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COMMISSION DISCLOSURE CASE REVIEW

Consumer Credit Appeal in Motor Finance – Undisclosed Commission

Johnson v Firstrand Bank (2024)
Wrench v Firstrand Bank Ltd (2024)
Hopcroft v Close Brothers Limited (2024)

Court of Appeal hands down decision in critical commission disclosure cases for car finance

This case involved three appeals concerning consumer finance arrangements for car purchases, where appellants claimed that car dealerships, acting as credit brokers, arranged financing and received undisclosed commissions from lenders, affecting the impartiality of the finance recommendations provided to consumers. The core legal questions related to the brokers' duties to disclose conflicts of interest and whether their conduct breached fiduciary obligations owed to consumers.

The FCA has already launched its enquiry into 'difference in commission arrangements' and has paused the handling of complaint by firms until December 2025. This was done to achieve an orderly resolution to the large volumes of claims that had come about. The FCA, through its skilled person review, has been gathering information on this topic for some months now.

As we shall see however this does not pause ongoing litigation and this decision has much wider implications for the whole consumer lending sector.

Background of the appeals

The appellants each entered into hire-purchase or conditional sale agreements to finance second-hand car purchases, facilitated by dealers who acted as credit brokers. These brokers received commissions from lenders (FirstRand Bank and Close Brothers) without adequately disclosing them to the appellants, leading to claims of unfairness under sections 140A-C of the Consumer Credit Act 1974 (CCA).

The dealers were paid finance commissions either at fixed rates or "difference in charge" (DIC) models, which the judgement states incentivising dealers to set interest rates higher within the allowable range. The cases in question all involved finance agreements entered into prior to the CONC 4.5 rules banning DICs in motor finance entered into force in January 2021.

Case facts

Of the three cases considered by the court of appeal, the circumstance in two were that there was a written disclosure of the existence of commission and in one case there was no disclosure at all. The cases are briefly summarised as follows:

1. **Johnson** – Johnson arranged financing through FirstRand for a car priced higher than his initial finance offer could cover. Unaware of the alleged "substantial" commission earned by the dealer, Johnson later argued that the partial disclosure was insufficient for informed consent.

2. **Wrench** – Wrench, through two separate dealerships, financed two cars with FirstRand (T/A MotoNovo). In both cases there was reference to the payment of commissions within the credit agreement however there was no evidence provided to state that the customer's specific attention would have been drawn to this arrangement.

3. **Hopcraft** – A student with limited financial means, Hopcraft sought affordable financing, which was arranged through Close Brothers. There was no evidence in this case that the customer had been made aware of a commission being paid to the dealer, either orally or in the written terms.

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Key issues and analysis

The Court of Appeal addressed several core issues across these cases, ultimately ruling that the dealers breached their duty by failing to provide clear, adequate disclosure of commissions.

1. **Adequacy of Disclosure** – The court considered whether the vague references to potential commissions in lender and broker documents met the disclosure standard necessary to ensure informed consent. Specifically, terms in Johnson's and Wrench's documents mentioned that commission "may be payable," but they did not detail the amount, method of calculation, or potential impact on the interest rates set. The Court found that merely referencing the possibility of commission without explaining its financial implications or specific amount fell short of full disclosure. This standard of transparency aligns with *Hurstanger Ltd v Wilson*, requiring disclosure to be specific enough to negate secrecy and reveal all "material circumstances" surrounding the commission arrangement.

2. **Duty to Disclose Material Circumstances** – In Johnson's case, the court considered his financial experience and capability to assess whether he had been adequately informed of the "material circumstances" affecting his decision. Given Johnson's inexperience and financial vulnerability, the Court deemed that greater transparency was required to ensure his understanding of the lender-broker relationship, including commission incentives. Consequently, both the limited transparency of documentation and Johnson's circumstances led the Court to rule that informed consent had not been given.

3. **Fiduciary and Disinterested Duty** – The Court ruled that the dealers, while primarily car sellers, also held a fiduciary role as brokers, given their responsibility to secure the most competitive financing. This fiduciary duty, strengthened by the "disinterested duty" of impartial advice, required full transparency regarding any commissions or incentives influencing the brokers' recommendations.

4. **Accessory Liability of Lenders** – The lenders argued their involvement was limited to paying standard commissions; however, their knowledge of the dealers' role as brokers imposed a duty to ensure adequate disclosure. The Court held that the lenders, aware of their influence on the brokers' impartiality, shared accessory liability for the brokers' breach of fiduciary duty.

5. **Unfair Relationship under CCA** – For Johnson's case, the Court found that the lender-consumer relationship was unfair under the CCA due to the non-disclosure of material commission details. This unfairness was compounded by the undisclosed commission's effect on loan affordability and transparency.

Remedy and redress

The Court ordered repayment of the full commission amount plus interest at a commercially acceptable rate, effectively requiring the dealers and lenders to disgorge the financial gains derived from undisclosed arrangements. Given that these agreements were arranged several years ago, the interest repayable could accumulate to a significant sum, substantially increasing the lenders' and brokers' financial liability. This ruling emphasises that the cost of non-disclosure includes not only commission repayment but also considerable interest, underscoring the importance of transparent consumer finance practices.

The ramifications here are extremely significant. Potentially all cases where a commission has been paid are now subject to challenge. More recent cases where the new FCA disclosure rules were complied with, where there was prominent disclosure of the commission arrangements are less likely to be subject to a successful challenge but given the wider scope of this ruling this cannot be guaranteed. We are now in a position where potentially all business written between 2007 and 2020 (or whenever the lender implemented the new FCA rules) is open to a claim whereby the obligation will be on the lender to demonstrate commission was clearly disclosed to the customer and that they freely consented to this.

It might be that the pause on discretionary commission disclosure cases is extended to cover other cases of this nature. This is a decision that has not yet been made.

Whilst court claims may be subject to limitation defences, older claims maybe referred to FOS who can potentially look at older claims based on when the customer became aware of the problem rather than when the business was written.

"Impacts and where do we go from here?"

Appeal? Commentators have already pointed at potential areas for appeal in this case, in particular the potential dissonance between the judgement and FCA rules. Somewhat unusually the Justices added a postscript to this judgement which indicated that they had found it difficult to reconcile conflicting legal precedents (by which they are bound) in these cases. They suggest that it would be for the Supreme Court to issue a definitive judgement on these issues. Although there is this suggested direction of an appeal in the judgement, **on 28 October the court of appeal refused permission to appeal**. But we do not consider this stops here, as it is likely that the lender will make an application to appeal directly to the Supreme Court which we hope will overturn the court of appeal decision on the fiduciary duty point and the informed consent point at least.

This process may however be lengthy, and even though it can be fast tracked it may still take a year before this is considered further. In the meantime, this judgement will stand as precedent for the lower courts to follow, despite the fact that many of the county court findings on these commission cases have fallen in favour of the lender.

Also, it was only a matter of time before **Martin Lewis** was going to cover this, and on his broadcast of Tuesday 29 October he also urges clarity asap!

He refers as follows: https://www.moneysavingexpert.com/latesttip/#court):

> *'So what we need is clarity, and we need it with urgency. If there's a Supreme Court appeal, it needs to happen ASAP and to report before the FCA does. Plus the FCA and the Government need to urgently work to ensure a functioning competitive market..'*

Does this go beyond the current FCA inquiry into DIC commission models?

Yes, it does. This judgement is specifically around the disclosure of the commission rather than the model being used. A non DCA commission model will still be subject to this judgement if it was not adequately disclosed to the customer.

What are the immediate ramifications?

In light of this judgement, it would be prudent for lenders and their brokers to provide a full and open disclosure of the commission arrangements and gaining explicit consent from the customer for this to happen. Lenders and brokers are already amending pre contract information and business systems to make such a disclosure straightforward and evidenced.

There will be an immediate need to re-train all sales staff in these new requirements. Auxillias can support both brokers and lenders in all aspects of the changes required.

What types of lending will this apply to?

The judgement would seem to include both B2C and B2B markets and both regulated and unregulated credit agreements.

Does this mandate full commission disclosure?

Whilst not explicitly stating so, in our view this would be the main way for a firm to be certain that it has complied with the obligations in this judgement.

Documentation

Firms need to ensure that their disclosure is adequate to meet the requirements of this judgement and to develop mechanism to disclose the amount of the commission and obtain informed consent from the customer to the commission arrangements. Unfortunately, unlike regulatory requirements where you have an implementation period, decision at this level via the court are instant need of implementation so we can see why some lenders have decided to stop lending until these new requirements are implemented as the industry are not operationally ready for the informed consent aspects and the disclosure of the commission amount aspects. Reference the key actions at page 7 that follows. Auxillias is advising its client on all commission related matters following this decision, to include full gaps analysis on disclosure and implementing processes that comply with regulatory requirements as well as this court decision.

Are there different standards of disclosure required depending on customer knowledge/experience?

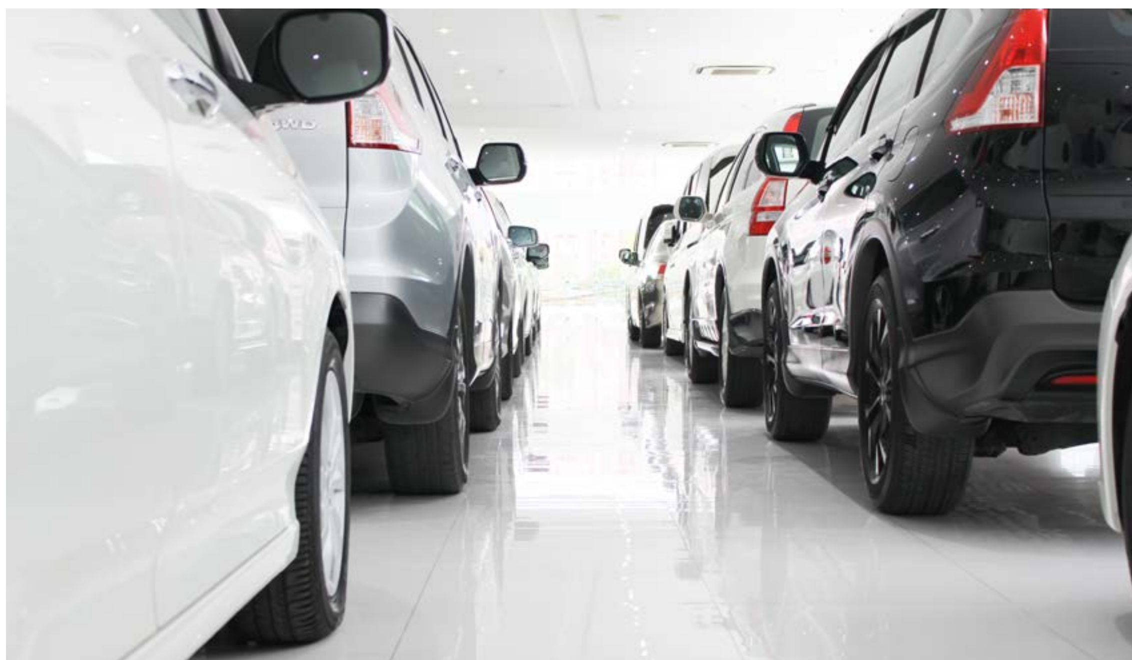
Whilst the judgement does refer to and considers the relative sophistication of the borrower, in practice it would be prudent for firms to assume a relative level of unsophistication for most borrowers and to tailor their new process accordingly. Whilst firms dealing mainly with business lending may be able to argue that a more sophisticated business borrower needed less protection, in practice it would be for the lender to prove this if challenged and therefore a degree of caution should be exercised if a less than fulsome disclosure is proposed.

Further claims

Regrettably this is likely to open the floodgates to further claims. Whist the FCA's pause on DCA cases is still in place it is worth being aware that at present claims not relating to DCA are not covered by the pause. This is being considered by the FCA. As noted above it is likely that the Supreme Court will need to consider this matter to give a definitive ruling however until a formal appeal is lodged or another case referred it will not be possible to stay new claims, and the county courts will be bound by this judgement. We expect the FCA to issue further guidance on this area in the near future.

We have already seen pauses on lending from some firms and dependent on future developments this may create such liabilities for some firms as to drive their exit from the market. Given the wide-ranging nature of this judgement, it may render a significant portion of past business across the sector liable to challenge and redress which may become unsustainable for some. This in turn risks significant market disruption and a contraction in consumer choice. The FCA and Government will likely be considering the implications of this very carefully. Considering the potential adverse impact on competition and harm for consumers.

It is also worth noting that whilst these claims were brought against the lenders, there is also the potential for a claim against the broker based on the same facts and legal precedents. If lenders fail, then claims management businesses and law firms may seek to target the broker firms to recover



compensation for clients. This in turn may have a significant impact on this sector too.

What about the Barclays Judicial Review case?

The Barclays judicial review of the FCA's review of DCA arrangement continues. It is likely the judges reviewing this case will reference this case in their judgement. It again makes it more likely that the Supreme Court will need to make a final ruling on all these questions.

Where does this leave the FCA?

The FCA has issued an initial statement on the Court of Appeal judgement which merely acknowledges the judgement. We can expect further comment on this from them in the very near future. Whilst we await the FCA's full response on this, we consider the FCA has been put in a difficult position that it now needs to consider the rules it set out in CONC 4.5.3 on the disclosure requirements. Now that there is a shift to disclose the amount it might be that the FCA looks to update this section of the handbook to incorporate the change, that is if indeed the position it decides to take.

This case does highlight the tension between legal and regulatory compliance which has never been satisfactorily resolved since the partial transfer of CCA provisions into CONC rules in 2014. In this case merely complying with FCA rules was considered insufficient to discharge regulatory responsibilities. This case highlights the need for the work to transfer the remaining provisions of the CCA into FCA rules to allow for one clear set of obligations for firms.

We also have the speech from the CEO of the FCA – Nikhil Rathi where he made some comments on the court of appeal decision urging for a quick direction on an appeal to the Supreme Court:

> *"Last Friday, the Court of Appeal ruled that it was unlawful for car dealers to receive a commission from a lender providing motor finance to a customer unless it was disclosed to the customer and they gave informed consent to the payment.*
>
> *The judges' ruling was rooted, not in the FCA's rules, but the longstanding common law principle of fiduciary duty which meant that the broker […] must act in the best interests of the customer and not put themselves in a position of conflict.*

Since the judgment was issued, we have been in close contact with the firms involved, the wider sector and the Government to monitor the market, analyse the impact on industry and consumers, and identify what action is required.

First and foremost, we need clarity on whether this is the courts' final word on the issue.

The 2 lenders in the case intend to appeal and it is in everyone's interest that when they do, the Supreme Court decides quickly whether it will take the appeal and, if it does, whether it agrees with the Court of Appeal.

In the meantime, our focus is on ensuring that customers receive fair treatment in line with the law and that the market for motor finance continues to function well, recognising that over 2 million people rely on it each year to buy a car.

We are encouraging firms to engage with us as they consider the impact the court judgment has on their products and services, and we are grateful for the way firms have acted responsibly so far.

We are working closely with the financial services sector, the Financial Ombudsman Service and the Government to understand any wider consequences and further steps needed.

While the case itself was not focused specifically on discretionary commission, it clearly relates to our work to determine whether motor finance customers have been overcharged because of the past use of discretionary commission agreements.

For such cases, we have paused until December 2025 the 8-week deadline that firms have to respond to complaints.

Some in the industry are asking us to expand that pause to cover complaints relating to other types of commission in motor finance. We are considering this carefully and working at pace through the potential benefits and risks of doing so.

We understand industry's desire for time to take stock.

Equally, the Court of Appeal has made the law clear and, if that is not challenged further, then firms need to handle any complaints in line with that.

What are lenders prospects going forwards?

Having noted above the prospect of the decision being appealed and the potential of the decision being reversed by the Supreme Court, there are also other prospects lenders could consider:

(i) Some lenders have better disclosure statements than others so where there have been substantive disclosure statements on commissions, particularly in Initial Disclosure documents or in Adequate Explanation documents, it can be argued there has been sufficient disclosure.

(ii) Where customers are more 'sophisticated' and potentially 'not vulnerable' these can be distinguished against the court of appeal's findings.

(iii) As noted above, the Limitation Act could potentially be used as a defence and should be pleaded where relevant. This can halt claims in their tracks.

(iv) As we have seen in other court cases Counsel for lenders have succeeded in cross examination of claimants following sole claims of unfair relationships.

(v) With a lot of cases still waiting in the wings of county courts – you could seek a stay of proceedings pending an appeal decision from the Supreme Court.

(i) Finally, as further mentioned above we still have the Barclays judicial review decision to come which may change things but remains to be seen.

Also note we have been for years using and relying on earlier caselaw that confirmed no agency exists between the lender and the dealer/broker such as found in the case of **Branwhite v Worcester Works (1969)**, which still could be argued and for the Supreme court to consider when the time comes. Many of you must be familiar with this case as it found that the dealer is not acting as an agent of the finance company but merely arranging a finance application to be made by a prospective customer.

It is worth noting the words of the Judges in this case which are significantly important.

Lord Wilberforce indicated that it must depend on the individual facts, and went on to say:

> *'In a typical hire-purchase transaction the dealer is a party in his own right, selling his car to the finance company, and he is acting primarily on his own behalf and not as general agent for either of the other two parties. There is no need to attribute to him an agency in order to account for his participation in the transaction…'*
>
> *'….Such questions as arise of the vicarious responsibility of finance companies for the acts or defaults of dealers cannot be resolved without reference to the general mercantile structure within which they arise, or if one prefers the expression, to commercial reality.'*

He then cited Lord Pearson in Garnac referring to:

> *'…. if they have agreed to what amounts in law to such a relationship….that while agency must ultimately derive from consent, the consent need not be to the relationship of principal and agency itself (indeed the existence of it may be denied) but may be to a state of fact upon which the law imposes the consequences which results from agency. It is consensual not contractual. So interpreted this formulation allows the establishment of an agency relationship in such cases as the present.'*

Lord Upjohn did not establish that dealers or brokers had actual or apparent authority from the financier.

It was following this case (and others) and the Crowther Report that created the deemed agency provision in s.56 of the Consumer Credit Act 1974 (CCA).

It is therefore imperative that the likes of this *Branwhite* case and others are considered in the context.

Key actions proposed:

As noted in our earlier report issued this week, the following are the key actions we propose:

1. **Review customer journey and commission disclosures:** Auxillias advises that motor finance firms examine customer interactions, particularly around commission disclosures in documentation, to "enhance how you are explaining and disclosing commission arrangements." While Auxillias acknowledges that updating documentation could bring past practices under scrutiny, it cautions against dismissing changes, emphasising that documentation and process improvements can demonstrate good-faith efforts to meet evolving standards.

2. **Evaluate independence and suitability disclosures:** The advisory firm urges companies to re-evaluate how brokers present their obligations to customers, specifically in terms of independence and suitability. In cases where brokers operate under lender rights of first refusal, Auxillias stresses that firms need to "look at disclosures around independence" to avoid any confusion in customer understanding.

3. **Prepare for a surge in claims:** Auxillias predicts an influx of complaints and claims from customers via claims management companies (CMCs). It suggests that companies assess the resources required to handle potential case volumes and consider measures to streamline complaint processes. A gap analysis of records, resource allocation, and streamlined complaint forwarding agreements are among the actions that can help manage increased activity.

4. **Consider revisiting product approvals:** In line with the FCA's Consumer Duty, Auxillias suggests that firms review product approval processes, particularly around distribution arrangements. Auxillias emphasises the importance of senior management taking the lead on these reviews, with decisions documented to comply with Consumer Duty expectations.

5. **Update conflict of interest policies:** Firms should enhance conflict of interest policies to "recognise how risks are managed" in commission-based arrangements. Updates to documentation and registers can ensure compliance with new standards and mitigate risk from potential conflicts.

6. **Collaborate with trade associations and industry peers:** Recognising that managing these risks will require a collaborative effort,

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Auxillias recommends liaising with trade associations, monitoring FCA and Financial Ombudsman Service (FOS) responses, and engaging with other industry players. "Parties cannot work alone or be fully effective operating in isolation," Auxillias stated, adding that proactive industry collaboration will be essential in adapting to these regulatory shifts.

Concluding thoughts

The judgement, as we have read it, proceeds on certain assumptions as to (i) the nature of the duties being undertaken by dealers and (ii) the sophistication and position of the consumers, which leads to an obligation to act on a disinterested basis (as in Wood) and, in tandem, an ad hoc fiduciary duty.

Fiduciary duty – a legal responsibility to act solely in the best interest of another party. This means trust and a legal obligation to maintain that trust. The court decision finds also that the dealer owes the customer a disinterested advice and creates a liability which is what the court has found now between a car dealer and a customer. This means advice should be disinterested meaning responsive to the customers expressed objectives rather than in the dealer's own interest.

As briefly mentioned above, don't forget that dealers have already under CONC 2.5.8 as a rule requirement not to secure more credit, secure a higher rate of interest, give preference to a credit product if it is for the personal gain of the dealer rather than in the customers best interest. So, we have a best interest test that we need to comply with under CONC since these rules were bought into force in 2014.

However, the FCA has never defined this as a fiduciary duty and we would agree with that. We do not think that a motor dealer has a fiduciary duty.

At the moment, focusing on the decision, there are two key areas:

1. *Wood* or fiduciary duties owed?

2. If so, what disclosure is required to avoid breaching those duties?

Considering each in turn:

Duties

The Court of Appeal pretty clearly states that such duties are likely to arise in the type of interaction between a consumer and a motor dealer qua credit broker. However, it also signposts what types of statements can be made by dealers to make clear that they do not owe a "fiduciary" or "disinterested duty" where this is the case. The courts disclosure example is not the best example, but our view is that some brokers may wish to consider and take advice on whether a fiduciary duty exists based on their own role in the transaction whilst at the same time complying with the requirements of the rest of the judgement and their regulatory responsibilities to disclose the existence, nature as well as the amount of commission, at least for now, and of course ensure that informed consent from the customer is obtained. This is essential.

Adequate disclosure statements must be front and centre in their pre-contract information documentation so that customers can be under no illusion as to the interaction they are having with the lender and the dealer.

Disclosure

Our view is that the disclosure given must be sufficient both to negate secrecy and to then obtain the consumer's informed consent to the commission payment. It might be the informed consent permission gets overturned leaving us with the duty to disclose but for now lenders need to act under the pretext that they need both.

The Court of Appeal's decision goes further than the approach of very many District Judges in finding that a standard term in the T&Cs that commission "may" be paid is not enough to negate secrecy. Rather, "the information in question [should] be clearly and openly conveyed to any reader in a document… designed for that purpose" even if consumers deliberately do not read it.

Ultimately, however, the question in every case is "whether enough was done to bring the salient facts to the attention of the borrower in a way which made their significance apparent".

If disclosure in T&Cs is not appropriate to negate secrecy, it certainly would not be enough to obtain informed consent. The Court is clear on the facts of Johnson that, in order to do so, the documents must have addressed (i) that "commission would (as opposed to might) be paid", (ii) that it was payable under an agreement that obliged the dealer to give FirstRand first refusal, (iii) how much the commission would be, and (iv) how it was to be calculated.

Although the Court referred to the somewhat extreme facts of *Johnson* (including the alleged dishonesty in the suitability document), factors (i), (iii) and (iv) seem to be of general application. In any given case, as per *Hurstanger*, what is required is that the consumer allows the commission to be paid "with full knowledge or all the material circumstances and of the nature and extent of his interest." See Johnson at [120].

What is necessary to impart "full knowledge" of the "nature and extent" of the dealer's interest necessarily depends upon the consumer and their likely understanding. Therefore, disclosure of the amount may not be necessary in some cases.

However, assessing it on a case-by-case basis is obviously unworkable. Therefore, the safest course (at least for the time being) is to give full disclosure of everything, including the amount of commission. If it can't be worked out precisely, some indication of the basis of the calculation would be appropriate. For example, that it "could be up to X% of the amount you are borrowing". The reality is that the Johnson decision is so extreme that lenders and dealers are in for a very bumpy ride for a few months. However, matters may yet slowly improve over the coming months:

1. Because all of these issues have attracted a lot of attention, the 'cat is out of the bag'. Therefore many consumers who might not previously have thought about it, may now be aware of these types of arrangements and the basis on which dealers act when arranging finance.

2. The ongoing County Court litigation will allow for the boundaries of the *Johnson* decision to be tested. Therefore, assuming lenders do not simply throw the towel in, for these cases (we would recommend that you do not do and that first look at the extent of the disclosure that you have provided between you and the dealer on a case by case basis), we will begin to learn what falls on which side of the line and, in particular, the types of matters which are fiduciary duty "red flags".

HOW WE CAN HELP

In dealing with the ramifications following the decision, we are currently supporting a number of clients - lenders, dealers and brokers alike in providing tailored advice, a review of commission statements, writing informed consent letters as well providing a toolkit support on how best to manage business now and in going forwards, and supporting those clients that have decided to halt trading in providing strategic tailored guidance and advice.

We are also working in conjunction with senior Counsel so that clients gain full confidence in their decision making process on how best to conduct future business whilst we await further news of an appeal to the Supreme Court.

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