IN THE SUPREME COURT
ON APPEAL FROM THE COURT OF APPEAL
CIVIL DIVISION (ENGLAND & WALES)
[2024] EWCA Civ 1282

UKSC 2024/0157
UKSC 2024/0158
UKSC 2024/0159

BETWEEN:

CLOSE BROTHERS LIMITED

Appellant

-and-

(1) AMY LOUISE HOPCRAFT
(2) CARL HOPCRAFT

Respondents

-and-

THE FINANCIAL CONDUCT AUTHORITY
NATIONAL FRANCHISED DEALERS ASSOCIATION

Interveners

AND BETWEEN:

FIRSTRAND BANK LIMITED (LONDON BRANCH)
T/A MOTONOVO FINANCE

Appellant

-and-

MARCUS GERVASE JOHNSON

Respondent

-and-

THE FINANCIAL CONDUCT AUTHORITY
NATIONAL FRANCHISED DEALERS ASSOCIATION

Interveners

AND BETWEEN:

FIRSTRAND BANK LIMITED (LONDON BRANCH)
T/A MOTONOVO FINANCE

Appellant

-and-

ANDREW WRENCH

Respondent

-and-

THE FINANCIAL CONDUCT AUTHORITY
NATIONAL FRANCHISED DEALERS ASSOCIATION

Interveners

WRITTEN SUBMISSIONS OF THE FCA

A. INTRODUCTION AND SUMMARY

1. The Financial Conduct Authority (the "**FCA**") is a body corporate that has statutory functions and powers for regulating the financial services industry under the Financial Services and Markets Act 2000 ("**FSMA**"). The FCA has three primary operational objectives: (i) to secure an appropriate degree of protection for consumers; (ii) to protect and enhance the integrity of the financial system; and (iii) to promote effective competition in the interests of consumers.[1]

2. The FCA has specific rule-making and supervisory functions in respect of the consumer credit activities that are the subject of these appeals. As set out in its application to intervene, the FCA has extended the time for firms to provide a final response to consumer complaints in respect of motor finance commissions until after 4 December 2025,[2] and it continues to investigate the nature and prevalence of historical rule breaches across the market.[3]

3. The FCA's submissions are made from an independent and non-partisan perspective, with a view to assisting the Court in its understanding of the legal landscape relevant to these appeals. The decision of the Court will inform any steps taken by the FCA across the market, which is estimated to be worth approximately £40 billion per annum.[4] It will also inform the resolution of thousands of claims issued in the County Court and the hundreds of thousands of extant complaints to firms and the Financial Ombudsman Service (the "**FOS**").

4. These appeals present an opportunity for the Supreme Court to provide authoritative guidance in respect of the tort of bribery, the law on secret commissions, and s. 140A of the Consumer Credit Act 1974 ("**CCA**"). The submissions below principally address the relevance of the statutory and regulatory framework, on which the FCA has expertise. It is suggested that, given the market-wide significance of these issues, taking a broad view of the relevant law will ensure that principles derived from different sources of law develop in coherence with each other.[5]

5. For the reasons set out below, the FCA's position on the appropriate exposition of the legal and equitable principles falls between that of the Appellants and the Respondents. The sweeping approach of the Court of Appeal in (effectively) treating motor dealer brokers as owing fiduciary

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1 Sections 1B(3), read with ss. 1C, 1D, and 1E of FSMA. Subject to these duties, the FCA also has a secondary objective of facilitating economic growth: ss. 1(B)(4A) and 1EB.

2 Policy Statement PS24/18 (for non-discretionary commission arrangements); Policy Statement PS24/11 (for discretionary commission arrangements). For ease of reference, these written submissions include the points which the FCA hopes will assist the Court, some of which were also contained in the FCA's Rule 26 Submissions.

3 In January 2024, the FCA commissioned a report from a skilled person under s. 166 of FSMA to review historical motor finance discretionary commission arrangements and sales across several firms. The findings of that report, delivered in August 2024, will inform the FCA's assessment of historical rule breaches and potential next steps (if any), such as exercising powers under s. 404 of FSMA to implement a consumer redress scheme.

4 This estimate is for 2024. According to the Finance & Leasing Association, 627,257 new cars and 1,438,805 used cars were bought on finance at the point of sale by consumers in the year ending December 2024.

5 The Court of Appeal indicated that the area is ripe for reconsideration from first principles (Judgment §176).

duties to consumers in the generality of cases goes too far. But it is respectfully suggested that the Court should exercise a degree of caution before accepting the Appellants' invitation to jettison the tort of bribery or the 'disinterested' duty, as that may leave a lacuna in the law and lead to the distortion of established principles.

6. The submissions below address the regulatory framework in **Section B** before turning to the legal and equitable principles in **Section C** and the CCA in **Section D**.

B. REGULATORY FRAMEWORK

B.1. Introduction

7. The issues before the Court principally concern legal and equitable remedies in respect of bribes and secret commissions. Nonetheless, in resolving those issues, it is submitted that the Court ought to have regard to the parallel regulatory framework.

8. As indicated in the FCA's Rule 26 Submissions, the interaction between public and private law is nuanced. The following principles are relevant:

   (1) The mere existence of a legislative or regulatory regime does not constrain the development of independent judge-made law in the same field.[6] Indeed, the common law is the "great safety net which lies behind all statute law", which the courts should develop incrementally in the interests of society as a whole.[7]

   (2) In some cases, however, a court may decline to enter into a particular regulated field as a matter of institutional competence[8] or where doing so would be inconsistent with Parliamentary intent[9] or even subordinate legislation such as the provisions in the FCA Handbook.[10]

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[6] Burrows, "The Relationship Between Common Law and Statute in the Law of Obligations" (2012) 128 LQR 232, 246 ("the starting point is that the common law should be developed as the courts think appropriate. It should only be if a statute clearly makes a common law development inappropriate—because it would be inconsistent with the statute—that one should interpret it as holding back that development"). Recent illustrations in this Court include *United Utilities Water v Manchester Ship Canal* [2024] 3 WLR 364, §14 and *Fearn v Tate Gallery* [2024] AC 1, §110.

[7] *In Re F* [1990] 2 AC 1, 13 (CA). As regards the gap-filling function, see further the notion that courts develop the law "interstitially": *Singularis Holdings Ltd v PricewaterhouseCoopers* [2015] AC 1675, §66; Bingham, "The Judge as Lawmaker: An English Perspective" in *The Business of Judging: Selected Essays and Speeches* (OUP, 2000), 3, 9.

[8] It is respectfully suggested that this is the underlying rationale of *Philipp v Barclays Bank UK Plc* [2024] AC 346, §§22–24 on which the Appellants rely at CBL Case §101 and FR Case §18. Similarly, the Law Commission's view was that "a court should give some recognition to the public law nature of the rules and the expertise of the regulatory bodies to whom Parliament has entrusted the achievement of the statutory purposes": *Fiduciary Duties and Regulatory Duties Consultation Paper* (Law Com No 124, 1992) §5.5.3 (emphasis added).

[9] See Burrows, fn 6, above; *In Re McKerr* [2004] 1 WLR 807, §32 (Lord Nicholls); *Johnson v Unisys* [2003] 1 AC 518, §57 (Lord Hoffmann). Thus, a common law duty of care "has to slot in alongside, and be coherent with, any relevant statutory regime in the field of its application": Sales, "Exploring the Interface Between the Common Law of Tort and Statute Law" (2024) 1 JIPL 3, 5. The position may be *a fortiori* in equity given that "equity follows the law": Heydon, "Equity and Statute" in Turner (ed), *Equity and Administration* (CUP, 2016) 211, 227.

[10] The FCA Handbook is the name given to the compilation of FCA Rules, Principles, Guidance, and other provisions made under FSMA. By way of illustration, in *Green v RBS* [2013] EWCA Civ 1197, the Court of Appeal declined to expand the law of negligent misstatement to cover, concurrently, a specific duty contained in the FCA Handbook

(3) Finally, a court may incorporate into the law of obligations some aspects of the regulatory framework, for example to analyse the content of a common law duty (e.g. the standard of care).[11] In some cases, this can be described as the legislative framework exerting a "gravitational pull" on the common law.[12]

9. In these appeals, there is a detailed regulatory scheme, in part introduced by Parliament (the CCA) and in part introduced by the regulator established by Parliament (the FCA)[13] intended to govern the conduct of the relevant parties, including motor dealer brokers, in a consumer credit transaction. Applying the principles summarised above, while the regulatory framework does not discourage or restrain the Court from imposing legal or equitable duties on motor dealer brokers, it should be taken into account when determining the content and incidence of private law duties.

10. The Court of Appeal's judgment ("**Judgment**") recognised obligations on motor dealer brokers, the content and characterisation of which differs from the regulatory scheme in material respects. This includes the following (by way of introduction).

11. **First**, the FCA Handbook imposes general duties on regulated consumer credit firms, including motor dealer brokers, to treat customers fairly, communicate clearly, and manage conflicts of interest (Principles 6, 7, and 8).[14] But, in doing so, the FCA Handbook does not presume that regulated firms are always performing an advisory function or owe fiduciary duties.[15]

12. **Second**, the FCA Handbook, in particular the Consumer Credit Sourcebook ("**CONC**") contains a specific rule requiring the broker to disclose the nature and existence of a commission if it could: (1) affect the broker's impartiality; or (2) have a material impact on the consumer's transactional decision (CONC 4.5.3R). There is, however, no mandatory disclosure of the amount in all cases

actionable under s. 138D of FSMA: §23. This principle was then applied in *Kerrigan v Elevate Credit* [2020] EWHC 2169 (Comm) §§173, 182 where the High Court declined to recognise a duty to take care not to inflict psychiatric harm in the context of consumer credit rules in the FCA Handbook, and considered that the FCA was better placed than the court to balance competing public interests and determine the development of the law in that area.

11 *Green v RBS* [2013] EWCA Civ 1197, §18 ("In determining the extent of this duty, it is useful to start with the requirements of the relevant regulatory regime … the skill and care to be expected of a reasonably competent financial advisor ordinarily includes compliance with the relevant regulatory rules").

12 This is a label that has been used to describe Lord Diplock's view in *Evan Warnink BV v J Townend and Sons* [1979] AC 731, 743, that where "there can be discerned a steady trend in legislation which reflects the views of successive Parliaments as to what the public interest demands in a particular field of law, development of the common law in that part of the same field which has been left to it ought to proceed upon a parallel rather than a diverging course". See Heydon, above fn 9, 234.

13 From 2014, and as explained further below, the FCA acquired the relevant regulatory responsibilities from the then Office of Fair Trading ("**OFT**").

14 As discussed further below, there is also a Consumer Duty (Principle 12), which came into force in July 2023, but did not apply at the time of the facts of these cases.

15 Although there are FCA Handbook rules that apply where a regulated firm chooses to provide advice, for example Principle 9 which provides that "A firm must take reasonable care to ensure the suitability of its advice … for any customer who is entitled to rely upon its judgment."

(cf. CONC 4.5.4R). The Judgment has the effect that disclosure of the nature, existence, and amount of the commission was required in all cases of motor finance within its scope.

13. **Third**, as far as lenders are concerned, both the FCA Handbook and the CCA impose on the lender independent free-standing duties to the consumer, and expect lenders to take some responsibility for the conduct of brokers. Thus, the FCA expects lenders to take reasonable steps to ensure that brokers acting on their behalf comply with CONC (CONC 1.2.2R). The CCA attributes to the lender the broker's acts and omissions under s. 56 through a statutory 'deemed agency' as part of the assessment as to whether the credit relationship is unfair under s. 140A. By contrast, the Judgment treats the lender as a primary wrongdoer under the tort of bribery and as an accessory to the broker's primary breach of fiduciary duty.

14. The FCA's view is that the regulatory framework—focused on transparency and fairness in arming the consumer with sufficient information to make an informed decision—is well-balanced and principled.[16] Of course, this Court is not prevented from taking a different course in setting the boundaries of what is required by common law and equity. However, understanding the balance struck by Parliament and the regulator will assist in calibrating any divergence, including so that the principles are readily discernible for future cases. The Court's ruling will also inform future changes to the FCA Handbook, which is kept under review and may be amended in the light of developments in the common law.

B.2. Consumer Credit Act 1974

15. The CCA provides a long-standing legislative framework for the regulation of consumer credit. It has the express object of advancing consumer protection by establishing a system for the regulation of traders involved in credit and hire transactions.[17]

<u>The Tripartite Arrangement</u>

16. In general in motor finance there is a tripartite arrangement between: (i) the consumer who borrows funds to buy the vehicle; (ii) the lender who puts forward the financing; and (iii) the motor dealer broker who (from the consumer's perspective) sells the car and acts as an intermediary

[16] Whether there has been *compliance* with those rules at the relevant time is a separate matter. The FCA has been taking steps in respect of market-wide compliance issues in the motor finance sector since its Review in 2017, leading to the outright ban of "discretionary" commission arrangements in January 2021. The trajectory of the FCA's work leading up to the ban is contained in public documents, principally: (i) "Our work on motor finance – update" (March 2018); (ii) "Our work on motor finance – final findings" (March 2019); (iii) Consultation Paper (CP19/28); and (iv) Policy Statement PS20/8. The ban was limited to discretionary commission arrangements, which are explained and addressed at fn 43 below. See further *R (Clydesdale) v FOS* [2024] EWHC 3237 (Admin) ("***Clydesdale***"), §§53–62.

[17] The CCA was introduced following the recommendations of the Crowther Report (*Consumer Credit: Report of the Crowther Committee* (Cmnd 4596, March 1971)) to replace piecemeal legislation such as the Hire-Purchase Act 1965. The FCA set out the relevant history in its Final Report on the Review of Retained Provisions in the Consumer Credit Act (March 2019) at §§2.10–2.26.

between the consumer and the lender. There is no uniform structure for these transactions, but it is commonplace for the motor dealer broker to sell the car to the lender, who in turn enters into an agreement in respect of that car with the consumer, typically a hire-purchase agreement[18] or a conditional sale agreement.

17. The motor dealer broker is usually not a party to the contract between the borrower and the lender.[19] Rather, the contract between the borrower and the lender is self-contained, including the lending terms as well as providing for the transfer of title to the goods. The commission arrangement, and the lender's oversight of the broker's interactions with the consumer, are set out in a separate agreement between the broker and lender.

18. From the consumer's perspective, they typically pay no fee to the broker for the finance arrangements, and the principal cost of the transaction will be the cost of credit. The broker provides the consumer with information about, for example, total credit, repayment amounts, and the Annual Percentage Rate. This may be contained in contractual documentation with the lender or in other non-contractual documentation, such as an Initial Disclosure Document, presented to the consumer. From the broker's perspective, they receive revenue from the sale of the vehicle and through commission received from lenders (as well as commission or fees from any other sales, such as associated insurance products).

Section 140A

19. The tripartite arrangements described above involve regulated consumer credit agreements[20] that finance a transaction between the debtor (the customer) and the creditor (the lender), and are therefore a form of "debtor-creditor-supplier"[21] agreement under s. 11(1)(a) and 12(a) of the CCA. These are a subset of "credit agreements" under the CCA.

20. Under the CCA, ss. 140A–140D provide for remedies in respect of "unfair relationships" arising out of credit agreements between creditors and debtors. The test under s. 140A(1) is whether the relationship between the creditor and the debtor arising out of the agreement "is unfair to the debtor". This Court has considered s. 140A on several recent occasions. As Lord Sumption explained in *Plevin*,[22] the unfair relationship provisions are "deliberately framed in wide terms" and

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18 Hire-purchase arrangements come in different forms, including the frequently used "personal contract purchase", which has lower monthly instalments and a larger balloon payment at the end of the term ("**PCP**").

19 See, e.g., the facts in *Clydesdale*, §3.

20 A consumer credit agreement is an agreement between an individual (the debtor) and any other person (the creditor) by which the creditor provides the debtor with credit of any amount: s. 8(1) of the CCA.

21 The FCA uses the term borrower-lender-supplier agreement as set out in Article 60L of RAO and replicated in the FCA Handbook Glossary, but nothing turns on the nomenclature.

22 *Plevin v Paragon Personal Finance Ltd* [2014] 1 WLR 4222 ("***Plevin***"), §§10, 29.

"undoubtedly intended to introduce a broad definition of unfairness". The same breadth is apparent in the remedial provisions.[23]

21. Under s. 140A(1)(c), the unfairness can arise because of "any other thing done (or not done) by or on behalf of the creditor", thus imputing to the lender the acts or omissions of third parties acting on the lender's behalf.[24] In conjunction with this, s. 56(1)(b) provides that the acts and omissions of a broker when conducting "antecedent negotiations" are attributable to the lender.[25] This is a "deemed" agency created by statute and it does not require or imply that there is any equivalent agency relationship at common law.[26] As such, contrary to the Appellants' submissions,[27] there is no inherent inconsistency between the operation of s. 56 and any fiduciary or 'disinterested' duty being owed by the broker to the consumer.

22. In *R (Clydesdale) v Financial Ombudsman Service*, discussed in detail below, the High Court confirmed that s. 56 has the effect that the acts and omissions of a motor dealer broker in failing adequately to disclose a commission will be attributable to the lender.[28]

B.3. Regulated Activities Order

23. Before 1 April 2014, the regulator responsible for consumer credit was the OFT under the CCA. The OFT had issued supplementary guidance, including the Irresponsible Lending Guidance dated March 2010 (updated in February 2011) ("**OFT ILG**") and the Credit Brokers and Intermediaries Guidance dated November 2011 ("**OFT CBG**").

24. The FCA assumed responsibilities over consumer credit in April 2014. This included the creation of new "regulated activities"[29] in place of the OFT's licensing regime.[30] At that time, the FCA also

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[23] The remedies available are listed in s. 140B and include repayment of sums or alteration of terms. The court is given "the broadest possible remedial discretion": *Smith v Royal Bank of Scotland* [2024] AC 955, §25.

[24] *Plevin*, §31 ("the Consumer Credit Act makes extensive use of the technique of imputing to the creditor for the acts or omissions of other parties who are not (or not necessarily) the creditor's agents").

[25] The Judgment at §145 records FR's concession that s 56 applied to deem the broker to be FR's agent in *Johnson*. The FCA considers that concession to have been rightly made, albeit on the wrong basis: the correct provision is subsection (1)(b) rather than (1)(c), per *Clydesdale*, §§318-321.

[26] Section 140A(1)(c) (read with s. 56) has the effect that any human action or inaction that produces unfairness is taken into account so long as it is by or on behalf of the creditor; where s. 56 applies, the legal liabilities of the lender and seller apart from s. 56 are largely irrelevant: *R (Shawbrook Bank) v FOS* [2023] EWHC 1069 (Admin), §§150–152, applying *Plevin*, §29.

[27] FR Case §§45–47; CBL Case §§82–84. In this regard, it may be noted that s. 56(3) is a provision which advances consumer protection by preventing circumvention of the deemed agency created by the statute; it does not dictate the common law analysis.

[28] *Clydesdale*, §§314–369, in particular §364. No appeal was brought on this point.

[29] Under s. 22 of FSMA and the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001.

[30] The transition was set out in a series of amendments to the CCA and FSMA, as set out in the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No. 2) Order 2013 and the Financial Services Act 2012 (Consumer Credit) Order 2013. This includes the addition of consumer credit activities as "regulated activities" under Chapters 6A and 14A of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001.

adopted aspects of the OFT's guidance into the FCA Handbook as explained below.[31] Under the current regime, the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 ("**RAO**") defines a number of credit-related regulated activities, including credit broking (Article 36A), entering into a regulated credit agreement as a lender (Article 60B), and entering into a regulated consumer hire agreement as owner (Article 60N).

25. As noted in Judgment §85, the definition of credit broking in Article 36A(1) includes "effecting an introduction" between a consumer and a lender who is the owner of the goods.[32] Within the RAO this terminology is confined to credit brokers, and the FCA submits it is clear that a firm may be carrying on the regulated activity of credit broking whether or not it is performing an advisory role.[33] For example, Article 36A would include a broker who acts as a "pure" intermediary to introduce the consumer and lender, and does not sell any product nor negotiate on behalf of either party.[34] Nonetheless, by providing credit broking services to consumers, motor dealer brokers come within the FCA's regulated perimeter and are subject to the FCA Handbook.

B.4. FCA Handbook

26. The FCA makes rules and guidance pursuant to a range of powers under FSMA, including ss. 137A, 137T, and 139A as set out in the FCA Handbook.[35]

<u>**Principles for Businesses**</u>

27. The Principles for Businesses sourcebook ("**PRIN**") sets out high-level standards of general application to regulated entities. It is well-established that the Principles apply independently of the more specific rules in the FCA Handbook. The Principles "create an overarching framework and are not constrained or diminished by a specific rule".[36]

28. The Principles apply equally to lenders and motor dealer brokers. They include the following, as set out in PRIN 2.1.1R:

    (1) A firm must pay due regard to the <u>interests of its customers</u> and treat them <u>fairly</u> (Principle 6).

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31 The FCA explained its approach at the time in Consultation Paper CP 13/7 §§2.4, 7.4, 7.38, 7.42; Consultation Paper CP13/10 §§5.2, 5.7–5.10 and Policy Statement PS14/3 §§4.5–4.32. The FCA Handbook provisions continue to cross-refer to historical OFT Guidance by way of "Note" (i.e. as "informative, but non-legislative material", as explained in the Reader's Guide to the FCA Handbook).

32 The Court of Appeal's reference to Article 36A(1)(b) appears to be in error: the correct provision is Article 36A(1)(a), because hire-purchase agreements and conditional sale agreements are regulated credit agreements, not regulated consumer hire agreements: see Article 60N of the RAO and s. 15 of the CCA. However, there is no material difference in the application of Article 36A(1)(a) and (b) for the purposes of this appeal.

33 See by contrast regulated activities such as "advising on investments" as provided for in Chapter XII of the RAO.

34 Per the distinction made in the Judgment at §98.

35 If a provision of the FCA Handbook is denoted with the suffix "G" it is guidance, whereas if the provision is denoted with "R" it is a rule. See the Reader's Guide to the FCA Handbook, Chapter 5 ("Status of Provisions").

36 *R (Options UK) v FOS* [2024] EWCA Civ 541, §74 (Asplin LJ).

(2) A firm must pay due regard to the information needs of its clients and communicate information to them in a way which is clear, fair, and not misleading (Principle 7).

(3) A firm must manage conflicts of interest fairly, including as between itself and its customers (Principle 8).

29. Since 31 July 2023, firms have been subject to the new "Consumer Duty" (Principle 12) which provides that a firm must act to deliver good outcomes for retail customers. To the extent that Principle 12 applies, Principles 6 and 7 do not apply: PRIN 2A.1.3G.

30. In light of these Principles, it is clear that regulated firms are not (and ought not to be) dealing with retail consumers as equal commercial counterparties. They must have regard to consumer needs, communicate clearly and fairly, and manage the risk of conflicts of interest. For the avoidance of doubt, the FCA does not consider that the above duties, in and of themselves, give rise to fiduciary duties.[37] However, the Principles and other FCA provisions are made against the backdrop of the common law,[38] so there may well be concurrent duties arising thereunder.[39]

Consumer Credit Sourcebook

31. The detailed rules applicable to consumer credit-related regulated activities are set out in CONC. The CONC rules and guidance in force at the relevant time[40] are briefly outlined below.

32. Chapter 1 sets out the application and purpose of this part of the FCA Handbook, including that a firm must: (a) ensure that its agents comply with CONC; and (b) take reasonable steps to ensure that "other persons acting on its behalf" comply with CONC (CONC 1.2.2R).[41]

33. Chapter 2 sets out general principles for consumer credit related activities. These include provisions requiring brokers to explain the key features of a regulated credit agreement to enable customers to make "informed choices", avoid making "unsuitable" recommendations, and advise the customer to read the terms of the credit agreement (CONC 2.5.3R).

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37 PRIN 2A.1.11G ("Principle 12 does not change the nature of a firm's relationship with any given retail customer. In particular, it does not create a fiduciary relationship where one would not otherwise exist …") and PRIN 2A.2.4G. This is part of the context for the observations made by the FCA's Chief Executive during a conference call with market analysts on 13 November 2024, on which CBL and FR have sought to place undue weight: CBL Case fn 87, FR Case §105.3 and fn 1.

38 For instance, in respect of insurance brokers, which are regulated entirely separately, the FCA's guidance is that the specific commission disclosure rules for commercial customers (ICOBS 4.4.1R) are additional to the general law on the fiduciary obligations of an agent (ICOBS 4.4.3G).

39 Similarly, the OFT ILG had noted at §4.19 that "where brokers and intermediaries are acting, in whole or part, as agents of the borrower, they should be aware of the implications of this including under the common law."

40 The rule changes introduced on 28 January 2021 are discussed in detail further below.

41 The same approach was adopted by the OFT. The OFT ILG stated that creditors should take appropriate responsibility for acts or omissions of brokers and other intermediaries or agents involved in the lending process.

34. Chapter 3 contains rules as to the content and nature of communications to consumers for the purposes of fairness and transparency. CONC 3.3.1R provides that a firm must ensure that a communication is (among other things) "clear, fair and not misleading", "balanced", and "does not disguise, omit, diminish or obscure important information". CONC 3.7.4G is a specific provision about communications by brokers. It provides that a firm should: (1) make clear the nature of the service it provides; (2) indicate in a prominent way any "financial arrangements" that might impact upon the firm's impartiality in promoting a product; (3) only describe itself as "independent" if it is able to provide access to a representative range of credit products; and (4) ensure that any disclosures about its independence are "prominent, clear and easily comprehensible".

35. Chapter 4 contains pre-contractual requirements, including disclosures as to commissions:

> "**CONC 4 – Pre-contractual requirements** …
>
> **CONC 4.5 – Commissions** …
>
> **CONC 4.5.3R – Commissions: credit brokers**
>
> A credit broker must disclose to a customer in good time before a credit agreement or a consumer hire agreement is entered into, the existence of any commission or fee or other remuneration payable to the credit broker by the lender or owner or a third party in relation to a credit agreement or a consumer hire agreement, where knowledge of the existence or amount of the commission could actually or potentially:
>
> (1) affect the impartiality of the credit broker in recommending a particular product; or
>
> (2) have a material impact on the customer's transactional decision.
>
> [Note: paragraph 3.7i (box) and 3.7j of CBG and 5.5 (box) of ILG]
>
> **CONC 4.5.4R**
>
> At the request of the customer, a credit broker must disclose to the customer, in good time before a regulated credit agreement or a regulated consumer hire agreement is entered into, the amount (or if the precise amount is not known, the likely amount) of any commission or fee or other remuneration payable to the credit broker by the lender ...
>
> [Note: paragraph 3.7i (box) of CBG]"

36. The above extracts are the rules in force before 28 January 2021, at which time the FCA made amendments to CONC 3.7.4G and CONC 4.5.3R including so that the disclosure is as to the "existence and nature" of the commission (not solely as to its "existence").[42] The FCA was concerned about potentially high levels of non-compliance with its rules at the time and the amendments were intended to be clarifications rather than changes in substance.[43]

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[42] Annex B to Policy Statement PS20/8.

[43] The Court considered this in detail in *Clydesdale*, §§53–62, addressing Policy Statement PS20/8, July 2020, proposing the rule changes which then came into effect on 28 January 2021. In particular, on 28 January 2021, the FCA imposed an outright ban on "discretionary" commission arrangements which: (i) link the broker's commission to the interest rate under the credit agreement; and (ii) give the broker discretion to set or adjust that interest rate (see CONC 4.5.6R). That is the type of arrangement which appears to have been in place in at least the *Wrench* case. It also appears that the broker in the *Johnson* case had the option to utilise a discretionary commission arrangement but opted to set the minimum rate and so to receive only the fixed element of the commission: see FR Case §67.

Interpretation of CONC 4.5.3R

37. The above provisions were considered in detail by Mr Justice Kerr in *R (Clydesdale) v Financial Ombudsman Service* (“**Clydesdale**”).[44] This was an unsuccessful judicial review in respect of a decision of an Ombudsman (“**FOS Decision**”) upholding a “lead” motor finance complaint. The complaint concerned a discretionary commission paid by a lender to a motor dealer broker. In January 2024, the FOS upheld the complaint on numerous grounds,[45] including a breach of Principles 6, 7, and 8, various provisions of CONC, as well as an unfair relationship under s. 140A of the CCA, and awarded compensation.[46] However, the FOS rejected arguments relying on secret commissions and fiduciary duties. The decision preceded the Judgment.

38. The High Court upheld the FOS Decision in respect of the FCA Handbook provisions as well as in relation to the finding of an unfair relationship under s. 140A. Among other things, CONC 4.5.3R required disclosure of the discretionary commission arrangement in question (emphasis added):

> “189. Those provisions should be read together, adopting a holistic approach. …
>
> 193. … the argument that absent an express requirement to disclose their ‘nature’, CONC 4.5.3R could not require disclosure of more than the bare fact that a commission was payable, is unattractive because it treats CONC 4.5.3R in isolation, not in harmony with its neighbours (Principles 7 and 8, CONC 3.3.1R and CONC 3.7.4G(2)).
>
> 194. I have reached the conclusion that in the 2018 version of CONC 4.5.3R, using the word “existence” *simpliciter*, the wording of the rule was then already wide enough to require, in some cases, disclosure of more than the bare fact that commission, a fee or other remuneration would be, or could be, payable. ...”

39. Mr Justice Kerr granted permission to appeal on this point, albeit “without much enthusiasm”.[47]

40. The FCA submits that the proper approach recognises that CONC 4.5.3R seeks to arm the consumer with adequate knowledge to enable them to make an informed decision.[48] The precise content of the disclosure may vary depending on the factual circumstances and nature of the commission arrangement, but disclosure is likely to be insufficient where it: (i) is not clear, transparent, and prominent (for example, it is contained only in fine-print in lengthy terms and conditions and

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[44] [2024] EWHC 3237 (Admin).

[45] By way of context, the FOS is required to take into account the law in making its decisions, but its jurisdiction is to decide the complaint by reference to what is “fair and reasonable”: s. 228(2) of FSMA and DISP 3.6.1R and 3.6.4R (“DISP” being a reference to the FCA Dispute Resolution Handbook).

[46] *Clydesdale*, §83. The FOS Decision is also available online with the reference DRN-4326581.

[47] The Judge also recorded in his Order that “I find the merits of the proposed appeal weak”. His reasoning was (quite fairly) that if the Court of Appeal reasoned differently to him (even reaching the same result) then this would affect numerous other claims (so that there was “some other compelling reason” for permission to be granted). No appeal has been pursued by the Claimant in respect of Ground 3 (concerning s .56 of the CCA), which the Judge had indicated in his main judgment was weak: §369. A hearing is to be listed before the Court of Appeal later this year.

[48] The Court of Appeal noted that the rule was “premised on credit brokers having a duty to be impartial in the first place” (§96). For the avoidance of doubt, the reference to impartiality in the rules is not intended to connote an advisory role, but rather to arm the consumer with sufficient information to make a decision for themselves.

not brought to the attention of the consumer); or (ii) indicates only that a commission "may be payable", without more (irrespective of its prominence).[49]

Vulnerability

41. The Court of Appeal regarded the Respondents' relative lack of financial sophistication, and the need for borrowing (particularly brokered finance), as indicia of vulnerability,[50] which informed its analysis. The FCA Handbook generally adopts a classification that treats retail customers, or consumers, differently from professional clients. However, the FCA would not regard a customer as vulnerable (at least in the sense used by the FCA) merely because they require car finance. To the contrary, FSMA provides that, in considering the appropriate extent of consumer protection, the FCA must take into account different levels of transactional risk, differing degrees of consumer experience and expertise, and the general principle that consumers should take responsibility for their decisions.[51]

C. SUBMISSIONS ON GROUNDS 1 TO 4

42. The submissions below address Grounds 1 to 4. The remedial issues (Ground 5) are of significant interest to the FCA,[52] but these submissions focus principally on the question of liability, where the FCA may be able to offer assistance different from that of the primary parties.

C.1. Grounds 1 and 2: Fiduciary Duties, the 'Disinterested' Duty, and the Tort of Bribery

43. The Court of Appeal rightly acknowledged that the law in this area contains tensions and difficulties of principle,[53] which the Appellants have explored in detail in their submissions. To assist the Court, the FCA briefly expresses its view on the law below by reference to its understanding of the policy rationale for proscribing bribes and secret commissions.

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49 The FCA's submissions as to how CONC 4.5.3R applied to discretionary commission arrangements are set out in *Clydesdale* §§174–183 and were accepted at §§192–194.

50 Judgment §§91, 100.

51 Section 1C(2)(a), (b), and (d) of FSMA. The FCA has issued detailed guidance in respect of vulnerability which takes into account a range of individualised drivers of vulnerability such as financial resilience and capability: Finalised Guidance FG21/1 ("FCA's guidance on the fair treatment of vulnerable customers").

52 By way of context, one of the possible interventions that the FCA could undertake is a market-wide consumer redress scheme, through the exercise of its powers under s. 404 of FSMA. Under such a scheme, firms would need to review in-scope transactions and potentially pay redress to any consumers who meet the relevant criteria. Before any such scheme can be proposed, the FCA is required to consider the relevant causes of action available to consumers against firms under FCA Handbook rules, statute, at common law, or in equity. The design of any scheme would need to have regard to the type and amount of relief that a court would award. For completeness, remedial provisions are different in the FOS jurisdiction for resolving complaints under s. 229 of FSMA, and different yet again in the Courts' jurisdiction under s. 140B of the CCA. If the FCA concludes that a regulatory intervention is appropriate, it is likely that this will commence with a consultation on a potential scheme.

53 Judgment §§176–178.

Fiduciary Duties

44. As a starting point, the FCA agrees with the general principles as to fiduciary duties in FR Case §§4–14. The FCA also shares the Appellants' concern that the Court ought to be cautious about expanding the well-established categories of fiduciary relationships, which could result in many types of intermediaries being regarded as being in fiduciary relationships with their customers.

45. By way of nuance, however, the FCA would emphasise that the existence of a fiduciary duty is highly fact-sensitive,[54] and that it is possible to recognise a fiduciary duty in respect of a particular subject matter only, rather than in respect of the entire relationship.[55] Moreover, any finding of a fiduciary obligation must be sensitive to the relevant contractual arrangements and (of particular interest to the FCA) the statutory and regulatory framework.[56]

The 'Disinterested' Duty

46. The FCA respectfully suggests that the key difficulty with the Appellants' approach—jettisoning the tort of bribery and recasting the 'disinterested' duty as nothing more than a fiduciary duty—is that, in a case where an agent (using that word in the broad sense outlined below) does not owe fiduciary duties, the principal will be left without the protection against conflicts of interest currently provided by the civil law of bribery.

47. The lacuna arises in part because of the uncertainty as to whether all agents owe fiduciary duties.[57] The Appellants' approach would leave principals with non-fiduciary agents without important protection that they currently have. That might, in turn, lead to the distortion of established principles about when and by whom fiduciary duties are owed. Further, and in any event, the abandonment of the tort of bribery altogether would be an extreme outcome. As explained below, the better rationalisation may be that the 'disinterested' duty provides a suitable middle ground.

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[54] *Re Coomber* [1911] 1 Ch 723, 729 ("There is no class of case in which one ought more carefully to bear in mind the facts of the case"); *Cook v Evatt (No 2)* [1992] 1 NZLR 676, 685 ("meticulous examination"); *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41, 102.

[55] *New Zealand Netherlands Society "Oranje" v Kuys* [1973] 1 WLR 1126, 1130; *Naaman v Jaken Properties Australia Pty Limited* [2025] HCA 1, [82].

[56] See, eg *Re One Blackfriars Ltd (In Liquidation)* [2021] EWHC 684 (Ch), §230. As for the contractual relationship, see *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145, 206; *Kelly v Cooper* [1993] AC 205, 214–215; *Quantum Advisory Ltd v Quantum Actuarial LLP* [2024] EWCA Civ 247, §38.

[57] There is a difficult and unresolved question in the law as to whether all agents owe fiduciary duties. See *Bowstead & Reynolds on Agency* (23rd ed) [6-037]; *Meagher, Gummow & Lehane's Equity: Doctrines & Remedies* (LexisNexis Butterworths, 5th ed, 2015) [5-210] onwards; Conaglen, "The Fiduciary Status of Agents" in Davies and Cheng Han (eds), *Intermediaries in Commercial Law* (2022) ch 2. There are high judicial statements that they do not: *Moxon v Bright* (1869) LR 4 Ch App 292, 294 (Lord Hatherley LC); *McKenzie v McDonald* [1927] VLR 134, 144 (Sir Owen Dixon); *Boardman v Phipps* [1967] 2 AC 46, 127 (Lord Upjohn); *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 71 (Gibbs CJ); *UBS AG (London Branch) v Landesbank Baden-Württemberg* [2017] 2 Lloyd's Rep. 621, [92] (Lord Briggs and Hamblen LJ).

The (Civil) Law of Bribery and its Rationale

48. As the Court of Appeal observed at §176, "the language of bribery and fraud does not sit easily with the type of scenario with which the present cases are concerned". Indeed, given the emotive label,[58] it is suggested it may be helpful to regard a 'bribe' as a term of art and perhaps to use the label of 'secret payment' in its place.

49. Putting the label to one side, a claim for bribery arises where: (i) a secret payment (or other inducement) has been made to an agent that gives rise to a realistic prospect of a conflict between the agent's personal interest and that of their principal; and (ii) the agent is someone with a role in the decision-making process in relation to the transaction in question.[59] (The law recognises that some payments are too small to create a realistic prospect of a conflict of interest and so too small to be treated as a bribe, though where the line is to be drawn will always depend on the circumstances of the case.)[60] "Agent", in this context, "is not limited to those who have the authority to alter the legal relations of their principals", but can extend to others such as canvassing agents if they are "put in a position to influence or affect the principal's dealings with third parties".[61]

50. The essential concern of this area of law is thus with conflicts of interest that can arise from secret payments by third parties to agents (using the word "agents" in that broad sense).[62] In modern terms, such conflicts of interest undermine trust and confidence in commercial transactions.[63] Given the rationale, the law has recognised that the prohibition ought to apply to any agent under "a duty to provide information, advice or recommendation on an impartial or disinterested basis"[64]—that is, any agent under the 'disinterested' duty recognised in *Wood v Commercial First Business Ltd* [2022] Ch 123. That reflects the logic of the civil law of bribery—to be 'disinterested' is the reverse of having a conflict of interest—and the FCA submits that it is thus an appropriate threshold for that area of law to be engaged.

51. The 'disinterested' duty is not without difficulties. For instance, the Appellants object that this duty collapses into the traditional fiduciary obligation of loyalty.[65] But it is respectfully suggested that in *Wood* the Court was cognisant of this risk and was seeking to decouple the 'disinterested'

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[58] *Ross River Ltd v Cambridge City Football Club Ltd* [2008] 1 All ER 1004, §218.

[59] *Republic of Mozambique v Privinvest Shipbuilding SAL (Holding)* [2024] 1 All ER 763, §86.

[60] See *Civil Fraud* (1st ed) §7-038; *Fiona Trust & Holding Corporation v Privalov* [2010] EWHC 3199, §73(ii).

[61] *Civil Fraud* (1st ed) §7-007. See also *Reading v The King* [1949] 2 KB 232, 236 (confirmed [1951] AC 507, 516); *Novoship (UK) Ltd v Mikhaylyuk* [2012] EWHC 3586 (Comm), §108.

[62] See, e.g., *Anangel Atlas Compania Naviera SA v Ishikawajima-Harima Heavy Industries Co Ltd* [1990] 1 Lloyd's Rep 167, 171; *Petrotrade Inc v Smith* [2000] 1 Lloyd's Rep 486, 490; *Shipway v Broadwood* [1899] 1 QB 369, 373; *Novoship (UK) Ltd v Mikhaylyuk* [2012] EWHC 3586 (Comm), §106; *Wood v Commercial First Business Ltd* [2022] Ch 123, §44.

[63] *FHR European Ventures LLP v Cedar Capital Partners LLC* [2015] 1 AC 250, §42; *Imageview Management Ltd v Jack* [2009] 2 All ER 666, §50.

[64] *Wood v Commercial First Business Ltd* [2022] Ch 123, §48.

[65] FR Case §§66–67.

duty from traditional fiduciary duties precisely to avoid the distortion of well-established equitable principles.[66] As David Richards LJ expressed the dilemma: "The risk inherent in requiring "a fiduciary relationship" as a pre-condition for remedies in respect of bribes or secret commissions is <u>either that civil remedies which should be available will be denied because there is not a fiduciary relationship</u>, or that the term "fiduciary relationship" will be <u>applied so widely as virtually to deprive it of content…</u>".[67]

52. The FCA respectfully agrees with the characterisation of the policy issues in *Wood*. It follows that acceptance of the Appellants' submissions may result in a lacuna in the general law for which regulation may not provide a complete answer. In *Wood* the Court strove to identify the necessary conditions in which a bribe or secret commission is proscribed by reference to the 'disinterested' basis on which information, advice, or recommendation is to be provided. Thus the 'disinterested' duty serves a unique function in the law which is allied closely with the rationale for prohibiting secret payments in certain contexts.

<u>Rationalising the 'Disinterested' Duty and the Tort of Bribery</u>

53. The courts' condemnation of secret payments is often in strident terms[68] and, perhaps as a result of this, the law has evolved to deem various elements of the wrong without proof. Thus the claimant need not prove that the bribe-payer acted with a corrupt motive or that the agent was in fact influenced by the payment.[69] Furthermore, given the extensive remedies available, and the potential breadth of the application of the tort following the Judgment, the Appellants are driven to make the submission that the law should not recognise a distinct tort of bribery at all.[70]

54. The FCA respectfully suggests that, notwithstanding the difficulties, there is merit in the law retaining a distinct claim in the tort of bribery, though (if necessary) clarified to place it on a firmer footing of principle:

    (1) The tort is well-established in English law. The cases date back more than a century,[71] and in 1979, in *Mahesan*, Lord Diplock considered that the tort was already an established part of English common law (where he was considering the state of English common law as at <u>1956</u>).[72]

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[66] See, for example, the broad definition of "fiduciary" that CBL is constrained to adopt in CBL Case §59(1) ("someone who undertakes to act for or on behalf of another in some particular matter or matters", from Finn, *Fiduciary Obligations* (1977) 201). That is too broad: see, e.g. *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41, 71–72.

[67] *Wood v Commercial First Business Ltd* [2022] Ch 123, §46.

[68] See, e.g., *Attorney General for Hong Kong v Reid* [1994] 1 AC 324, 330H; *Parker v McKenna* (1874) LR 10 Ch App 96, 125; *Wood v Commercial First Business* [2022] Ch 123, §42.

[69] *Daraydan Holdings Ltd v Solland International Ltd* [2005] 1 Ch 119, §53.

[70] See, e.g., CBL Case §§5–7.

[71] *Morison v Thompson* (1873-1874) LR 9 QB 480 and *Salford Corporation v Lever* [1891] 1 QB 168.

[72] *Mahesan v Malaysia Government Officers' Co-operative Housing Society Ltd* [1979] AC 374, 379.

There are many cases since then, including most recently *Privinvest*, where the Supreme Court itself set out the elements of, and the principles governing, the tort of bribery.[73]

(2) Against that background, powerful reasons of principle and policy would be required to jettison the claim at this stage of its development. The fear of a fusion fallacy is not a sufficient answer. Even if the common law claim developed from claims in equity for breach of the agent's fiduciary duty of loyalty, that is not unusual; there are many examples of the common law building on, and being influenced by, equity.[74] There is also nothing foreign to the English legal system in a claimant having alternative claims arising out of the same facts.[75]

(3) If the tort of bribery is retained, the FCA agrees with the Appellants that it is important to clarify the remedies that are available (and how they differ from the remedies available for breach of fiduciary duty). For instance, the Court may consider that the principal's claim against the third party should be limited to a claim for compensatory damages, assisted by a rebuttable[76] presumption that the principal has suffered loss in the amount of the bribe.[77] The FCA would also suggest that the established bars to rescission at common law may be particularly relevant to prevent the wholesale unwinding of the transactions in question.[78] At each stage, the Court should avoid double recovery.[79]

55. If the Court accepts that the 'disinterested' duty is what is required for the civil law of bribery to be engaged, the tort of bribery will serve an important purpose not served by any other wrong: it will protect against the conflict of interest that can arise from secret payments by third parties to agents who do not owe fiduciary duties of loyalty but who do owe the 'disinterested' duty.

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73 *Republic of Mozambique v Privinvest Shipbuilding SAL (Holding)* [2024] 1 All ER 763, §86. See also *FHR European Ventures LLP v Cedar Capital Partners LLC* [2015] 1 AC 250, §17.

74 By way of illustration, the decision in *Hedley Byrne v Heller* [1964] AC 465 expanded tortious liability for negligent misstatement by importing principles of assumption of responsibility developed in the well-known fiduciary duty case of *Nocton v Lord Ashburton* [1914] AC 932. The common law fashioned the tort of misuse of private information out of equitable breach of confidence: *Campbell v Mirror Group Newspapers Ltd* [2004] 2 AC 457. See also *Roxborough v Rothmans of Pall Mall* (2001) 208 CLR 516, §§97–100 (referring to examples of "the absorption or adoption by the common law of equitable notions").

75 See *Fistar v Riverwood Legion and Community Club Ltd* (2016) 91 NSWLR 732, §48; *Perera v Genworth Financial Mortgage Insurance Pty Ltd* (2017) 94 NSWLR 83, §44; *Mann v Paterson Constructions Pty Ltd* (2019) 267 CLR 560, §198. See also *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567, 581.

76 It is difficult to see why the presumption should be irrebuttable. If, in a rare case, the third party can prove that the principal has not suffered loss, they should be able to do so.

77 Claims in money had and received against the third party could be rationalised on this basis. See English, "Bribery and secret commissions – a common law-equity divide" [2025] LMCLQ 158, 175–179.

78 At law, if *restitutio in integrum* is impossible then that is a bar to rescission. See generally O'Sullivan, Zakrzewski, and Elliott, *The Law of Rescission* (Oxford University Press, 2nd ed, 2023) ch 18. See also *Mahesan s/o Thambiah v Malaysia Government Officers' Co-operative Housing Society Ltd* [1979] AC 374, 380, where Lord Diplock noted that in *Salford* "[r]escission was not available as the goods which were the subject of the sales had been consumed".

79 See, e.g., English, "Bribery and secret commissions – a common law-equity divide" [2025] LMCLQ 158, 179–181.

The Proper Characterisation of the Broker-Consumer Relationship

56. There are two stages of analysis as regards the broker-consumer relationship. The first is identifying the type of relationship required for secret payments to one party (here, the motor dealer broker) to be proscribed. The second is characterising the relationship between the motor dealer broker and the consumer to determine whether it is a relationship of that type.

Regulatory framework

57. Whatever type of relationship is identified as the threshold at the first stage, at the second stage the regulatory framework is a material consideration. Here, that framework suggests that motor dealer brokers do not perform an advisory function simply by dint of their status as credit brokers, but that they are under obligations to give clear information to consumers about their options and the broker's role in the financing arrangement to help consumers make informed choices:

    (1) Motor dealer brokers are conducting the regulated activity of effecting introductions between consumers and lenders under Article 36A of the RAO. This does not—at least according to the express language of the legislation—necessarily entail providing advice.

    (2) Motor dealer brokers are subject to a range of specific obligations including in respect of enabling consumers to make informed choices (CONC 2.5.3R), communicating in a balanced and clear way that does not obscure important information (CONC 3.3.1R), and disclosing the existence and nature of a commission if it could (1) affect the broker's impartiality in recommending a product or (2) affect the consumer's transactional decision (CONC 4.5.3R).

    (3) Motor dealer brokers have duties to treat customers fairly and communicate clearly (Principles 6 and 7). Since July 2023, this has been replaced with a duty to deliver good outcomes for retail customers (Principle 12). But none of these duties give rise, without more, to a duty to advise or any fiduciary duty.

    (4) Motor dealer brokers (and lenders) also have duties to manage conflicts of interest fairly (Principle 8). This duty applies to all manner of firms and is not limited to situations where firms are providing advice.[80] But it does show the significance of appropriately managing conflicts of interest, even where there is no fiduciary duty.

58. For many consumers, a car loan is likely to be a significant financial decision, and they may not be able to purchase a car outright. But from the regulatory perspective they are not vulnerable consumers vis-à-vis the broker on that basis alone. As explained above, the focus of the regulatory

[80] Submissions to the contrary were rejected in *Clydesdale,* §§163, 164, 189, 199.

framework is on adequately arming consumers with information to make appropriate transactional decisions for themselves.

'Disinterested' Duty

59. Taking into account the regulatory framework set out above, it is suggested that, in the typical situation described by the Judgment, motor broker dealers do owe a 'disinterested' duty that prevents them from taking secret payments from third parties. The rationale for proscribing secret commissions in this context is the need to avoid undisclosed arrangements that could lead to conflicts of interest. That is entirely consistent with the framework described above. In particular, motor dealer brokers provide important information to consumers: they distil potentially complex options to enable informed choices. That requires presenting information in an unbiased way to be able to make an informed choice. If a commission is paid then the customer ought to know this insofar as it is relevant to their decision-making.

60. The Appellants argue that this approach misunderstands the role of the motor dealer broker, who is agent for *neither* party.[81] But, as explained above, a true agent-principal relationship is neither necessary nor sufficient for a 'disinterested' duty. The broker is an intermediary who acts on behalf of both parties in respect of different tasks in the tripartite arrangement, as rightly recognised at Judgment §92. The motor dealer broker acts for the lender insofar as it undertakes the administrative burden in respect of the sale of the car and loan documentation (and in the case of discretionary commissions, the dealer is also able to select the applicable interest rate within a range).[82] And the broker acts for the consumer in exercising judgement in finding and presenting an offer of finance and (at least) enabling them to make an informed choice. This role in the decision-making process is sufficient to engage a 'disinterested' duty.

Fiduciary Duties

61. As for fiduciary duties, the question in each case is whether the motor dealer broker had undertaken to perform such a function for, or had assumed such a responsibility to, the consumer as would thereby reasonably entitle the consumer to expect that the motor dealer broker would act in the consumer's interests to the exclusion of their own interests.[83] The Court of Appeal concluded that the motor dealer brokers had done that, principally because they had undertaken to find a suitable and competitive offer (and in some cases to "find the best deal" or the "most suitable" deal (at §18)) such that consumers had placed a degree of reliance on the motor dealer brokers to find them an offer which met their needs (§§91, 93). From the FCA's perspective,

[81] FR Case §25.
[82] That the dealer acts on behalf of lenders in certain respects is supported by the lender-dealer contractual arrangements, CONC 1.2.2R, as well as the operation of s. 56 of the CCA as a deemed agency relationship.
[83] FR Case §9.

however, the provision of such a service does not give rise to a fiduciary duty in the sense of acting in the consumer's interest to the exclusion of the broker's own interests. Such a characterisation goes much further than the regulatory framework, which is principally focused on transparency, and which recognises that in many cases the motor dealer broker performs the more limited functions of providing information and options to the consumer.

62. Accordingly, the FCA submits that motor dealer brokers do not typically owe fiduciary duties. Treating all motor dealer brokers as fiduciaries would be too sweeping an approach, which would appear to dilute the requirements for the recognition of a fiduciary duty and would also be at odds with the legislative and regulatory framework explained above. In particular, such an approach would create a generally applicable standard of conduct for motor dealer brokers which overrides the carefully calibrated standards established by the FCA Handbook. It would therefore give rise to concerns of inconsistency of the kind identified in paragraph 8(2) above. From the regulator's perspective, such dilution could also have significant, unintended read-across to other regulated intermediaries, which in turn may generate a range of unanticipated legal consequences.

C.2. Ground 3: Treating the Lender as a Dishonest Assistant

63. If the FCA's submissions on Grounds 1 and 2 are accepted, the issue of whether the lender should be treated as a dishonest assistant to a breach of fiduciary duty does not arise. Nevertheless, Ground 3 is addressed for completeness.

64. It is well-established that accessory liability for breach of fiduciary duty requires dishonesty, measured against ordinary standards of honesty.[84] The FCA makes two submissions of principle in this respect. First, insofar as knowledge is necessary, it is not necessary that the lender have knowledge of the legal conclusion that the broker owes fiduciary duties; they need only know the essential facts that give rise to that legal conclusion.[85] Second, assessing dishonesty in this context requires consideration of (i) the defendant's actual state of knowledge and belief and (ii) the standards of ordinary decent people as to what is honest and dishonest. The FCA submits that, in applying that test, the lender's regulatory obligations and the contractual arrangements with the broker may be relevant. As explained above, the FCA expects that lenders will take reasonable steps to ensure that brokers acting on their behalf comply with the CONC disclosure requirements, and usually the contractual documentation between lenders and brokers will include oversight mechanisms.

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[84] See, e.g., *Group Seven Ltd v Nasir* [2020] Ch 129, §58.

[85] See, e.g., *Lifestyle Equities CV v Ahmed* [2025] AC 1, §§108, 126–127, 131, 133. See also *Twinsectra Ltd v Yardley* [2002] 2 AC 164, §§24 ("I do not suggest that one cannot be dishonest without a full appreciation of the legal analysis of the transaction. A person may dishonestly assist in the commission of a breach of trust without any idea of what a trust means."), 135; *Barlow Clowes International Ltd (In Liquidation) v Eurotrust International Ltd* [2006] 1 WLR 1476, §28. Compare FR Case §105.3.

These matters will be relevant in analysing the lender's degree of knowledge, as well as the assessment of their honesty or dishonesty in the individual case.

C.3. Ground 4: Secrecy

65. In the event that the Court accepts the FCA's submissions in respect of Grounds 1 and 2, then the 'disinterested' duty would play an important function in common law in delimiting the situations in which a secret commission is proscribed. The concept of "secrecy" then becomes particularly significant because, following the decision in *Hurstanger Ltd v Wilson* [2007] 1 WLR 2351, where there is partial disclosure,[86] a case will be taken out of the realm of bribery. The rationale is that where a commission has been (even partially) disclosed then it is not appropriate to describe it as a bribe or secret commission (with all the remedial consequences that follow).

66. The common law must clearly demarcate when a commission is secret and when it is not. The FCA's own standards and disclosure rules are, on this particular question, <u>not</u> directly relevant because they pursue a much higher standard, i.e. transparency and informed decision-making by consumers, rather than merely the absence of secrecy. The test of partial disclosure which renders a commission <u>not</u> secret is necessarily a less exacting threshold. (By way of contrast, where "informed consent" is required, then the regulatory standards are likely to be informative as a minimum standard in light of paragraph 8(3) above.)

67. The FCA suggests that negating secrecy will be a case-by-case assessment informed by both the content of the pre-contract disclosure materials and the manner in which terms were presented to the consumer. It is respectfully suggested that in the ordinary case where terms and conditions disclose the possibility of commission being paid, that ought to be sufficient to negate secrecy for the purposes of the tort of bribery. However, the FCA suggests that the common law is not so naïve that the prohibition on secret payments can be circumvented by deliberately misdirecting a consumer to irrelevant terms or deliberately obscuring a reference to such a payment in the documentation. In those circumstances, it is right that the tort of bribery is engaged.

D. SUBMISSIONS ON GROUND 6

68. Ground 6 arises in respect of *Johnson*. The FCA submits that, on the facts of this case, despite the detailed objections advanced, there is no prospect of impugning the decision of the Court of Appeal. Contrary to FR's submission, the amount of the undisclosed commission (relative to the total credit charge) is a very significant factor in the unfairness test, by analogy with *Plevin*.[87]

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[86] The FCA agrees with Judgment §11 that the label of "half-secret" is apt to confuse.

[87] *Plevin*, §18 ("But at some point commissions may become so large that the relationship cannot be regarded as fair if the customer is kept in ignorance"); cf. FR Case §168.3.

69. More generally, the FCA's concern is as to the public interest in achieving finality and clarity in the law under s. 140A in the motor finance context. Consistency in respect of the many thousands of pending complaints and claims will be aided by this Court's authoritative ruling. In that regard, while s. 140A requires a highly fact-sensitive assessment, the principles are tolerably clear and the Court ought not allow the prospect of a remittal to delay further the resolution of these issues.

70. As this Court has previously held on several occasions, s. 140A establishes a test of unfairness which is fact-sensitive and allows the court to take into account a very broad range of factors.[88] As far as motor finance is concerned, the FCA agrees with the Judgment at §169 that a relationship is not unfair merely because a commission was paid of which a borrower was unaware. However, relevant factors tending towards unfairness will include at least: (i) the size of the commission relative to the charge for credit; (ii) the nature of the commission (because, for example, a discretionary commission may create incentives to charge a higher interest rate); (iii) the characteristics of the consumer; (iv) the extent and manner of the disclosure (including by the broker insofar as s. 56 is engaged); and (v) compliance with the regulatory rules.[89]

E. CONCLUSION

71. The FCA is grateful for the opportunity to intervene and to participate in the present appeals in furtherance of its statutory functions. For the reasons set out above, it is respectfully submitted that the Court should have regard to the careful balance that has been struck in the applicable regulatory scheme when determining the appeals.

JEMIMA STRATFORD KC

AARUSHI SAHORE

MOHAMMUD JAAMAE HAFEEZ-BAIG

JAGODA KLIMOWICZ

BRICK COURT CHAMBERS

10 March 2025

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[88] *Plevin*, §§10, 29; *Smith*, §22.

[89] Regulatory breaches inform but do not determine the s. 140A assessment: *Plevin*, §17; *Clydesdale*, §§350, 368.