

# Gough Square Chambers' consumer credit column: August 2025

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In the August 2025 column, Ann-Marie O'Neil considers the judgment in *Johnson v FirstRand Bank Ltd*, *Wrench v FirstRand Bank Ltd* and *Hopcraft v Close Brothers Ltd* [2025] UKSC 33.

## Unfair relationships and fiduciary duties in motor finance industry

On 1 August 2025, the Supreme Court handed down its judgment in the cases of *Johnson v FirstRand Bank Ltd*, *Wrench v FirstRand Bank Ltd* and *Hopcraft v Close Brothers Ltd* [2025] UKSC 33. The single judgment was handed down by Lords Reed, Hodge, Lloyd-Jones, Briggs and Hamblen.

This follows the Court of Appeal's decision in *Johnson v FirstRand Bank Ltd* [2024] EWCA Civ 1282 (see [Article, Gough Square Chambers' consumer credit column: October 2024](#)).

### Background

All three cases shared a similar scenario; each claimant had visited a motor dealership to purchase a vehicle. Each dealership assisted the claimants in obtaining finance to fund the purchase. The claimants entered into the credit agreements arranged by the dealerships and provided by the defendants. The dealerships received commission from the defendant lenders. The commission structure in at least two of the three claims permitted the dealer a level of discretion to fix the interest rate. The higher the interest rate, the higher the commission. Such practices were banned by the FCA in 2021.

In *Hopcraft*, there was no mention of commission in the paperwork provided. In *Wrench*, the terms

and conditions disclosed that commission may be paid in a sub-clause under the heading "General". In *Johnson*, the terms and conditions disclosed the possibility of a commission and, in addition, the possibility was also disclosed within a "Suitability Document".

The Court of Appeal concluded that the dealers owed a duty to provide information, advice and recommendation on a disinterested and impartial basis in tandem with an ad hoc fiduciary duty. As a result, any payment of commission without the consumer's fully informed consent (which included knowledge of the nature and amount of commission) was a breach of those duties. The Court of Appeal's reasoning centred on the general role of a credit intermediary and, consequently, had the potential to turn all motor dealer credit brokers and, indeed, all intermediaries into fiduciaries.

In addition, the Court of Appeal found that the relationship between Mr Johnson and the lender was unfair under sections 140A-C of the Consumer Credit Act 1974 (CCA). The reason for the finding of unfairness was that:

- The size of the commission was very high.
- The sum borrowed and paid to the dealer was much more than the vehicle was worth.
- The tie between the dealer and the lender had been falsified or actively concealed.

FirstRand and Close Brothers appealed to the Supreme Court, with the FCA and the National

Franchised Dealers Association intervening. The Supreme Court expedited the appeal. The hearing took place between 1 and 3 April 2025.

## Issues considered by Supreme Court

There were six grounds of appeal. In its judgment, the Supreme Court addressed the live issues thematically starting with bribery, then the claim in equity and finally, the unfair relationship claim in *Johnson*.

In respect of bribery, the Supreme Court addressed four questions:

- Should the tort of bribery be abolished? See Should the tort of bribery be abolished?.
- What duty relationship engages the tort of bribery? This included consideration of the “disinterested duty” arguably created by Richards LJ in *Wood v Commercial First Ltd* [2022] Ch 123 (Wood). See What duty relationship engages the tort of bribery?.
- Can partial disclosure negate secrecy? See Can partial disclosure negate secrecy?.
- What are the remedies available if bribery is established? See What are the remedies available if liability is established?.

Following on from its conclusions on bribery, the Supreme Court then addressed whether a motor dealer is a fiduciary in a motor finance transaction and whether an accessory to a breach of fiduciary duty needs to have acted dishonestly (these questions being central to the determination of the appeal). See Is a motor dealer who acts as a credit broker a fiduciary? and Does an accessory to a breach of fiduciary duty need to have acted dishonestly?.

Finally, the Court considered whether the Court of Appeal’s approach to the question of unfairness under section 140A of the CCA in *Johnson* was correct and, upon concluding that the Court of Appeal had erred, exercised the unfairness assessment itself (see Unfairness).

## Supreme Court’s findings

### Should the tort of bribery be abolished?

The Supreme Court rejected the argument that the tort of bribery should be abolished, noting that it is a well-established civil wrong at common law with important deterrent value and distinct remedies compared with equitable causes of action [139-156].

### What duty relationship engages the tort of bribery?

The Supreme Court clarified that liability in the tort of bribery (at common law and in equity) requires the recipient of the inducement to owe a true fiduciary duty to the claimant [157-207]. This is a high hurdle.

The Court reaffirmed that bribery must involve a breach of the no-conflict rule inherent to fiduciary relationships. Payments to non-fiduciaries do not trigger this wrong. When considering the “disinterested duty” set out in *Wood*, the Court concluded that there was no such lower duty, but if Richards LJ was merely intending to express the nature of fiduciary duties in a different way, then he had not erred.

In the specific context of motor finance deals, at paragraph 276, the Court held that motor dealers operate in arm’s length commercial transactions: they negotiate with lenders for their own benefit and are not bound by loyalty to the borrower. These features are incompatible with fiduciary status and therefore exclude the tort of bribery in standard dealer-customer finance arrangements.

### Can partial disclosure negate secrecy?

Partial disclosure cannot negate secrecy. Only full disclosure and fully informed consent of all relevant details can neutralise any secrecy-based breach of fiduciary duty. Disclaimers such as “commission may be payable” will not suffice.

The Supreme Court rejected the idea that partial disclosure is sufficient to avert liability for bribery. It returned to the stricter requirement for full disclosure of all material facts plus informed consent. Further, the Court confirmed that equitable fiduciary breaches can be avoided only if all material facts are disclosed and the principal obtains fully informed consent.

The Court explained that what constitutes “full disclosure” depends on the context [214-216]. Notably, reference only to a commission being “possible” or that a commission “may” be paid does not meet the threshold. The Court explained that it is “unable to agree with the reasoning in *Hurstanger* [2007] 1 WLR 2351 [225]”, which permitted partial or “half-secret” disclosure as sufficient in some circumstances. Partial disclosure negate secrecy; if material facts remain undisclosed and consent is not fully informed, then liability follows.

### **What are the remedies available if liability is established?**

Where liability for bribery is established (that is, breach of fiduciary duty via secret commission without informed consent), the Supreme Court clarified that both common law and equitable remedies are available subject to traditional equitable discretion.

The wronged principal may recover the full amount of the bribe paid [229-236]. This is a primary legal remedy and does not require any loss. The fiduciary has held the bribe improperly and must disgorge it.

The equitable remedies (including rescission and equitable compensation) are also available where fiduciary breach is shown, and informed consent was absent. However, rescission is discretionary and may be refused if disproportionate or impractical. At common law, rescission is available as of right subject to the usual rules of counter-restitution [166].

In broader fiduciary jurisprudence, the Court emphasised that secret commissions are held on constructive trust for the principal. Equitable compensation is restitutionary rather than compensatory. It seeks to restore the principal to the pre-bribe position, not to compensate for damage. The Court rejected any suggestion of limiting recovery, clarifying that there should be no automatic denial of recoverable remedy—even where partial disclosure occurred.

### **Is a motor dealer who acts as a credit broker a fiduciary?**

The Supreme Court concluded that not only did the typical features point away from the existence of a fiduciary duty but that they were [277] “irreconcilably hostile to the recognition of a fiduciary obligation”.

In its considerations, the Court summarised six typical features of the tripartite motor vehicle finance transactions [268-275]:

- Each of the three parties (the consumer, dealer and lender) were engaged at arm's length from the other participants in the pursuit of their own interests. No one could reasonably think otherwise.
- The service of obtaining finance was not provided by the dealers as a separate service. It was an ancillary service akin to providing an extended warranty or additional equipment sourced from a third party.
- The dealers gave no undertakings that they would eschew their own commercial interests in pursuit of the consumers' best interests.

- The dealers did not assume the role of the agent of the consumer. The dealer did not have any authority to legally bind the consumer.
- Dependency or vulnerability of a consumer is irrelevant to whether a fiduciary duty exists.
- The trust and confidence reposed in a motor dealer who has undertaken to assist in obtaining finance does not change the arm's length negotiation which takes place.

It concluded that the Court of Appeal had been wrong to determine that a motor dealer was a fiduciary.

### **Does an accessory to a breach of fiduciary duty need to have acted dishonestly?**

In the light of the Supreme Court's determination that motor dealers do not owe a fiduciary duty, the Court treated the question of accessory liability as academic. Nonetheless, the Court addressed equitable accessory liability in hypothetical terms, clarifying the role of dishonesty should such liability ever arise.

In addition, the Court noted that mere knowledge of the duty and the payment is insufficient. The liability demands dishonesty. The accessory must have turned a blind eye or actively disregarded the lack of informed consent by the claimant. The Court rejected notions that mere awareness of the broker's fiduciary duty or mere knowledge that commission was paid constituted dishonesty per se.

In relation to the conduct that might amount to dishonesty, the Court observed that if a lender had structured its contract to suggest generic or boilerplate disclosures, despite knowing that customers would not be providing informed consent, that could cross into dishonesty. The Court also noted that while mere business compliance with disclosure rules may be innocent, actively suppressing or ignoring full transparency could attract accessory liability if a fiduciary relationship existed and consent was absent.

In circumstances where the accessory lacked subjective awareness of wrongdoing, or where disclosure was objectively acceptable under industry norms, liability would not follow – even if a breach of fiduciary duty occurred.

### **Unfairness**

The Supreme Court approached unfairness as a “highly fact-sensitive assessment” [297], focusing on several factors. The Supreme Court accepted the Court of Appeal's ultimate decision

that unfairness existed, but for different reasons. Notably, the Court rejected the Court of Appeal's reliance on a mismatch between the price paid for the car and industry valuations (Glass's Guide). That disparity had not been pleaded or explored at trial. The Supreme Court ruled it was not a permissible basis for the unfairness finding in this case given the lack of evidential foundation [311-312].

There are three key points to draw out:

- **The Court emphasised the significance of the commission level.** In Mr Johnson's case, the motor dealership received approximately 55% commission of the total charge for credit. Such a high level of remuneration constituted a "powerful indication" that the relationship was unfair, albeit not determinative. The Court found a breach of CONC 4.5.3R and, while not explaining its reasoning, it would appear that the Court considered that the size of the commission could have a material impact and consequently its non-disclosure amounted to a breach. Nevertheless, the Court did not expressly rely on a breach of CONC to support the unfair relationship finding.
- **The Court emphasised the failure to disclose the true nature of the commercial arrangement between the motor dealer and the lender.** Mr Johnson was presented with a "Suitability Document" that implicitly suggested impartial advice yet concealed the dealership's contractual obligation to offer FirstRand first refusal on the finance. The Court commented that "the documentation created a false impression that the dealer had access to a panel of 22 lenders and had selected the deal which was most suitable for Mr Johnson" [336].
- **The Court took account of Mr Johnson's characteristics and the overall context.** He was financially unsophisticated. The Court added that Mr Johnson was wrong not to have read the documents, but this error was mitigated by the documents lacking proper disclosure by having been buried in small print. The Court found that

an ordinary consumer in his position would not expect such a large commission and would not be alert to it unless it had been prominently disclosed.

Drawing these threads together, the Supreme Court held that the effective non-disclosure of an excessive commission combined with non-disclosure of the lender-broker commercial tie, directed at an unsophisticated borrower, rendered the relationship "unfair" as a matter of law. The Court noted that neither the size of the commission nor the disclosure failings did not automatically result in unfairness, but here, the absence of meaningful disclosure, the scale of commission, and the misleading impression as to the commercial ties created a real imbalance under section 140A of the CCA.

Accordingly, the Supreme Court allowed Mr Johnson's appeal on the CCA ground and ordered FirstRand to repay an amount equivalent to the commission, with interest.

### Comment

This is obviously a positive result for the motor finance industry and the wider economy.

The FCA has announced that it will be consulting on a redress scheme from early October. The exact nature of the scheme remains to be seen. In the meantime, it may be that claims management firms accelerate currently stayed and new claims in the County Court on the basis of unfair relationship alone.

### Gough Square Chambers' consumer credit columns

For previous consumer credit columns written by barristers at Gough Square Chambers, see [Practice note, Gough Square Chambers' consumer credit column](#).

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