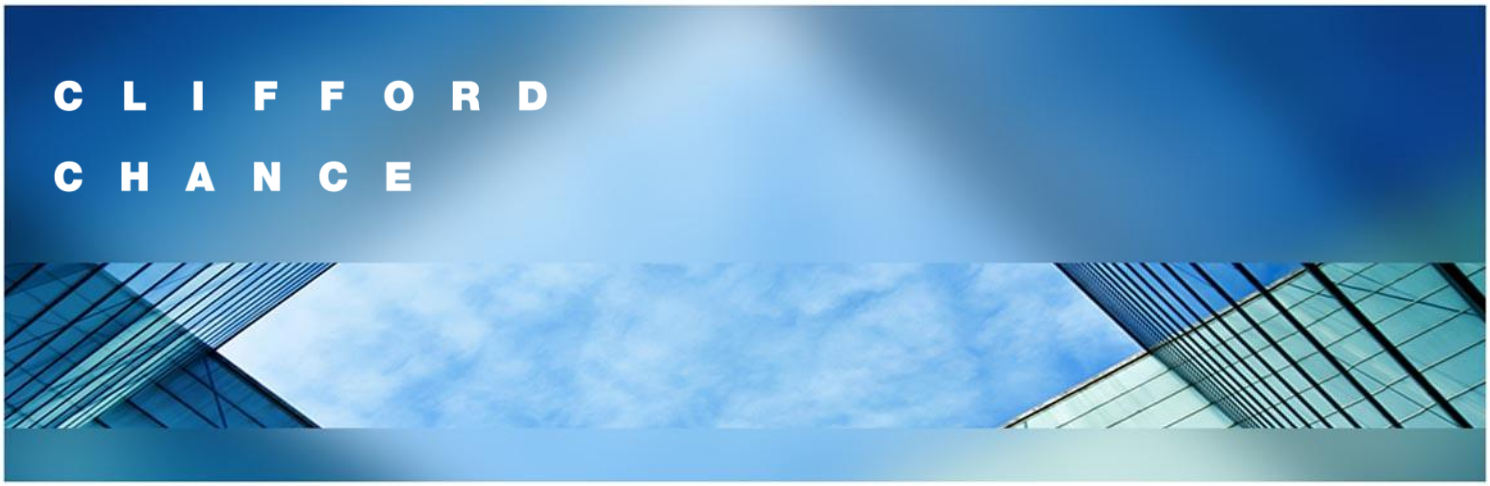

MOTOR FINANCE COMMISSIONS – IMPLICATIONS OF THE SUPREME COURT'S DECISION FOR SECURITISATIONS

On 1 August 2025, the UK's Supreme Court handed down judgment in the linked appeals of *Johnson and Wrench v FirstRand Bank* and *Hopcraft v Close Brothers* [2024] EWCA Civ 1282, following the far-reaching Court of Appeal decision in 2024. In this briefing, we consider the judgment's implications for motor finance securitisations, other commonly securitised asset classes, and present and future securitisation transactions in general.

WHAT DID THE SUPREME COURT DECIDE?

Our briefing published on 1 August 2025, titled *Motor Finance Commissions – Supreme Court Decision*, summarises the Supreme Court's findings on the key issues which were put before the Court by the Appellant lenders and the Respondent consumers. In brief, the Court held that car dealers arranging finance do not owe fiduciary duties to customers, primarily because they act in their own commercial interests and do not undertake to act with loyalty or impartiality. This followed from establishing the principle that a fiduciary duty does not arise from the dependency or vulnerability of a consumer but from an express or implied undertaking by an alleged fiduciary. As a result, lenders cannot be held liable for dishonest assistance or bribery, since both claims require a fiduciary relationship. While the tort of bribery remains, it only applies where the recipient is a fiduciary, which the Court confirmed dealers are not.

The Court also emphasised that determining whether a lender–consumer relationship is unfair under section 140A of the Consumer Credit Act 1974 (CCA) is a fact-sensitive exercise. It then went on to provide guidance as to the range of factors that could be relevant in motor finance, including the size and nature of any commission, the clarity and extent of disclosure, the characteristics of the borrower, and compliance with regulatory rules. The Court asserted that the mere existence of a secret or half-secret commission did not in itself make the relationship unfair. In Mr Johnson's case, the Court found the relationship with FirstRand to be unfair due to a high commission, lack of transparency, and misleading documentation.

THE FCA'S RESPONSE

As it promised, the FCA responded swiftly to the Supreme Court's judgment. In a statement published on 3 August 2025, the FCA announced its intention

Key issues

- The Supreme Court has ruled that car dealers arranging finance act in their own commercial interests and do not owe fiduciary duties to customers, removing lender liability for dishonest assistance or bribery.
- Further, the Court confirmed that the assessment of unfair relationships under the Consumer Credit Act 1974 is highly fact sensitive and requires taking account of a very broad range of factors, but the mere existence of secret or semi-secret commissions was not determinative.
- The FCA has announced that it will consult on a motor finance redress scheme covering discretionary commissions and unfair relationships, due in October 2025.
- For the motor finance industry, the Court's clarifications regarding fiduciary duties will be seen as positive and the enhanced disclosure practices since the Court of Appeal decision were welcomed by the FCA and are likely to continue.
- Lenders in other markets will want to review their practices to ensure their relationships with consumers are fair under the Consumer Credit Act.
- The impact on current and future securitisation transactions is now limited to circumstances where assets include DCAs or unfair relationships.

to "consult on an industry-wide scheme to compensate motor finance customers who were treated unfairly". The FCA's focus is on assessing the factors that will make a lender-consumer relationship unfair and, in doing so, it has acknowledged the factors raised by the Court in the context of s.140A of the CCA referred to above. The FCA has proposed that the scheme will cover discretionary commission arrangements (DCAs) that were not properly disclosed, and that it will consult on which, if any, non-discretionary commission arrangements should be included.

The FCA's current estimate is that the cost of any scheme is unlikely to be materially lower than £9bn, and while there are plausible scenarios where it is as high as £18bn, it considers the cost being somewhere in the middle is more likely. It should be noted these estimates are only about one-third to one-quarter of the estimates being mentioned prior to the judgment in certain parts of the press. A key element of the FCA announcement is that it expects the scheme to be manageable for the motor finance industry and that it will be focussed on preserving a healthy market for motor finance going forward.

The FCA has stressed that there is no need for consumers to use law firms or claims management companies to access such remediation programme (and will consult on whether it should be "opt-in" or "opt-out"). It has also suggested that as a base case such remediation programme could look back as far as 2007 (to match the Financial Ombudsman scheme) and also estimates that most consumers will probably receive less than £950 in compensation per agreement.

The FCA intends to publish the consultation by early October 2025 and thereafter finalise the scheme so that customers can start receiving compensation in 2026.

The FCA now has a complex task of considering whether it can place parameters around what constitutes unfairness in a manner that can be applied systematically by the motor finance industry. While under s.140A of the CCA unfairness is considered on a case-by-case basis on the facts (for example, some of the factors in the Johnson assessment of unfairness included representations made by the dealer to Mr Johnson), a workable remediation scheme would need to have straightforward-to-apply tests to determine eligibility to be practicable which by its very nature will prohibit consideration of all relevant factors in the same manner that they would in a s.140A claim before a court. The consultation will naturally focus on this and we expect significant input from industry on any proposed "proxies" for unfairness as part of the scheme's design. In this regard, it should be noted that in the Johnson case the commission paid to the dealer was significant (approximately 55% of the cost of credit) and any proxy for unfairness set at a high level (as in the Johnson case) would result in only some relationships being assessed by way of proxy as unfair.

Away from the consultation on the remediation programme, naturally there has been a lot of speculation about what this means for the claims management companies that were behind a significant number of the claims that resulted from the Court of Appeal judgment. As mentioned above, the FCA has stressed that any remediation programme on unfairness should not result in a consumer needing to use a law firm or a claims management company, however claims under s.140A of the CCA remain. Given a s.140A claim is based on the facts and circumstances we consider there will be difficulty for claims management companies to "industrialise" claims in a way that results in a viable commercial proposition for them, so this area may remain with

specialist law firms but industry observers will no doubt be seeking to observe trends in this area.

WHAT DOES THIS MEAN FOR COMMONLY SECURITISED ASSETS?

While all the linked cases appealed to the Court related to motor finance products, the wider consumer credit market has keenly awaited the Court's judgment in part to determine the potential implications for read-across to other consumer credit products. A number of the issues considered by the Court (e.g. whether a broker owes a fiduciary duty; what level of disclosure is required; is full disclosure necessary to avoid an unfair relationship) naturally apply to many types of consumer credit. In the following tables, we set out the current market practice and our expectations of the immediate impacts of the Court's judgment for motor finance and for other consumer credit products, including with a securitisation lens.

Motor finance

Current practice

- Brokers (car dealers or credit brokers) receive commissions which historically were mostly secret or semi-secret. Since the Court of Appeal judgment in *Wrench, Johnson and Hopcraft*, these have been fully disclosed and, in many cases, customers have been required specifically to acknowledge the presence of a commission.
- Under the FCA Consumer Credit sourcebook (CONC rules), credit brokers must disclose commissions (amount upon request).
- Under the FCA Consumer Duty, firms must act to deliver good outcomes for retail customers.

Impact of the Supreme Court's decision

- The Court judgment has removed the risk of liability for car dealers (or credit brokers) and their motor finance lenders for breach of fiduciary duty (and as a result, the tort of bribery) for both pre- and post-Court of Appeal motor finance arrangements, but the risk to motor finance lenders of unfair relationships under s.140A of the CCA, while already existing, has been highlighted and remains.
- The Court provided helpful guidance on the factors that trigger an unfair relationship under s.140A in the context of motor finance noting, specifically, that the presence of a secret or semi-secret commission was not determinative of unfairness.
- We expect the new higher level of disclosure of commissions to continue, particularly given the Court's comments about lack of disclosure being one of the factors that can lead to a consumer relationship being characterised as unfair and the FCA's positive observation about the new practice since the Court of Appeal judgment (which may be encapsulated by the FCA in rule changes in the future). However, we expect motor finance lenders will want to review their processes in light of the factors raised by the Court to ensure that they

are comfortable that the relationships they have with consumers are clearly stated not to be fiduciary and can be benchmarked as not including the types of factors that were highlighted by the Court as causing fairness concerns.

- The industry will now need to wait for the FCA's consultation in October 2025 for more certainty on next steps and the scope of the redress scheme. It seems likely the redress scheme will cover, at a minimum, DCAs, but possibly wider unfairness in fixed commission scenarios as well.
- Whilst concerns around unenforceability or rescission as a result of secret or semi-secret commissions have fallen away (and therefore concerns around additional asset warranties in securitisations) the remediation programme is still on the horizon. Whilst remediation programmes typically sit outside of securitisation transactions and are a cost of the originator, the size of any scheme will still be in focus. The FCA has, however, already said that the scheme design will factor in the concern around having a healthy motor finance market going forward.

Other consumer credit, consumer loans and mortgage loans

Current practice

- Brokers (including credit brokers and other intermediaries such as aggregator websites) receive commissions.
- Under the FCA CONC rules, credit brokers must disclose commissions (amount upon request).
- Under the FCA MCOB rules, mortgage brokers must disclose commissions and their amounts.
- Under the FCA Consumer Duty, firms must act to deliver good outcomes for retail customers.

Impact of the Supreme Court's decision

- The Court judgment has removed the risk of liability in the tort of bribery or for breach of fiduciary duty, but the (existing) risk of unfair relationships under s.140A of the CCA remains.
- Given an unfair relationship under s.140A is determined on the facts and circumstances, the extent to which the factors drawn out by the decision of the Court (the size of the commission relative to the charge for credit; the nature of the commission (discretionary or otherwise); the characteristics of the consumer; the extent and manner of the disclosure; and compliance with regulatory rules) also apply to other consumer credit products will vary depending on the nature of the product and the relationship between the consumer and the intermediary/broker. For example, with an aggregator website there is not the same level of risk of the intermediary, on the facts, representing matters to an individual consumer that contribute to unfairness.
- We expect lenders of other consumer credit products will want to review their processes in light of the factors raised by the Court to ensure that

they are comfortable that the relationships they have with consumers are clearly stated not to be fiduciary and can be benchmarked as not including the types of factors that were highlighted by the Court as causing fairness concerns. In particular, disclosure practices around commissions, and the relative amount of commissions by comparison to the amount and cost of credit, are likely to be reviewed.

WHAT DOES THIS MEAN FOR SECURITISATION TRANSACTIONS?

The immediate benefit for the securitisation markets is that there is now a great deal more certainty as to the impact of the *Wrench, Johnson and Hopcraft* cases, albeit the shape of the FCA's redress scheme is still to come. Market participants should be able to take comfort that the issues raised by the Court more broadly (whether brokers owe customers a fiduciary duty; whether non-disclosed commissions are always unfair) are largely resolved, and many may take the view that the risk position has returned to how it was prior to the Court of Appeal judgment in October 2024. While the Court did uphold one case regarding unfairness under s.140A of the CCA, unfair relationships under s.140A themselves are an issue that has been present in the consumer credit market for nearly 20 years and market participants are generally familiar with the issues they present and the processes they require to mitigate against finding them. The Court's decision does not fundamentally change this consideration.

Further, while the FCA redress scheme continues to be on the horizon for the motor finance industry, firms at risk of redress claims will take comfort that, while the FCA has not closed off the question of broadening the scheme to non-DCAs, the potential scope is much narrower than the position feared after the Court of Appeal judgment. Our expectation is that, as typically the case with redress, any residual issues relating to unfair relationships under the CCA and commission arrangements (particularly DCAs) will, for the majority of securitisations, be resolved outside of the transaction structure. This would generally occur through direct redress arrangements between firms and their customers (where required), rather than resulting in dilutions flowing through transactions, but this of course will need to be analysed on a case-by-case basis.

For auto loan/lease securitisations, we consider that there are broadly four categories of transactions where the impact of the Court's judgment will be observed:

- **Existing securitisations involving assets with DCAs** – This category will mostly be applicable to securitisations created before the ban on DCAs at the start of 2021. The FCA's recent announcement clarifies that DCAs that were not disclosed will be within scope of the proposed redress scheme. As such, the impact for securitisations involving assets with DCAs will be:
  - whether an increased focus on s.140A unfairness will see an uptick in claims in respect of agreements outside the scope of the remediation programme (although a remediation payment does not close off a s.140A challenge, it must make it less likely to occur) which could result in asset losses (including any consequential set-off risks in respect of

securitised assets) to the extent not covered by warranties or indemnities; and

- whether the originator (particularly in the context of an originator-serviced transaction) can withstand the financial impact of the redress scheme.

- **Existing securitisations involving assets with non-DCAs and secret or semi-secret commissions** – This category will be applicable to existing securitisations of assets created after January 2021, when DCAs were banned, but before the *Wrench, Johnson and Hopcraft* cases at the Court of Appeal focussed the market's attention on disclosure of non-DCAs in the context of motor finance products. For this category, the impact is expected to be less pronounced, but market participants should pay close attention to the FCA's consultation process to determine whether there is an increase in the number of securitised assets which are subject to s.140A claims (plus any consequential set-off risks in respect of the securitised assets) and the impact of the remediation costs on the originator.
- **Future securitisations involving assets with non-DCAs and secret or semi-secret commissions** – This category will be applicable to future securitisations of assets created after January 2021 when DCAs were banned, but before the *Wrench, Johnson and Hopcraft* cases at the Court of Appeal focussed the market's attention on disclosure of non-DCAs in the context of motor finance products. After the Court of Appeal judgment in *Wrench, Johnson and Hopcraft*, it became difficult to securitise such assets because of the Court of Appeal's reasoning and the presence of secret or semi-secret commissions. For this category, we would expect that they can now be securitised, albeit with the same watchful eye to the prevalence of s.140A claims and the impact of the remediation costs on the originator, as set out above.
- **Future securitisations involving assets with non-DCAs and fuller disclosure/explicit consent** – This category will mostly be applicable to securitisations of recently originated assets, particularly where lenders took steps to amend their processes following the Court of Appeal decisions in *Wrench, Johnson and Hopcraft*. For this category, we expect the market should return broadly to the position prior to the Court of Appeal judgment, on the basis that the risks of unfair relationships under s.140A is not a new one, and the factors presented in the Court's judgment only clarify a number of elements which the market was broadly aware of already as being relevant to determining whether a relationship is unfair. In that regard, we would expect the following:
  - Some market participants faced pressure to include asset warranties in their transactions to address potential risks around commission arrangements in the event of a less broker/lender-friendly outcome in the Supreme Court. We expect the market to be comfortable that those changes can largely be reversed.
  - Some market participants included extensive descriptions of the *Wrench, Johnson and Hopcraft* cases and its potential impact on the securitised assets in disclosure documentation, and we expect the market to be comfortable that this can be phased out.
  - We expect, as above, there to be some focus on the ability of originators to withstand the cost of any redress scheme and any consequential set-off risks in respect of securitised assets.

WHAT NEXT?

Following the Supreme Court's ruling, several further developments are expected:

- As noted above, the FCA intends to launch its redress scheme consultation in October 2025.
- The Court of Appeal is expected to deliver its judgment in *Clydesdale Financial Services Limited (T/A Barclays Partner Finance) v. FOS*, a judicial review of the FOS's decision in case DRN-4326581. That decision, which was delayed pending the Supreme Court's ruling, concerns the use of DCAs and whether such arrangements breached the FCA's consumer credit rules, particularly CONC 4.5.3R. The outcome could have significant implications for the FCA's approach to redress and future enforcement in relation to DCAs.

CONCLUSION

The Supreme Court's decision has helpfully clarified the legal framework governing fiduciary duties and secret and half-secret commissions. In response, market participants should consider assessing their current practices relating to non-fiduciary relationships, broker commissions, disclosures, and consumer fairness, particularly with reference to the factors raised by the Court. The motor finance industry should also keep a close eye on FCA communications as we approach the redress scheme consultation in October 2025. But, overall, we consider the Court's judgment to be positive for brokers and lenders, and we expect it to lead to a reduction in the uncertainties impacting the auto securitisation market, as well as reducing concern around the potential for other consumer credit products to be brought into scope of potential liability.

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