

By email only: registry@supremecourt.uk

2 December 2024

Registry of the Supreme Court
Supreme Court
Parliament Square
London
SW1P 3BD

Dear Registrar,

Hopcraft, Wrench & Johnson - [2024] EWCA Civ 1282
Court of Appeal Case Nos. CA-2024-000353, CA-2024-000482 and CA-2023-001453
Case references: UKSC 2024/0157, UKSC 2024/0158 & UKSC 2024/0159

Re: Applications for Permission to Appeal to the Supreme Court and Proposed Appellants' Request for Expedition

1. The Financial Conduct Authority (the "FCA") has responsibility under the Financial Services and Markets Act 2000 (as amended) for matters including the regulation of consumer credit business. Such business includes motor finance.
2. The FCA is writing in connection with the applications made by FirstRand Bank and Close Brothers (the "Proposed Appellants") seeking permission to appeal in the above matter ("Applications"). The Applications were issued and received by the FCA on 22 November 2024. The Proposed Appellants have sought expedition of the permission decision. The FCA supports the application for expedition and asks that, in the event that the Court grants the Applications, the Court determines the substantive appeal as soon as possible to assist in securing legal certainty for the market.
3. The FCA is writing to provide some additional context and information. It is hoped that this might assist the Court in determining (at least) the next procedural steps in these proceedings.

Introduction

4. As part of regulating the conduct of motor finance business, the FCA supervises and enforces compliance with the regulatory provisions contained in the 'FCA Handbook'. It also supervises and enforces relevant aspects of the Consumer Credit Act 1974.
5. The Applications raise a number of important points of law in relation to the law of bribery and fiduciary duties that are likely to be of great significance for the motor finance sector. They impact upon both potential backward-looking liabilities to pay compensation to consumers, as well as

forward-looking adjustments to business models. There may also be wider implications for other financial services markets regulated by the FCA that involve intermediary arrangements.

6. As the Proposed Appellants have noted in their Applications, there are thousands of pending County Court proceedings¹ and complaints before the Financial Ombudsman Service² (the "FOS") which all concern motor finance commissions. In the FCA's view, it is highly desirable for these matters to proceed on the correct interpretation of the legal principles and to avoid inconsistent outcomes.
7. In line with its statutory objectives, the FCA may seek permission to intervene in any appeal if permission is granted with a view to assisting the Court, for instance, with respect to the regulatory framework.

The motor finance market

8. Motor finance is an important consumer credit market. According to the Finance and Leasing Association ("FLA"), in the 12 months to September 2024, consumers used regulated motor finance to purchase 625,000 new cars, borrowing £17.4bn, and 1.4m used cars, borrowing £21.3bn.³ Motor finance is a key component of the wider motor industry in the UK, with around 80% of new car purchases and a substantial minority of used car sales being funded through finance. The FCA estimates that almost 99% of 31.7m motor finance agreements entered into since 2007 entailed a commission payment to a broker.

Impact of the judgment on the market

9. Accounting standards generally require firms to recognise provisions for liabilities of uncertain timing or amount and recognise contingent liabilities for possible obligations. Some firms have already made a significant provision for the potential costs in relation to motor finance commissions. Following the judgment, some analysts have pointed to the higher uncertainty and downside risk for affected firms and have increased their forecasts for the likely size of compensation that firms could face as well as the impact on new business.
10. We also note that there has been a material impact on some firms' share price since the date of the judgment.

Consumer complaints about motor finance commissions and FCA work

11. The Applications refer to the FCA's rules and to its current work in this area.⁴ The FCA has to date focused on the use of certain types of discretionary commission arrangements ("DCAs") between motor finance lenders and brokers.⁵ DCAs were banned by the FCA in January 2021 in the motor

¹ Close Brothers Application [59(2)], [60]; FirstRand Application [35]-[36], [63], [78].

² Close Brothers Application [60]; Application FirstRand [39.1]; see also the Financial Ombudsman's webpage in respect of car finance commission complaints available online: <https://www.financial-ombudsman.org.uk/news/update-car-finance-commission-complaints>.

³ FCA Consultation Paper CP 24/22, November 2024 Annex 2, [7].

⁴ Close Brothers Application [10], [44], [61], [66]; FirstRand Application [20]-[21], [34], [39.2].

⁵ DCAs are a discrete sub-set of motor finance commission arrangements which (i) link the broker's commission to the interest rate under the credit agreement (so that a higher interest rate results in higher commission); and (ii) give the broker discretion to set or adjust that interest rate.

finance context.⁶ At the same time, the FCA amended the rules in the FCA Handbook to clarify the requirements as to disclosure of commission by credit brokers generally.⁷

12. In January 2024, the FCA launched a review of the historical use of DCAs.⁸ This review seeks to understand whether there were widespread failures to comply with the regulatory framework in relation to DCAs over the period April 2007 to January 2021 that resulted in harm. If so, the FCA has said it will consider the exercise of its redress powers to provide compensation in an orderly, consistent and efficient way that most appropriately balances the FCA's statutory objectives.⁹
13. There is a significant and growing volume of motor finance commission complaints. As at the beginning of December 2023, there were approximately 10,000 motor finance commission complaints referred to the FOS (of which over 90% were referred since the start of 2022).¹⁰ In the period January to March 2024, the major banks and non-bank lenders representing 82% of the consumer motor finance market had received around 335,000 DCA complaints. Between the end of January and the end of February 2024 (i.e. a one month period), complaints volumes increased more than fivefold.¹¹
14. To ensure a consistent approach to handling complaints in respect of DCAs, the FCA has extended the time that motor finance firms have to respond substantively to DCA complaints while the FCA's review continues.¹² Following the judgment, in the anticipation of a significant increase in volumes of complaints about motor finance agreements where the commission arrangements involved were not DCAs, the FCA has consulted on broadening that extension to cover complaints relating to any type of commission arrangement.¹³ The FCA has estimated that there could be over 470,000 motor finance non-DCA commission complaints made by the end of January 2025 following the judgment.¹⁴
15. The issues raised in the Applications are likely to be material in considering the merits and appropriate remedies in a significant number of these pending complaints. Prompt resolution of

⁶ FCA Policy Statement, PS 20/8, July 2020, available online: <https://www.fca.org.uk/publication/policy/ps20-8.pdf>.

⁷ PS 20/8, Chapter 3. The FCA is also an interested party in current High Court proceedings concerning *inter alia* the meaning of these rules (Claim No. AC-2024-LON-001124: *Clydesdale Bank v Financial Ombudsman Service and the FCA* (heard in October 2024 by Mr Justice Kerr)). Judgment is pending.

⁸ 'FCA to undertake work in the motor finance market', Press Release dated 11 January 2024, available online: <https://www.fca.org.uk/news/statements/fca-undertake-work-motor-finance-market>.

⁹ For example, under s. 404 of the Financial Services and Markets Act 2000. The FCA has a strategic objective of ensuring that relevant markets function well. The FCA also has three operational objectives (1) securing an appropriate degree of protection for consumers (2) protecting and enhancing the integrity of the UK financial system (3) promoting effective competition in the interests of consumers. The FCA has a secondary objective of facilitating the international competitiveness of the UK economy (including in particular the financial services sector) and its growth in the medium to long term.

¹⁰ FCA Policy Statement, PS 24/1, January 2024 [1.13], available online: <https://www.fca.org.uk/publication/policy/ps24-1.pdf>.

¹¹ CP 24/22, [3.5].

¹² PS 24/1, and Policy Statement PS 24/11, September 2024, available online: <https://www.fca.org.uk/publication/policy/ps24-11.pdf>.

¹³ 'FCA proposes to extend the time firms have to handle complaints relating to motor finance commission', Press Release dated 21 November 2024, available online: <https://www.fca.org.uk/news/press-releases/fca-proposes-extend-time-firms-handle-complaints-motor-finance-commission>. The FCA is consulting on two options for extending the time firms will have to provide final responses to motor finance complaints where there were commission arrangements that did not include a DCA. Option 1 is an extension until 4 December 2025 to align with the complaints handling rules for motor finance DCA complaints. Option 2 is a shorter extension until 31 May 2025.

¹⁴ CP 24/22, Annex 2, [32].

these issues would also assist the FCA's consideration of what regulatory intervention (if any) may be appropriate in this area. This is because the relief that would be available in court proceedings where there is a common law, equitable or statutory basis of liability is a consideration to which the FCA would need to have regard when considering the exercise of its redress powers.

Conclusion

16. For the reasons set out above, the FCA supports the Proposed Appellants' application for expedition in respect of the permission to appeal decision so that the legal uncertainty in this area can be resolved as soon as possible for the benefit of consumers, firms and the operation of the market as a whole. In the event that the Applications are granted, the FCA also requests that the Court determines the substantive appeal as soon as possible. This will help to ensure certainty and stability in the market and enable the FCA to pursue with all possible speed its work in this sector in respect of historical commission arrangements. A definitive pronouncement on the issues raised in the Application will also provide invaluable guidance in respect of the hundreds of thousands of consumer claims and complaints that are currently pending.
17. If the FCA can be of any further assistance to the Court, please do not hesitate to contact its legal representatives at the address above.

Yours faithfully,

Stephen Braviner Roman
General Counsel and Chief Risk Officer