to appeal to the Supreme Court. Even the Court of Appeal noted that the Supreme Court's guidance would assist on certain issues, especially given that they were bound to follow both *Wood* and *Hurstanger*, where a tension on certain issues exists.

## Gough Square Chambers' consumer credit columns

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