Legal Studies (2026), 1–6
doi:10.1017/lst.2026.10141

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CURRENT DEVELOPMENTS: CASE COMMENT

The motor finance litigation

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(Received 18 November 2025 UTC; revised 08 June 2026 UTC; Accepted 09 June 2026 UTC)

Introduction

The agency problem describes the information asymmetry where the agent knows more than the principal, who accordingly is vulnerable to the agent taking advantage. It is the central issue in the motor finance litigation, where the basic facts are that a consumer buys a car on credit from a dealer who takes a secret commission from the lender or hides other salient facts from the buyer.

Hopcraft v Close Brothers Ltd sets out how the unfair credit agreement provisions of sections 140A–140D of the Consumer Credit Act 1974 (CCA 1974) deal with this problem, and how fiduciary law, on these facts, does not.[1] The fiduciary claims all ultimately failed. This case note examines how the rules for when the fiduciary duty of loyalty arises in novel situations has narrowed and the nature of the 'undertaking' of loyalty now required. It also examines the remarkable similarity and utility of the CCA 1974 regime as developed by the Supreme Court. For the other matters in this very long and detailed judgment, the reader is referred elsewhere.[2]

1. Facts

Regarding the basic scenario recited above, the salient facts so far have been these. One lender might have a right of first refusal (or 'commercial tie'). In a discretionary commission arrangement (DCA) the dealer has a discretion to set the interest rate and receive a greater commission accordingly. The commissions might vary across lenders. *Hopcraft* thus differs from the previous leading cases, *McWilliam v Norton Finance (UK) Ltd*[3] and *Wood v Commercial First Business Ltd*,[4] by introducing the goods-selling aspect. Those cases concerned intermediaries selling only a loan and it was held the fiduciary duty of loyalty arose and was breached. But the agency problem remains on these new facts. Without full disclosure, the buyer cannot be sure the seller is not taking advantage and putting its own interests ahead of the buyer's by selecting the loan with the best commission for the seller rather than the best terms for the buyer.

The conjoined cases differed mainly in the degree of disclosure. In *Hopcraft* there was none at all. In *Wrench* the existence of the commission was made 'as inconspicuous as it could be'.[5] In *Johnson's* case it was in the fine print and, contrary to the declaration that there would be a selection from a panel of

[1] [2025] UKSC 33, [2025] 3 WLR 423.

[2] Eg P Watts 'Secret commissions and agents' remuneration – a critique of *Hopcraft v Close Brothers Ltd* at common law and equity' [2025] Journal of Business Law 607; J Goudkamp 'The tort of bribery' (2026) 142 Law Quarterly Review 169.

[3] [2015] EWCA Civ 186, [2015] 1 All ER (Comm) 1026.

[4] [2021] EWCA Civ 471, [2021] 3 WLR 395.

[5] *Hopcraft* [2024] EWCA Civ 1282 at [113].

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lenders, one had a right of first refusal.[6] Even though Mr Johnson had had the opportunity to discover the commission by reading the documentation, he had not done so. Further, Mr Johnson was subject to 55% commission and the other claimants only a few percent. Only his and Mr Wrench's agreements were subject to DCAs.

The principal claims advanced were those of fiduciary law. As in *McWilliam* and *Wood*, the dealers were incomplete agents, not having the power to bind their customers to a contract automatically.[7] Such persons do not owe the duty of loyalty without more, but the agency problem plainly remains. Therefore the first stage was to make out that the dealer owed an ad hoc duty of loyalty. This would demand that the dealer put the buyer's interest ahead of its own, and would be breached by accepting an undisclosed commission.[8] The second stage was to reach the lenders, the actual targets, in accessory liability. Here equitable dishonest assistance must be made out on their part. There are also common law versions of these claims in the tort of bribery, exigible against both parties.

The claimants argued that the dealers' representations amounted to the requisite undertaking of loyalty. Mr Johnson had received a 'suitability document' which, inter alia, represented that the loan chosen would be 'the one that may be most appropriate given your personal circumstances and requirements' and a similar statement was made to Mr Wrench orally.[9] The judgment does not mention any statement of this kind made to the Hopcrafts. They had to rely only on their dependency or vulnerability.

The CCA 1974 claim was advanced in all three conjoined cases, but only Mr Johnson took it past the court of first instance. Under sections 140A–140D the court has wide discretionary powers if it finds an unfair credit relationship. Unfairness was alleged on the basis of the non-disclosure, the commercial tie and breaches of the Consumer Credit Sourcebook (CONC).

2. The fiduciary undertaking

The Court of Appeal in *Hopcraft*, as in *McWilliam*, accepted that the vulnerability of the buyers was sufficient: 'It is precisely because the brokers were in a position to take advantage of their vulnerable customers and there was a reasonable and understandable expectation that they would act in their best interests, that they owed them fiduciary duties.'[10] As for the claim against the lender, the requisite dishonesty could be presumed from the payment itself and additionally dishonesty was also found on the facts for paying the commission.[11] All three claimants succeeded.

In dismissing all the equitable claims, the Supreme Court focused on the duties owed by the dealer – once it had been held that no fiduciary duty was owed, there could be no accessorial liability on the lender. The common law claims also required fiduciary status, not a lesser duty as the Court of Appeal had held, so these too fell away in consequence (and the Supreme Court added that '[t]he requirement to prove dishonesty is no mean forensic task)'.[12]

The Supreme Court set straight the conflation of the two senses of 'vulnerability'. Traditionally, fiduciary law protected those vulnerable in the sense they were unable to take the steps necessary to assure themselves of the appropriateness of the transaction due to the difficulty of monitoring it.[13] This is the specific type of vulnerability arising from the agency problem. The other sense of vulnerability relates to the characteristics of the principal, who might be unsophisticated, uninformed and therefore

[6] *Hopcraft* [2025] UKSC 33 at [44].

[7] Not strictly a legal category but a useful one. It is advanced in P Watts and FMB Reynolds *Bowstead and Reynolds on Agency* (London: Sweet & Maxwell, 23rd edn, 2023) para 1–020 and used, for example, in *McWilliam* [2015] EWCA Civ 186 at [40].

[8] *Hopcraft* [2025] UKSC 33 at [268]–[271].

[9] Ibid at [79], [42], [270].

[10] *Hopcraft* [2024] EWCA Civ 1282 at [100]; *McWilliam* [2015] EWCA Civ 186 at [41].

[11] *Hopcraft* [2024] EWCA Civ 1282 at [91], [134], [137].

[12] *Hopcraft* [2025] UKSC 33, [2025] 3 WLR 423 at [74].

[13] *Ex p Bennett* (1805) 10 Ves Jun 381 at 396.

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vulnerable to confidence tricks and sharp practice. This usage seems to have emerged in the first successful fiduciary claim against a loan broker for a secret commission, *Hurstanger Ltd v Wilson.*[14] Now it is wrong in law. Vulnerability is a consequence of, not a reason for, there being fiduciary duties.

That left the positive test for raising those duties. The Supreme Court emphasised repeatedly that – outside of traditional categories such as trustee and beneficiary or binding agent and principal, where the duty of loyalty arises automatically – an 'undertaking' of 'single-minded loyalty' is required. The putative fiduciary must put aside his or her own self-interest and act solely in the principal's interest. In a commercial context, trust and confidence are not enough and it is 'normally inappropriate to expect a commercial party to subordinate its own interests'.[15] In accordance with much commentary, the Supreme Court defined the requisite undertaking as follows:[16]

> [A] person consciously assumes (or undertakes) responsibility in relation to the management of the property or affairs of another, in circumstances where he or she knows or ought to appreciate that this carries with it the expectation that he or she will act with loyalty to that other in that regard.[17]

On this, the dealers' arguments succeeded for two reasons. First, they submitted that they acted in their own self-interest as an arm's-length seller throughout and therefore made no such undertaking.[18] This was the industry's expectation, but it was not a case of the Court mapping a subjective or even industry-wide collective, and therefore close to objective, expectation to the test. The law is more subtle, as the following dicta show. One cannot always escape fiduciary duties by willing it alone.

On the one hand, the Court considered that the oral assurances and 'suitability document' did not amount to an undertaking to act in the client's sole interests.[19] On the other, the Court noted the objective nature of the undertaking: 'The person undertaking that task does not have to have a subjective awareness of the duty of loyalty and the specific legal duties that that entails'.[20] It also noted that the undertaking can be implied by necessity based on an objective assessment of the circumstances[21] or if 'the very nature of the service undertaken [means that it] can only sensibly be provided by a person who puts their own personal interests aside'.[22]

Implication was impossible on these facts, according to the Court, because the buyer, dealer and lender had separate interests and all operated at arm's length. The dealer wanted to sell the car at a profit (whether from the sale, commission or both). The lender wanted to deploy loans to creditworthy customers. The customer wanted an attractive deal. Negotiation of the price could affect the loan's terms.[23] The 'interference' between the two transactions can be described as follows. Essentially, one cannot impugn the loan (on a fiduciary basis) without impugning the sale of goods (on which it is impossible to argue for a fiduciary duty) since the loan is or is usually required to buy the car. The two transactions are inseparable. It the loan were rescinded on a fiduciary remedy, the sale of goods would have to be too. If the commission were disgorged on a fiduciary basis, the price on the non-fiduciary sale of goods would have to rise so that the dealer could continue to turn a good profit. From this a fiduciary undertaking as to the loan cannot be implied since there certainly was no fiduciary undertaking as regards the sale of goods.

[14][2007] EWCA Civ 299, [2007] 1 WLR 2351 at [52].
[15]*Hopcraft* [2025] UKSC 33 at [108], [109], [97], [110].
[16]Eg DA DeMott 'Beyond metaphor: an analysis of fiduciary obligation' [1988] Duke Law Journal 879 at 915; JC Shepherd 'Towards a unified concept of fiduciary relationship' (1981) 97 Law Quarterly Review 51 at 67.
[17]*Hopcraft* [2025] UKSC 33 at [96].
[18]Ibid, at [9].
[19]Ibid, at [270].
[20]Ibid, at [96].
[21]Ibid, at [100], [109].
[22]Ibid, at [286].
[23]Ibid, at [268].

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That aside, it appears that the court filters the parties' expectations through its usual objective lens and retains final control over whether fiduciary duties arise. The industry was therefore legally correct not to expect to owe a duty of loyalty, but the determination of this correctness remains with the court. Putting it at its highest, one may go no further than saying that the Court made the requisite undertaking much more specific, narrow and closer to a test of pure consent than might have been thought before. It also affirmed its central role. Previously, it was just one of many competing grand explanatory theories of the fiduciary obligation,[24] and one criticised for taking an overly reductionist contractual approach.[25] Now it is the one Canada,[26] Australia[27] and England have converged on.

This is nonetheless highly significant. The presence of the requisite undertaking has regularly been almost assumed in the past, but from now is likely to be the subject of fierce debate.[28] Moreover, the Court did not approve or disapprove the cases without a sale of goods, such as *Wood*, though it did acknowledge the difference in that the brokerage there was a 'distinct and separate service in its own right'.[29] Given this uncertainty, a challenge might well be likely.

3. The CCA 1974 claim

The Supreme Court noted that the test in section 140A of the CCA 1974, to determine whether a credit relationship is unfair, is extremely general and highly fact-sensitive.[30] A non-exhaustive list of relevant factors was provided: (1) the size of the commission relative to the cost of the credit; (2) the nature of the commission including the existence of any DCA; (3) the characteristics of the consumer; (4) the extent and manner of the disclosure; and (5) compliance with the rules in CONC.

The final factor is remarkable since it incorporates the credit broking industry regulations (made by the Financial Conduct Agency (FCA) under section 137A(1) of the Financial Services and Markets Act 2000 (FSMA 2000)), intended to be obligations between broker, lender and regulator, turning them into obligations between borrower and lender. Commentators have noted the tension between regulatory rules intended to be enforced by state agencies (with only limited direct rights for private individuals expressly provided for) and allowing private individuals to enforce broader breaches directly.[31] Indeed, the Supreme Court noted that 'the courts do not have the institutional competence to make regulatory rules'.[32] The resolution of this tension is therefore that this claim is not regulatory law properly so-called. Instead, private law such as the CCA 1974 provides an independent basis upon which the court is competent to adjudicate between private individuals, which the Court merely 'strive[s] to make … coherent with [the] statutory regime'.[33]

The key provisions of CONC are (very briefly): 4.5.3R, demanding disclosure if it would 'actually or potentially' affect the broker's impartiality or, if known to the customer, have a 'material impact' on his or her decision to take the loan; 3.3.1R prohibiting misleading the customer; 3.7.4G requiring the firm to make clear anything that might affect the dealer's impartiality or have a material impact on the

[24]See Shepherd, above n 16.

[25]L Smith 'Parenthood is a fiduciary relation' (2020) 70 University of Toronto Law Journal 395 at 402.

[26]*Galambos v Perez* [2009] SCC 48, [2009] 3 SCR 247.

[27]*Grimaldi v Chameleon Mining NL (No 2)* [2012] FCAFC 6, (2012) 200 FCR 296 at [177].

[28]Eg *Ross River Ltd v Waveley Commercial Ltd* [2013] EWCA Civ 910 at [39]; *Ross River Ltd v Cambridge City Football Club Ltd* [2007] EWHC 2115 (Ch) at [198]; *Glenn v Watson* [2018] EWHC 2016 (Ch) at [131]; *Ratiu v Conway* [2005] EWCA Civ 1302, [2006] 1 All ER 571 at [78].

[29]*Hopcraft* [2025] UKSC 33 at [269].

[30]Ibid, at [297].

[31]SD Deane 'Fiduciary duties and regulatory rules: are the courts and the regulator on a collision course?' (2025) 40 Journal of International Banking and Financial Law 608; I MacNeil and K Chałaczkiewicz-Ładna 'Agency and conduct of business rules: lessons from the motor finance saga in the UK' in *Research Handbook on Consumer Protection in Financial Services Law and Regulation* (Cheltenham: Edward Elgar, forthcoming).

[32]*Hopcraft* [2025] UKSC 33 at [242].

[33]Ibid, at [242].

https://doi.org/10.1017/lst.2026.10141 Published online by Cambridge University Press

customer's decision; 3.7.3R demanding disclosure of any commercial tie; and 2.5.8(13)R providing that a firm must not prefer one particular lender for its personal gain over the customer's best interests.

On the facts of *Johnson*, the non-disclosure was a breach of 4.5.3R.[34] The Supreme Court accepted that Mr Johnson would have made queries if properly informed, though it was not necessary to show he would not have proceeded.[35] It accepted he was 'commercially unsophisticated', that 'no prominence' was given to these terms but it was 'questionable' whether a lender could 'reasonably expect a customer to have read and understood the detail'.[36] As for the commercial tie, even though the judgment is quite muted here, it is hard not to conclude that this was simply because the breaches were so self-evidently grave.[37] It should have been disclosed per se and was not, and it did have a material impact on Mr Johnson's decision. As for the DCA, the judgment is silent, perhaps because it was not used to set a higher interest rate. Nowadays DCAs are forbidden and no doubt would be a powerful indicator of unfairness. In any case, the test was met.

Very little, however, was said about the remedy. In the previous leading case on section 140A, the Supreme Court had remitted the question to the county court where more facts could be found and the remedy considered in more detail.[38] In *Hopcraft*, the Supreme Court simply ordered that the value of the fee (plus interest) be paid as the 'appropriate' remedy.[39] The FCA's redress scheme gives one possible interpretation of a more detailed ruleset under the CCA 1974, since section 404 of the FSMA 2000 provides that such schemes must mirror the legal claims. The FCA has set eligibility at any of: a DCA (if used); high commission (39% of the total cost of credit and 10% of the loan); or an undisclosed commercial tie (subject to exceptions).[40] For the greater remedy as in *Hopcraft*, eligibility requires: an undisclosed commercial tie and/or a DCA; and commission of at least 50% of the total cost of credit and 22.5% of the loan.[41] Those falling in between will receive a hybrid remedy of the average of the estimated actual loss and the commission, plus interest. Given the flexibility of the CCA 1974 and the Court's observation that the 'overall consideration of fairness … involves a wide range of considerations and forensic judgment',[42] this seems a perfectly serviceable interpretation.

It is true that, as the Court observed, this regime comprises lesser duties with lesser disclosure requirements.[43] There is no absolute duty of disclosure[44] and the remedy is not always the full value of the commission with no further enquiry. That aside, its closeness to fiduciary law in dealing with the agency problem is astonishing. Disclosure is required if it would affect the principal's decision-making, a large part of the agency problem fiduciary law protects against.[45] In the sub-rules, we see that a potential, not just an actual, conflict of interest suffices (eg in the case of a commercial tie at a good rate and low commission or merely a very high commission),[46] and the CCA 1974 regime does not accept a causal defence that the breach did not change the principal's decision.[47] That small commissions do not trigger unfairness mirrors the known trade usage defence.[48] Similarly, the terms must be brought to the

[34]Ibid, at [329].
[35]Ibid, at [327].
[36]Ibid, at [336].
[37]Ibid, at [333], [335].
[38]*Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61, [2014] 1 WLR 4222 at [41].
[39][2025] UKSC 33 at [338].
[40]Financial Conduct Authority 'Motor finance consumer redress scheme' (PS26/3, March 2026) paras 1.20, 5.4, 10.6, available at https://www.fca.org.uk/publications/policy-statements/ps26-3-motor-finance-consumer-redress-scheme.
[41]Ibid, paras 1.26–1.27, 10.69–10.70.
[42]*Hopcraft* [2025] UKSC 33 at [307].
[43]Ibid, at [241]–[246].
[44]Ibid, at [241]–[246].
[45]*Bray v Ford* [1896] AC 44 at 52.
[46]*Boardman v Phipps* [1967] 2 AC 46 at 124.
[47]*Rukhadze v Recovery Partners GP Ltd* [2025] UKSC 10, [2025] 2 WLR 529.
[48]*FHR European Ventures LLP v Mankarious* [2011] EWHC 2308 (Ch), [2012] 2 BCLC 39 at [74]–[82] (this point not subject to appeal); *Medsted Associates Ltd v Canaccord Genuity Wealth (International) Ltd* [2019] EWCA Civ 83, [2019] 1 WLR 4481 at [14], [50], [44].

https://doi.org/10.1017/lst.2026.10141 Published online by Cambridge University Press

customer's attention, mirroring the requirement that the degree of disclosure depends on the sophistication of the principal.[49] Most of all, however, CONC 4.5.3G and 3.7.4G require the dealer to be impartial, which in the circumstances is loyalty by another name. It is hard not to see this as another law of loyalty fulfilling the role of the fiduciary duty of loyalty where the latter does not apply.

Conclusion

The key change made to fiduciary law by *Hopcraft* is the narrowing of the route to an ad hoc fiduciary duty of loyalty by confirming the necessity of the requisite undertaking and overruling the Court of Appeal's acceptance of the characteristic vulnerability of the client as sufficient. This did for the motor finance claims under fiduciary law. But the approach adopted for the CCA 1974 claim is a close substitute. Despite its looser standards, it remains stringent – the lenders' liabilities are estimated to be some £9.1bn[50] – and protects those vulnerable to sharp practice even if fiduciary law does not.

[49]M Conaglen 'Fiduciaries and fiduciary relationships' in J McGhee (ed) *Snell's Equity* (London: Sweet & Maxwell, 34th edn, 2020) para 7–015.

[50]Financial Conduct Authority, above n 40, para 1.49.

Cite this article: D Whayman 'The motor finance litigation.' (2026) *Legal Studies* 1–6. https://doi.org/10.1017/lst.2026.10141

https://doi.org/10.1017/lst.2026.10141 Published online by Cambridge University Press