28th January 2025

To whom it may concern

RE: Barrister comment in regards to UK Treasury intervention into Motor Finance Appeal

You may be aware of the recent news headlines stating that the UK Treasury Department led by Rachel Reeves has applied to intervene in the upcoming Supreme Court Case ("Hopcraft & Wrench v. First Rand and Close Brother"), this case is currently set to be heard in April 2025.

The Court of Appeal has previously ruled in favour of the claimants, three private individuals who had used vehicle finance to purchase cars. The Court found that these individuals were entitled to refunds on the undisclosed commission they paid together with interest on that sum.

Woodville Consultants Ltd has sought the advice of Barrister Victoria Roberts (one of the leading PCP Barristers) who was involved in the creation of the upcoming Financial Ombudsman Scheme created to settle PCP claims. The conclusion issued is as follows:

"The government's intervention application seems ill-judged, ill-prepared by their own treasury lawyer and lacking in merit. The Supreme Court must be satisfied that its application assists the court. What the Treasury has sought to do is put forward unsubstantiated comments which the lenders have put to them. It is pertinent that both lenders support the application.

The executive should not intermeddle with the judiciary which is something that the SC may point out to the government."

For the full advice provided, please see the document attached to this letter.

Yours sincerely

Peter Legge
Director
Woodville Consultants Ltd

NOTE ON TREASURY'S INTERVENTION: RE MOTOR FINANCE APPEAL

Ground One: Adverse effect on UK's business and effect of economic growth and the CA's decision to mark an abrupt change in the law as has been understood by the FCA and Treasury's possible concern that the UK may appear "congested" due to too many differing / conflicting sets of obligations.

There has always been regulatory guidance about preventing conflicts of interests between brokers and lenders. See for example as follows:

The UK banking codes of practice e.g. Consumer Protection Codes and Regulations

By statute:

The Consumer Credit (Disclosure of Information) Regulations 2010: sets out what information should be put into a consumer credit agreement (SECCI) i.e. what the total charges of credit are made up of which would include commission.

The Competition Act 1988 granted powers to the OFT.

BY the FCA' CONC Rules

Since April 2014 CONC 3.7.3R provides that:

"*a firm must, in a financial promotion or a document which is intended for individuals which relates to its credit broking, indicate the extent of its powers and in particular whether it works exclusively with one of more lenders or works independently*".

CONC 3.7.4G requires that a firm in a financial promotion or communication with a customer to indicate in a prominent way:

"the existence of **any financial arrangement**s with a lender that might impact the firm's impartiality in promoting a credit product to a customer"

N.B the above clearly covers all commission arrangements including fixed commission arrangements and other incentives such as stocking facilities.

CONC 4.5.3: credit brokers are "required to disclose to a customer in good time before a credit agreement is entered into, the existence and nature of any commission or fee or other remuneration payable to the credit broker by the lender where the existence or amount of the commission, fee or other remuneration could actually or potentially:

> "(1) *affect the impartiality of the credit broker in recommending the credit agreement*[1]*…; or*
>
> *(2) if made known to the customer, have a material impact on the customer's transactional decision to enter into the credit agreement…"*

Note: paragraph 3.7i (box) and 3.7j of CBG[2] and 5.5 (box) of ILG[3].

1. The effect of paragraph 3.7i(box) and 3.7j of CBG[4] was that the OFT said that:

   *(i) potential borrowers should be made aware of the existence of a **financial arrangement** between a broker and a creditor that might potentially impact on the impartiality of the broker in terms of the credit products that it promoted to a potential borrower, or when knowledge of the existence or amount of commission could potentially have a material impact on the potential borrower's borrowing decision;*

[1] See also CONC 2.5.8(13)R (a credit broker must not give preference to credit products of a lender where the object of doing so it to make a personal gain) and CONC 3.7.3R (a credit broker must indicate the extent of its powers and in particular whether it works exclusively with one or more lenders or works independently) and CONC 3.7.4G (under (2) a credit broker must indicate to the customer in a prominent way the existence of any financial arrangements with a lender that might impact upon the firm's impartiality in promoting a credit product to a customer).

[2] OFT's Credit and Intermediaries Guidance

[3] OFT's Irresponsible Lending Guide

[4] The Office of Fair Trading's Credit Brokers and Intermediaries Guidance published in November 2011

(ii) the amount or likely amount of any commission should be disclosed by the broker on request by the borrower so that the borrower should be enabled to take a view as to whether there was likely to be a conflict of interest. Failure to do these things was an unfair or improper business practice.

In relation to CONC 4.5.3R, the FCA said at Paragraphs 3.28 and 3.29 that:

"*Our rules in CONC 4.5.3R require brokers to disclose, in good time before a credit agreement is entered into, the existence of any commission or fee or other remuneration payable to the broker by a lender (or a third party) if knowledge of the existence or amount of the commission could actually or potentially:*

(i) affect the broker's impartiality in recommending a particular product; or

(ii) have a material impact on the customer's transactional decision

"This would include DiC[5] ***and similar commission arrangements*** *which allow the broker discretion to adjust the interest rate, to earn more commission. This is a conflict of interest that may affect the broker's impartiality. It may also affect the customer's decision on whether to deal with the broker or to proceed to an agreement.*

See the case law as to how the courts are required to interpret CONC Rules: e.g in the case of *Clydesdale* (the Barclays JR) Kerr.J stated that:

Conc 4.5.3R is not to be read as requiring disclosure of no more than the bare fact that a commission was payable … a submission which treats CONC 4.5.3 in isolation not in harmony with its neighbours i.e. principles 7, 8 and conc 3.3.1R and conc 3.7.4G. In the 2018 version of Conc, 4.5.3R uses the word "existence". The wording of the rule was already then wide enough to require in some cases disclosure more than the bare fact of commission.

[5] Difference in charges

The FCA's Principles:

Principle 6 requires firms to:

"*A firm must pay due regard to the interests of customers and treat them fairly"*.

Principle 7:

"*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*".

Ground Two: Adverse impact on motor finance industry including the availability or cost of motor finance to consumers.

The lenders did not provide the initial market base rate to the broker and at a rate that did not benefit them financially hence there was already a profit being made by the lender before all of the other incentives and commissions are considered. We must also take into account the fact that under the DCA models, the lenders benefitted from this also by virtue of a proportion of the commission which was returned back to them (in the region of 20%).

As per the Chief Executive's guidance of 12 April 2024, lenders should have put aside / are required to have sufficient reserves to meet any redress payable to consumers. Therefore, any suggestion that paying out for redress should be met by the consumers with future credit agreements would lead to further allegations of unfairness pursuant to s.140A CCA 1974.

Once redress is paid, that is actually increasing growth in the economy e.g. for every pound that is returned to a consumer, it will generate approximately £1.50 growth in the economy.

Redress will also boost consumer confidence in the motor finance industry because they will have confidence that there will be more transparency and therefore more lending.

It should be added that lenders such as Black Horse Finance also trades as Land Rover Finance already have significant manufacturers' subsidies which will continue and therefore any suggestion that they will suffer financial instability is negated by this.

A car purchase is not only a necessity but the second biggest purchase which a consumer will make and therefore the need for car finance will always be as continuing cycle.

Ground three: Risk of putting smaller lenders out of business given alleged risk of large amounts of compensation being paid out.

Motor finance consists predominantly of 9 main lenders, all of which are governed by the FSCS and motor finance only contributes to a small proportion of their overall lending and profit. So even in the unlikely event, a smaller one is put out of business, the FSCS is obliged to step in to pay out redress: see the Hartley Pensions case as an example.

Note on the Treasury's paper: Fiduciary duties and regulatory rules (**Ground 4.1**):

This is a note which was prepared by Professor Burrows in 1999. At that time, the treasury looked at creating a statutory defence to a claim for breach of fiduciary duty which would remove liability from a defendant who had failed to comply with its statutory duties but then decided to do nothing so this seems irrelevant.

The complaint seems less about the treasury's argument that the law has developed beyond regulatory rules but rather it is a point that the FCA have misunderstood the law when it issued its guidance on motor finance.

The FCA have definitively not misunderstood the rules given the recent High Court Barclays JR decision.

The Treasury have made an application to intervene at the 11th hour – very much a last-minute decision – they have not instructed counsel or prepared any detailed submissions. It is a 1-page document which they have filed. We believe they have no intention of properly intervening, hence, their ill-prepared application and they just want good PR at this time for

businesses, which has been illustrated by the share price bounce of LBG and CB.

Ground 5 – remedy

There is absolutely no ambiguity that there is going to be an FCA redress scheme for DCA. As, we know, for the 3 non-DCA cases, the Court of Appeal determined:

i) Johnson – a half-secret case there should be full reimbursement of the commission, together with contractual and compensatory interest. Whilst the % of compensatory interest was not outlined – it was calculated at 8%.

ii) Wrench & Hopcraft – both fully secret cases – they were to be remitted back to the originating County Court to deal with quantum. They were/will being submitting that full recission should be given – i.e. what has been awarded in Johnson, together with full reimbursement of the monthly finance payments.

The Treasury is seeking to make representations on the above – which is not controversial.

Please note, their application (which is in draft form and unsigned so therefore an informal one) has not yet been granted and even if it is, it could well me limited to them making written representations only.

The proposed redress scheme will not be a matter for the Supreme Court to deal with in any event as they are primarily concerned with liability.

Conclusion

The government's intervention application seems ill-judged, ill-prepared by their own treasury lawyer and lacking in merit. The Supreme Court must be satisfied that its application assists the court. What the Treasury has sought to do is put forward unsubstantiated comments which the lenders have put to them. It is pertinent that both lenders support the application.

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