

Transcript of a conference call led by Nikhil Rathi (NR) between the FCA and market analysts on motor finance, 4.30pm 13 November 2024

NR: Hi everyone. Good afternoon.

Welcome to this call. Thank you for joining again.

For those who don't know me I'm Nikhil Rathi, Chief Executive of the FCA.

I'm joined by a full team here from the FCA. Stephen Braviner Roman (SBR), who's our general counsel. Matt Brewis, who's a director of the FCA, who, along with Mario Theodosiou, is leading on our work on motor finance. As well as legal and communications colleagues.

We will be recording it, as we did last time. We will be publishing it on our website in the usual way later this evening, before the markets open tomorrow. I'll give a short introduction of what we announced this morning and then hopefully have enough time at the end to take questions from you. We'll do that, in the usual way, as we receive them.

One of the reasons I've convened this call is I felt the feedback we had last time was that it was useful for you to hear where we were coming from even if there were limits to what we can say, and I think today there will be limits to what we can say. We always value the feedback after these interactions, if they're useful to you. There will be further moments on this issue where we'll want to communicate with the market and where our thinking is, so do please give feedback after the call this afternoon.

This morning we announced that we will be publishing a consultation paper in the very near future on extending the time motor finance firms have to handle commission complaints for non-discretionary commissions. I can't go into the precise details of everything that's going to be in that consultation paper till it's published but I can talk through where we are heading with that.

The reason we are doing that is you will be familiar that on 25 October the Court of Appeal handed down a judgment on various cases, which I'll refer to as the "Johnson Judgment" and it covered a range of scenarios about motor finance commissions. The claims that had been put to the court were claims under common law and equity for a breach of fiduciary duties and unfair relationships under section 140A of the Consumer Credit Act 1974.

The meaning or the effect of the FCA Handbook was actually not the focus of those judgments, though some aspects of our rules, specifically our consumer credit sourcebook, were touched on but were not essential to the decision. The reason I'm underling that is because that decision was framed in the context of broader law over and beyond FCA rules.

All three appeals were found in the consumers' favour and the Court of

Appeal has clarified law in this area.

The ruling of the Court of Appeal can only be overturned if one of the parties obtain permission to bring a further appeal to the Supreme Court and the Supreme Court then takes a different view to the Court of Appeal.

The two lenders involved in the case have already confirmed they intend to appeal to the Supreme Court, but as far as we know they have not yet made their application, but once they do, the court will need to decide whether to grant that application.

We have said today that we will write to the court to encourage them to make their decision on whether they're going to take that application or not as expeditiously as possible, and should they take the application we stand ready, should the court agree, to assist by intervening in the case with whatever assistance we can provide to the Supreme Court should they go down that route.

But pending any further information from the Supreme Court, as it stands today, motor finance lenders and brokers are required to comply with the Johnson judgment both for new business and when responding to relevant complaints.

For new business this may mean amending their current processes and procedures, for example, in relation to disclosure obligations. Obviously, we have an objective here at the FCA of markets functioning well, alongside our other statutory objectives, and it's in the interest of everyone that lawful lending continues. The motor finance market is a very significant market for UK consumers.

What we've seen since the judgment, and we've been in close touch with firms as they have been working through the implications of the judgment, we've seen firms pause business whilst they were implementing change to their processes and systems and then recommencing lending as soon as they considered that they could do so lawfully in line with the Court of Appeal judgment.

It's important for me to note that in terms of the legal position we, the FCA, are not the arbiter of the law on fiduciary duty. That's quite appropriately for the courts to rule on, and 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 also considering whether it will be helpful for us to publish our own views to help firms navigate uncertainty, recognising that the final decisions on all these matters rest ultimately with the court.

Over the past few weeks we've been engaging with trade bodies, with firms, with consumer groups to garner their views on the impact of the court judgment across the market and to consider what we can do as a regulator to continue to support the market and ensure the fair treatment of customers at pace, and also to ensure compliance with the law.

Following this engagement, and once an application has been confirmed, as I said earlier, we'll be writing to the Supreme Court to ask the court to make

a decision on permission to appeal quickly and if permission is granted for the substantive hearing to take place as soon as possible. This is because the potential impact to both the market and consumers are material.

As we've been doing this engagement it's also been clear to us that some stakeholders would like us to consider giving firms more time to respond to motor finance complaints where a non-discretionary commission was involved, in the same way that we have already done for motor finance complaints concerning discretionary commission arrangements.

The expectation is that motor finance firms will receive a high volume of complaints in response to the judgment and therefore giving firms more time to respond will ensure they have sufficient time to consider how these might be efficiently and effectively handled, which also benefits consumers.

The judgment related to fixed commission in motor finance agreements as well as discretionary arrangements, which were banned by the FCA in 2021. There's already an extension in place for the discretionary commission arrangement related motor finance complaints. If we do not consider an extension for non-discretionary commission arrangement motor finance complaints there's a risk they could be treated differently despite the underlying product being the same and the judgment applying to both types of commission arrangement.

As I mentioned earlier, some of the parties intend to appeal to the Supreme Court and if an appeal goes ahead it will take some time for this to be concluded.

What we have said this morning, we are going to do as soon as we can, is launch a public consultation so we can obtain a wide range of views before coming to a decision on what our next steps should be in respect of extending the time motor finance firms have to handle commission complaints. When reviewing the outcome of the consultation we will, as always, consider how best to support our statutory objectives particularly in relation to market integrity and consumer protection. And if we decide to take our proposals forward in relation to an extended pause we will look to implement that extension by mid-December.

That's all I'm going to say to start with, I know that was a lot to digest, but I'm now happy to open the floor to questions.

[Participant], quick off the mark.

PARTICIPANT: Thank you, and thank you very much for hosting this afternoon, it's very helpful. I guess maybe picking up first on something you just mentioned, so looking beyond motor finance, and you said you're considering coming back on that, I guess where the market is there's a lot of concern about where that scope could go. So what are the factors you're considering, how quickly could you come and say something? I guess just a bit more round that would be helpful.

And then I guess a second one, if I could, just noting your comment around banks considering provisioning in the statement this morning. It would be really interesting to hear what's your expectation there for the banks in

terms of what they should be thinking about? Because from an accounting side I'd say it's very difficult for them, given the amount of uncertainty there is now for them to be able to reliably estimate, which is the fundamental accounting principle, so your thoughts around that would be helpful. Thank you very much.

NR: Thank you [Participant]. Absolutely, we recognise your first point regarding the potential applicability beyond motor finance. Obviously in the first instance the most acute impact has been in the motor finance market, and that's where our focus has been, but we are working through the judgment, we are considering it very carefully. Of course any judgment is specific to the facts of the case and so we need to be mindful of that, and anything we say on this will always of course be subject to the fact that the courts make the final decision on some of the interpretation of the underlying law.

Stephen, would you like to add something more on that?

SBR: Just to say that the facts, and I'm stating the obvious, the facts are the key to this, so the fact pattern of this particular — these three cases that were in the Court of Appeal judgment, that's our starting point in considering how far it goes. We're not in a position to say anything further particularly about how far that does extend at the moment, but that's what we're looking at, that's what all the firms will be looking at, the fact pattern, and I'm sure that they're all getting their own legal advice, and it will be a case of proceeding slowly really into that rather than rushing to make any grand — nobody can make any grand sweeping statements as to where the law extends, and we won't be doing that. But we will look carefully at what more we can do which could be genuinely helpful to firms.

NR: On provisioning, I think there are a few elements to this, [Participant], and of course every firm is unique, they know their book, historic book and so on and the nature of the contracts and complaints they have been receiving, but there is an administrative cost potentially in dealing with potentially a large scale level of complaints. A pause is simply that. It's a pause, it's not going to stop those complaints permanently, so I think there will be a certain amount of estimating that can be done for different scenarios around that, and then of course there is the estimate around potential liability as well.

Each firm will have to consider its own position, but I think you've already seen some announcements start to come through, that in the interests of sound prudential planning and sound accounting that some firms have decided to take the decision to take a few more provisions, and obviously we're in touch with each firm as they take those decisions.

I appreciate there is a degree of uncertainty, and each firm will have to work that through themselves. We do have prudential rules which require everybody to maintain adequate prudential provision — adequate financial resources to conduct business in the United Kingdom.

PARTICIPANT: Perfect. Thank you very much.

PARTICIPANT: With the original motor finance cases it felt like it was a product flaw, the discretionary commission, and therefore in my head going for a consumer

redress programme, and I appreciate you haven't made that decision yet, would make sense. I think you referred to it earlier as the fact patterns in these particular cases. It doesn't feel like it's quite so generic in the sense that you're having to determine exactly what information is being disclosed by the broker and almost the vulnerability of a customer. So I'm just wondering how you are thinking about it, whether you're thinking, this is something that might be better being done on a case by case basis through the courts or whether a consumer redress programme would also be suitable to address these particular products as well? I appreciate you may not be able to answer that at this point in time.

NR: Stephen, over to you.

SBR: I think, well, to cut to the chase, I'm not going to disappoint you, in the sense I'm not going to give you an answer as you predicted at the end of your question. I think we're not — we haven't worked through all those points that you were indicating. Obviously we've got a range of toolkits at our disposal from letting things play through complaints to other actions. As you indicate, [Participant], this particular case isn't about a bad product per se, it's about — ultimately it's about a relationship: someone walks into a forecourt and buys a car and in order to get the finance enters into another agreement through that broker to get the finance. It's about that relationship, and about the exchange of information that happened in that relationship, and it is very fact-specific in that sense.

So, to that extent I agree with you, that there is a distinction between a faulty product, and what's happened in this case, which means that that's one of the reasons it's not straightforward for us to say the answer has to be this thing. We need to, as Nikhil said in his statement, think through the implications, think through what the right and helpful thing for us to do, bearing in mind the objectives of: we want a functioning car market, we want loans to happen in a lawful way, we want consumers to get access to the product, but if consumers genuinely have suffered harm or have been mistreated in some way then it's right that they should get redress. So we need to work through all of those aspects.

NR: I recognise this is hard for you and the work you're doing, you're trying to assess the market, and it's challenging. And so that's one of the reasons why we want to have this conversation with you, so we can take you through this step by step over the coming months as we're working this through. There is uncertainty, we accept that, we'll see where the Supreme Court gets to. There's also a separate judicial review where that's happened, the Barclays case with the Financial Ombudsman (FOS), and we will get that judgment at some point as well. As all this information comes through to us we can then consider what the implications are for both the discretionary commission arrangement work we've been doing and of course the broader implications with non-discretionary arrangements too. That's not settled yet.

PARTICIPANT: Great. No, these calls are very helpful. Even though you can't necessarily give us the answers it's just useful to hear how you're thinking about some of the processes, so I'd echo [Participant's] comments, that these calls are great. Thank you.

NR: Great. Thank you.

[Participant]?

PARTICIPANT: Hello. To repeat, thank you for doing this, it is helpful.

I've got two actually, if I can Nikhil? The first is the idea that you may become an interested party if the cases go to the Supreme Court. Can I ask in that context whether you previously thought there may have been or was a fiduciary duty in the motor market at large? I mean, one would assume that wasn't your assumption historically given the 2014 CONC rules and the updated 2021 rules didn't require lenders to disclose the commission amounts, and of course FOS earlier in the year didn't find there was a disinterested duty or a fiduciary duty either, so has this ruling surprised you, and in that context if you do get involved with the next step of this would you expect to be putting those ideas across to the Supreme Court?

The second question, is I'm just thinking about the timeframe if the redress scheme were to widen out. I mean, obviously if fiduciary duty across the wider market is established at some point in the future, post-2021 arrangements possibly come into scope. What's your view on pre-2007, and this may be one for your legal experts, but my understanding was if we're dealing with cases relating to fiduciary duty prior to 2007, and half secret commissions in particular, the Limitation Act would apply because there wasn't concealment, you knew that there was a commission being paid, so someone from 2002 couldn't use the Hurstanger judgment to claim in 2024? Any thoughts about timeframe, and then also your own view on whether there's a fiduciary duty in the motor market would be really helpful.

NR: The first thing I should say, we obviously respect the Court of Appeal's judgment, and we have a requirement obviously to ensure compliance with the law, and we respect the judgments of courts and obviously we will wait to see what the Supreme Court says. Let me just say that clearly upfront.

Secondly, clearly if we felt there had been a fiduciary duty as interpreted by the court we would have, I imagine, said that at the point we took the decisions to ban motor finance commissions in 2021 and adopted our rules.

It is the legal structure of the United Kingdom that we make our rules but there are other legal issues and that must be considered too. There's primary legislation under the Consumer Credit Act, and of course what the Court of Appeal has done is gone into common law in relation to fiduciary duty. So, I think we accept our rules are not the final word on this and we always have to have deference to how the courts think about these issues. I certainly think if the Supreme Court does take the case, and that's an if, and if the Supreme Court does accept an intervention from us, and that's another if, I think we will want to explain about how we were thinking about these issues when we were making our rules and in the work we have been doing over recent months, as well as trying to articulate the broader market issues and impact.

Our objectives on consumer protection are absolutely clear, that consumers must be treated fairly and receive fair redress. We also have an objective of markets functioning well for consumers in the future too. We want to make sure that those wider considerations, as we have our wider public interest

objectives, are brought to bear too.

That's how I take that. I think Stephen you may want to add something, and also on the Limitation Act.

SBR: Yes. I think that our rules are not predicated on there being a fiduciary duty, that is certainly true. Our rules are predicated on the potential for a conflict of interest though in this sort of circumstance, so that's one thing I would say. But you're right, the FOS decision, that was the subject of judicial review that Nikhil referred to, and other FOS decisions have not gone as far to be based on a fiduciary duty. And the fact that this case had to go to the Court of Appeal to determine that it was a fiduciary duty, rather than the county court all saying the same thing on that issue, indicated that the law wasn't entirely clear. I think we can say that without any controversy.

On the Limitation Act point, without being boring, I don't want to get drawn on what our legal view is on when that applies, and which date will be important. But you're entirely right, that the Limitation Act considerations will be important for any individual complainant trying to take this through the courts to try to seek redress. That will be an important point for them, and more broadly for us in thinking about the bounds of market integrity, consumer protection, the wider considerations that Nikhil was referring to, how the Limitation Act applies and how it seeks to achieve some finality in relation to it being an important consideration for us to take into our wider thinking.

NR: Yes. And you'll remember, just on this point about legal uncertainty, when we extended the complaints pause for discretionary commission arrangements earlier in the year we did explicitly cite the pending legal cases, including the Court of Appeal case that we've now got the judgment for and of course the judicial review. So I hope we telegraphed that those will be relevant in our thinking here.

[Participant]?

PARTICIPANT: Thank you Nikhil.

PARTICIPANT: Great, thanks Nikhil. Just a quick one from me. Could you help us think about the timelines? Now, I appreciate that a lot of this is out of your hands, but when would you expect a response from the Supreme Court, and if they do take this case on would you encourage an expedited case?

NR: To the second question, yes. On the first I'll defer to Stephen. I think it's very hard for us to give you an explicit timetable because all the cases that go to the Supreme Court are typically cases that have very significant public interest and so we don't know really how long before they will give a view on whether they accept the appeal or not.

SBR: Yes, exactly. I think typically the Supreme Court will deal with the permission decision within three months or so. So, in a normal case, you would expect to hear whether the Supreme Court are going to take it within that sort of timeframe. At the moment if they took the decision today to grant the permission, so fast forward three months and they took the decision today to grant permission my understanding is that the Supreme

Court in a normal case will be fixing a hearing for around next summer, so about six months or so from now. So, if you were to add those two facts together, in a normal case you might be looking at nine months, maybe longer, before you got to a Supreme Court hearing. That's not to say that that's what will happen in this case. As Nikhil has said, we've already indicated that we're going to asking the court to move as quickly as it can, I'm sure the parties will be asking the court to move as quickly as it can, but that's the best framework or guidelines to what a normal timeframe will be that I can give you.

NR:

Thank you.

I'm not seeing any more hands. I hope that has been useful. I recognise we're not able to share vast amounts of information with you but I hope you find it useful to be able to just understand where we are coming from. As I said at the start, do please give us feedback. We do place a lot of value on our engagement with this community, we know it's important for you to understand where we are coming from, we'll seek to do so as openly as we can all the way through as we consider these issues.

I will draw things to a close there. I'll repeat what I said earlier that a transcript for this will be available on our website later this evening, before markets open tomorrow.

Thanks very much for making time at the end of the day. Have a good evening.

ENDS