

# A sting in the claim

**Fred Philpott** considers the twists, turns & quantum leaps of otherwise ordinary-seeming cases

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The law has been much concerned with payments made in breach of various types of duty. It is very understandable. Human nature often results in businesses of various types, involving agency, planning, the granting of contracts and many others, having this temptation.

A 'backhander' may seem fairly harmless to those involved, but it is insidious and corrosive to our nation. Western Europe, the 'old' Commonwealth and North America go to great lengths to prevent this type of corruption. Even so, it will surface—eg in football (*Logicrose v Southend United Football Club* [1988] 1 WLR 1256) and the infamous case of architect John Poulson in the early 1970s. Other countries may take a lighter view on the issue.

Thus, in the UK we have a substantial body of law in which our judges have, over the centuries, been determined to deal firmly with activities which could be described in a general way as bribery. Lord Justice Tuckey considered many of the cases in *Hurstanger Ltd v Wilson* [2007] EWCA Civ 299, where it was held the judge below had been correct on the consumer credit technicalities, but the commission was 'half-secret'.

For context, we should go back to 2007 when the consumer credit world was worrying about having to implement to new EU Consumer Credit Directive. Meanwhile the litigation was concentrating on the unenforceability of regulated consumer credit agreements. Claims management companies were branching out from their fairly new ambulance chasing business. The basic argument was that there was non-compliance with the Consumer Credit Act 1974 (CCA 1974) and Regulations (the main case was *Carey v HSBC* [2009] CTLC 103). Such a case was before Recorder Michael Douglas QC. It was entirely focused on whether the regulated agreement complied with Sch 6 of the 1983 Agreements Regulations because, if it did not, the agreement was irredeemably unenforceable under s 127(3) (now repealed), CCA 1974. What had commission to do with it? It was probably the genesis of what we have today, with a Supreme Court judgment and FCA rules only being made public after the markets closed because of the financial implications of motor finance commission.

Very shortly before the trial, a routine document emerged which showed that the broker has been paid a commission by the lender, in addition to the fee the borrowers paid to the broker. A side letter said: '…in certain circumstances this company does pay commission to brokers / agents…'

## PPI

There was another business model for claims management companies, and the target was payment protection insurance (PPI). This beneficial product was introduced in the 1970s and known as Accident, Sickness and Unemployment. For a modest premium, the cost of which was added to the credit, a customer was insured for their payments under the credit agreement from certain eventualities. Creditors would get a small commission for passing the work to insurers.

But greed came into play. There were few claims and the lender upped the commission from the insurers to the extent that, in due course, often more than 80% of the premium was kept by the lender with the borrower paying interest on this sum, together with the little that went to the insurer. Borrowers generally knew nothing of this commission, and it ended up in the Supreme Court in *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61.

## Motor finance

For more than 100 years commission has been paid between a dealer and a creditor; initially it was the dealer who paid commission so someone could acquire his, eg piano.

The latest episode (by no means final) is *Johnson v FirstRand Bank Ltd and other cases* [2025] UKSC 33. The failure fully to disclose commission could result in an unfair relationship under s 140A, CCA 1974. What should have been a great victory for lenders was subject to this caveat. In particular the court dismissed arguments on bribery, fiduciary relationships etc.

In *Johnson* it was said (at [242]): 'The statutory and regulatory rules which govern the behaviour of the car dealers and finance companies are an important part of the context in which equity operates, and in which the question whether whatever equity should recognise any undertaking to act selflessly needs to be addressed.'

However, it was said (at [268]): 'Neither the parties themselves nor any onlooker could reasonably think that each of the participants to such a negotiation was doing anything other than considering their own interests.'

It is difficult to see how one can then condemn the transaction as unfair as was done.

As I suggested in an earlier *NLJ* article ('Commissions: what's in a name?' 175 *NLJ* 8111, pp7-8), the idea the customer has been unfairly treated is simply wrong. Unlike PPI, the customer is not paying the commission: it is a matter between the dealer and the bank. If the word 'commission' had not been applied, but instead it was billed as services for dealing with the arrangement for the grant of hire-purchase, we would not be here.

## What if?

History is facts, but also 'what ifs?'. If the point has not been taken by counsel for the borrowers on seeing the fact of commission late on in *Hurstanger*, maybe none of this would have happened. The 'conducting litigation' cases of *Mazur v Charles Russell Speechlys LLP* [2026] EWCA Civ 369 is a further example of how low-level litigation dealing with a routine civil dispute can grow into something never contemplated initially by those involved. Overall, the lesson is that when involved in what appears a routine bit of litigation, don't be surprised if it has a sting in the tail. **NLJ**

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