

Lord Forsyth of Drumlean
Chair, House of Lords Financial Services Regulation Committee

By email only

13 November 2024

Dear Lord Forsyth,

RE: Court of Appeal judgment on motor finance commission

The Court of Appeal handed down a judgment on 25 October 2024 on three cases (*Hopcraft v Close Brothers Ltd*, *Johnson v Firstrand Bank Ltd*, *Wrench v Firstrand Bank Ltd*), which is having an impact on the motor finance and other markets. I wanted, therefore, to provide background on the cases, to explain our work in response and what we have been doing to raise standards in this vital market.

Ashley Alder and I will be appearing before your Committee later this morning, giving evidence on our recent enforcement proposals. We would be happy to answer any initial questions the Committee may have on motor finance.

The Court's judgment

The cases concerned commission paid by a lender to a motor dealer, acting here as a credit broker, for a motor finance agreement.

The Court of Appeal found the broker owed both a disinterested duty (to provide information, advice or recommendation on an impartial or disinterested basis) and a fiduciary duty (a duty of loyalty attracting certain obligations in relation to conflicts of interest) to the consumer.

In two of the cases, the lenders were liable because they had paid a secret commission. In all three cases, the Court of Appeal decided that the fiduciary duty had been breached because the borrowers' informed consent to the payment of commission had not been given. The Court indicated that this would require the consumer to be told all material facts that might affect their decision to agree to the payment, including the amount of the commission and how it was to be calculated.

The judgment related to fixed commission in motor finance agreements as well as discretionary commission arrangements (DCAs), which we banned in 2021.

The focus of the Court of Appeal decision is common law, rather than FCA rules or principles. Firms authorised by us must meet wider legal requirements as well as regulatory rules. The interpretation of common law is rightly for the courts.

The two lenders involved intend to appeal.

We will write to the Supreme Court asking it to decide quickly whether it will give permission to appeal and, if it does, to consider it as soon as possible, given the potential impact of any judgment on the market and the consumers who rely on it. If permission to appeal is granted, we will consider intervening to share our expertise to assist the Court.

Our work in response to the judgment

Following the *Hopcraft, Johnson and Wrench* judgment, 11 firms paused motor lending while they made changes to comply with the law, as clarified by the Court of Appeal. Of these, 8 have returned to lending. 3 motor finance firms switched to a zero-commission model in the short term. There has also been a material impact on some firms' share price and a [credit rating agency](#) has reported on the uncertain and potentially significant financial implications of the judgment.

We are closely monitoring the market and have engaged intensively with lenders and brokers, including speaking to 63 firms, to understand their response to the judgment. We have joined an industry and government discussion and convened our own industry roundtable. We have also discussed the judgment's implications with consumer representatives.

We continue to work closely with our partners in government, the Financial Ombudsman and the Prudential Regulation Authority, which jointly regulates many of the lenders.

Informed consent

There is a risk any changes made by firms to ensure their customers' informed consent for commission in motor finance arrangements may not be implemented efficiently or consistently. We see recent guidance provided by the Finance and Leasing Association on what its member firms could do to be sure they have received their customers' informed consent as a welcome step forward.

We are reviewing firms' approaches. Once we are clearer on what changes are being made, we will consider whether it might be appropriate for us to provide firms with further guidance.

We will, however, keep in mind that an application for permission to appeal to the Supreme Court is likely. There may, therefore, be a further judgment which changes or clarifies the position. Additionally, whether prospective borrowers have been told all the material facts affecting their decision on a credit agreement will depend on individual facts and context.

Breadth of judgment

There is some uncertainty about whether the Court of Appeal's judgment applies beyond motor finance. Firms will be getting their own legal advice, but we are considering whether it would be helpful for us to publish our own views to help firms

navigate uncertainty, recognising that the final decisions on these matters rest with the courts.

More time to deal with motor finance commission-related complaints

We announced today that we will consult on extending the time firms have to respond to consumer complaints about motor finance where a non-discretionary commission was involved, and for consumers to refer them to the Financial Ombudsman Service. We expect to publish the proposals within 2 weeks and, if taken forward, for the complaint extension to be in place by mid-December 2024. Once the consultation is issued, we will notify your Committee in the usual way so that you can consider the matter.

Motor finance firms are likely to receive a high volume of complaints in response to the recent Court of Appeal judgment. Any complaint extension would allow them time to consider how these might be efficiently and effectively handled. This would help prevent disorderly, inconsistent and inefficient outcomes for consumers making complaints, motor finance firms and the market.

The proposed complaint extension will cover at least the period until the Supreme Court decides whether to grant permission to appeal *Hopcraft, Johnson and Wrench*. We will include options on the length of the proposed extension in our consultation.

Motor finance firms will need to use the time provided to ensure they have the resources to issue final responses to complaints at the end of a proposed extension. Motor finance firms are also likely to need to consider whether they should make any financial provisions as relevant complaints will need to be handled in line with the law.

In the meantime, motor finance consumers who believe they have cause to complain about commission arrangements should make them as normal.

Our historic work on motor finance

The overwhelming majority of new cars and many used vehicles are bought through credit agreements. We estimate around 2 million people a year rely on motor finance to buy a vehicle. Given this market's importance, we have undertaken significant work to raise standards.

[In a 2019](#) review, we set out concerns about the widespread use of discretionary commission arrangements (DCAs) in motor finance. DCAs linked the amount of commission brokers received to the interest rate paid by consumers and allowed brokers wide discretion to set the interest rate. This created incentives for the broker to charge consumers higher interest rates. In 2021, following consultation and a temporary shift in focus to address the Covid-19 pandemic, we banned DCAs in motor finance.

Our 2019 review also found that firms were inconsistently applying existing commission disclosure requirements. We therefore clarified the rules to better reflect our intention that consumers should receive information about the existence and nature of a commission paid by a lender to a broker, if the commission could affect

broker impartiality or if knowledge of it might affect the consumer's decision. This clarified rule applies to all consumer credit, not just motor finance.

In our review, we told motor finance lenders they should review their systems, and address harm, or potential harm, identified.

During this period, we also focused on protecting motor finance borrowers – among other consumer credit consumers – who find themselves in financial difficulty:

- We issued [temporary guidance](#) in April 2020 to ensure consumers affected by Covid received appropriate support and did not face repossession.
- This was developed further through the pandemic to ensure lenders [provided tailored support](#) for those struggling to make repayments.
- We made this guidance for firms permanent on [4 November 2024](#).
- We fined [Volkswagen Financial Services \(UK\) Ltd](#) £5.4m for the treatment of customers in financial difficulty.

From 31 July 2023, [our Consumer Duty](#) rules came into force for financial services and products, including motor finance, sold to retail consumers. The Duty raises consumer protection standards by requiring firms to ensure their products are designed to meet the needs of the consumers they are intended for, represent fair value, are sold using clear and timely information and that customers can access helpful support.

Our review into historic DCAs in motor finance

In January this year, [we launched a review](#) of historical motor finance DCAs across several firms.

There had been a notable increase in consumer complaints about this issue, which firms had largely been rejecting. By December 2023, approximately 10,000 motor finance commission complaints had been referred to the Financial Ombudsman Service (the Ombudsman).

The Ombudsman issued its first final decisions on DCA complaints against lenders in January 2024. It found in favour of the complainants, referencing regulatory requirements (rather than common law) in place at the time. One of the Ombudsman's decisions is being challenged by Barclays Partner Finance in a judicial review, in which we are an interested party, which was heard in October 2024. Claims relating to commission in motor finance have also been brought in the county courts, some of which have been upheld.

Our review seeks to understand if there was widespread misconduct related to DCAs before our ban, if consumers have lost out and, if so, the best way to make sure any compensation owed is received in an appropriate settlement in an orderly, consistent and efficient way.

We also gave motor finance firms more time to provide final complaints about motor finance where a DCA was involved, and consumers more time to refer their complaints to the Financial Ombudsman Service, and consumers more time to refer their complaints to the Ombudsman. This was to prevent disorderly, inconsistent and

inefficient outcomes for consumers and knock-on effects on firms and the market while we reviewed the issue and determined the best way forward.

In September, we [further extended this](#) until 4 December 2025. We did so because it had taken longer than expected to get the data we needed. We also wanted to account for relevant court decisions, including the recent Court of Appeal judgment and the judicial review of the Ombudsman's decision referred to above.

We are considering what impact the Court of Appeal's judgment has on our review into historic DCAs in motor finance, including for both its timeline and scope. This will inevitably be heavily influenced by the decision of the Supreme Court on any appeals and its timelines.

Many rely on the smooth functioning of the consumer credit market generally, and the motor finance market specifically, so they can buy products they need. I hope this letter sets out the work we are doing, and can do, to help ensure the market remains competitive and serves the needs of borrowers, who should receive fair, consistent and lawful outcomes.

Yours sincerely,

A handwritten signature in black ink that reads "Nikhil Rathi". The signature is written in a cursive, slightly slanted style.

Nikhil Rathi
Chief Executive