

Gough Square Chambers' consumer credit column: February 2026

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Lee Finch, Sabrina Goodchild, Ann-Marie O'Neil 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 February 2026 column, Lee Finch considers the potential impact of the decision in *Johnson v FirstRand Bank Ltd*, *Wrench v FirstRand Bank Ltd* and *Hopcraft v Close Brothers Ltd* [2025] UKSC 33 in the context of mortgage brokers and fiduciary duties.

Fiduciary duties and mortgage brokers post-*Hopcraft v Close Brothers*

Introduction

Arguments that mortgage brokers owe fiduciary duties long pre-date the motor finance litigation in *Johnson v FirstRand Bank Ltd*, *Wrench v FirstRand Bank Ltd* and *Hopcraft v Close Brothers Ltd* [2025] UKSC 33. While the theory as applied to motor dealers was, at the very least, ambitious and has now been decisively rejected by the Supreme Court, its application to mortgage brokers has always been more plausible. Mortgage brokers, unlike motor dealers, commonly charge fees to borrowers and do not act as counterparties selling their own assets.

Before the Supreme Court decision, there was a line of Court of Appeal decisions in which mortgage brokers were held to be fiduciaries (*Wilson and another v Hurstanger Ltd* [2007] EWCA Civ 299; *McWilliam v Norton Finance UK) Ltd t/a Norton Finance* [2015] EWCA Civ 186; and *Wood v Commercial Business Ltd and Pengelly v Business Mortgage Finance 4 plc* [2021] EWCA Civ 471). Similar decisions were also made in respect of other brokers (for example, investment brokers: *Medsted Associates Ltd v Canaccord GenuityWealth (International) Ltd* [2019] EWCA Civ 83).

Against that backdrop, defendants rarely contested fiduciary status. Instead, litigation focused on containment strategies:

- Whether disclosure rendered commissions merely “half secret”.
- Whether rescission should be refused as disproportionate.
- Whether lenders could be liable as accessories absent dishonesty.

That landscape has shifted materially post-*Hopcraft*.

For a case report on *Hopcraft*, see [Legal update, Undisclosed commissions in motor finance: Supreme Court rules on fiduciary duties and unfair relationships](#).

Hopcraft v Close Brothers

Although *Hopcraft* is most closely associated with motor finance cases, its wider doctrinal significance should not be underestimated.

First, the Supreme Court rejected the notion of a half-secret commission, disapproving *Hurstanger* on the point. A commission taken by a fiduciary is either properly authorised or not; partial disclosure does not create an intermediate category. Second, the Supreme Court held that there was no diluted duty of “disinterested information, advice and recommendation”, liability depends on the existence of a full fiduciary duty (over-ruling *Wood*

to the extent necessary). Consequently, causes of action will only stand where there is a full fiduciary duty and, where a fiduciary duty exists, a partial disclosure will not provide any defence.

In addition to overruling the Court of Appeal in these two specific but important respects, the Supreme Court also clarified and restated the governing principles for fiduciary duties:

- The paradigm of a fiduciary is a trustee acting under an express trust (paragraph 84).
- Solicitors and company directors have become settled categories of fiduciary (paragraph 85).
- The relationship of principal and agent is another well-known category in which fiduciary obligations may arise. Whether they do or not will depend on:
 - the nature of the parties' contract;
 - the fiduciary's undertaking; and
 - the context of the particular agency.

(Paragraphs 86 and 101.)

- Credit brokers who act simply as intermediaries without the power to bind their customers are not agents in the sense in which agency is a term used in law (paragraph 271).
- The position of an intermediary is not analogous with that of a trustee, company director, partner or agent (paragraph 277).
- Outside of the settled categories (which do not include credit brokers or intermediaries), fiduciary obligations may still arise on an ad hoc basis (paragraph 87).
- The existence, in a commercial context, of trust and confidence between parties to a transaction is not sufficient to impose ad hoc fiduciary obligations (paragraph 97). There must be an assumption of responsibility by the fiduciary (express or implied) to act exclusively on behalf of the other in the conduct of the other's affairs (paragraph 100).
- It is important not to distort the commercial bargain between the parties to a contract by too readily implying fiduciary obligations (paragraph 102).
- It is normally inappropriate to expect a commercial party to subordinate its own interests to those of another commercial party (paragraph 110).
- An agreement or undertaking to find the most suitable package or get the best deal falls short of an undertaking to exclude consideration of one's own interests (paragraph 270).
- An explanation that commission may be received is inconsistent with an undertaking to exclude one's own interest (paragraph 270).

- Fiduciary obligations will not be implied in fact where those obligations would be incompatible with the intermediary's position (paragraph 282).

The Supreme Court's decision in *Hopcraft* is the definitive statement on when fiduciary obligations apply. However, *Hopcraft* did not expressly overrule the previous line of Court of Appeal authorities where fiduciary duties were found in the mortgage broker context and, consequently, those authorities must still be considered.

Previous Court of Appeal authorities

In *Hurstanger*, the borrowers applied for a loan through a mortgage broker. There was no suggestion that the broker had a range of lenders, no express requirement to advise and a disclosure that the broker may receive commission. However, the Court of Appeal concluded that the defendants were entitled to expect the broker to get them the best possible deal and the case proceeded on the basis that the broker owed fiduciary duties. Importantly, from the case reports, it appears that fiduciary status was conceded by the defendant.

In *McWilliam*, the borrowers engaged a broker who was expressly not providing advice. This did not prevent the Court of Appeal finding that the broker was under an obligation to "identify the lender willing to lend to the borrowers on the most advantageous terms" and proceeding on the basis that the broker was a fiduciary. There are difficulties with *McWilliam*: first, it was an undefended appeal and Tomlinson LJ expressly stated that it was an unsuitable vehicle for wider principles to be determined; and second, the court considered itself bound by *Hurstanger* and did not take account of the fact that *Hurstanger* had proceeded on a concession without the point being argued.

In *Wood*, the broker had access to a panel of lenders and the broker undertook to work from that panel to provide the appropriate product to meet the client's individual circumstances and needs. The Court of Appeal found that the broker was required to undertake its tasks in a disinterested fashion and expressly rejected the argument that the disclosure that the broker may receive commission was incompatible with a fiduciary duty. It is debatable whether or not the court intended to find a full fiduciary duty, but it did find a sufficient duty to establish liability.

Outside of mortgage broker cases, in *Medsted* the Court of Appeal held that an investment broker owed a fiduciary duty because the

investors reposed trust and confidence in the broker. Following *Hopcraft* that reasoning must be rejected as faulty.

Dispute

The issue moving forwards is to what extent does *Hopcraft* apply to mortgage brokers?

Claimants will argue that *Hopcraft* should be interpreted narrowly and confined to the motor dealer context in which it was decided:

- They will highlight the factual differences between motor dealer brokers and mortgage brokers.
- They will argue that the Supreme Court did not overrule the previous Court of Appeal decisions, and courts of first instance are still bound to follow *Hurstanger*, *McWilliam*, *Medsted* and *Wood* (notwithstanding the issues with each of those decisions (see Previous Court of Appeal authorities)).

Defendants will argue the contrary.

Answer

The Supreme Court's analysis of fiduciary principles in *Hopcraft* was an essential element of the basis on which it decided the case. Consequently, it forms part of the binding ratio of the decision (*R (Kadhim) v Brent LBC* [2001] QB 955). Earlier authorities cannot survive to the extent they are inconsistent with that analysis.

Mortgage brokers do not constitute a settled fiduciary category. Fiduciary duties therefore arise only where the broker has undertaken, expressly or by necessary implication, to act exclusively in the borrower's interests. Pre-*Hopcraft* decisions provide no shortcut around this requirement. The decisive inquiry is the nature of the broker's undertaking, assessed against the Supreme Court's clarified principles.

In practice, express undertakings of exclusive loyalty are likely to be rare. Industry language typically centres on securing a "best deal" or "most suitable product" - formulations that *Hopcraft* confirms are insufficient.

Implied undertakings face similar obstacles. The Supreme Court has made clear that disclosure of

potential commission is conceptually inconsistent with fiduciary loyalty, significantly weakening arguments for implication.

Conclusion

Hopcraft is not determinative of mortgage broker claims, but it is now the unavoidable starting point. By abolishing the "half-secret commission" doctrine, it heightens the consequences where fiduciary duties are established. At the same time, its rigorous analysis materially strengthens defendants' ability to resist the imposition of fiduciary obligations.

The first post-*Hopcraft* mortgage broker claims are currently working their way through the court system. As of the date of this column, I have appeared in two cases where judgment has been handed down.

In *Young v Swift* (*Cardiff County Court*, 5 February 2026), DDJ Pollitt accepted the defendant's submissions and found that the claimants had not proved an undertaking of undivided loyalty; notably, there was no disclosure of commission in this case. Perhaps more importantly, in *Berrington and Downing v Swift* (*Leicester County Court*, 20 February 2026), after a two-day trial, HHJ Hedley handed down a reserved judgment in which he confirmed that the starting point was *Hopcraft*. In relation to the prior Court of Appeal decisions, he stated:

"The decisions in those various cases simply cannot now stand following *Hopcraft*, or at any rate certainly not as authority for the proposition that a credit-broker arranging finance will necessarily be taken as being a fiduciary. In my judgment the ratio decidendi of *Hopcraft* is to the contrary. In order to be a fiduciary in circumstances where the traditional fiduciary relationship is not in play, more is required. It is, in each case, a question of fact as to whether the necessary elements are made out."

Gough Square Chambers' consumer credit columns

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