Neutral citation: [2024] EWCC 22
Case No: K00BK235
Date: 5 December 2024

IN THE COUNTY COURT AT SOUTHAMPTON
ON APPEAL FROM THE COUNTY COURT AT BASINGSTOKE
DISTRICT JUDGE LYNDS

Before :

HIS HONOUR JUDGE GLEN
- -

Between :

Jakub Kasperczak	**Appellant**
- and -	
FirstRand Bank Limited (London Branch) T/A Motornovo Finance	**Respondent**

- -
- -

Jonathan Butters (instructed by **Consumer Rights Solicitors Ltd.**) for the **Appellant**
Harrison Denner (instructed by **Eversheds Sutherland (International) LLP**) for the **Respondent**

Hearing date: 11 October 2024
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JUDGMENT

His Honour Judge Glen:

Introduction.

1. The Appellant makes a renewed application for permission to appeal (and, if granted, seeks to appeal) the decision of District Judge Lynds sitting at the County Court at Basingstoke on 3 June 2024 that the Appellant's claim should be reallocated to the Small Claims Track. By order dated 9 September 2024, I directed that the application should be listed with the appeal to follow if permission was granted. The Appellant was represented by Jonathan Butters of Counsel and the Respondent by Harrison Denner also of Counsel and I heard oral argument from them on 11 November 2024. I have subsequently been able to consider their skeleton arguments which were not before me at the hearing, buttressed in Mr Butters' case by a sizeable bundle of 'authorities'.

2. Following the decision of the Court of Appeal in *Johnson v. FirstRand Bank Limited (London Branch) T/A Motornovo Finance [2024] EWCA Civ 1282*, I invited both Counsel to provide me with further written submissions if so advised by 15 November. Mr Harrison chose not to do so. Despite the invitation to send these to me directly, Mr Butters chose to send his submissions via his instructing Solicitors who in turn sent them to the court at Basingstoke, Unsurprisingly, they did not reach me before I prepared the first draft of this judgment. In so far as they genuinely address *Johnson* (as opposed to taking the opportunity to refine submissions already made), I have taken them into account in finalising this judgment.

Background.

3. On 22 January 2017 the Appellant entered into a conventional hire purchase agreement with the Respondent in relation to a second-hand Audi A6 vehicle. The amount advanced was £19,400 repayable over 60 months at a 'fixed rate of interest' of 8.25% and an APR of 16.4%. He paid a deposit of £1,047. It is alleged in the defence that the agreement was 'settled' early on 31 December 2020. I take this to mean that the Appellant paid off the outstanding finance (less an early repayment discount) and became the owner of the vehicle.

4. The finance was arranged by the dealer, Imperial Cars of Swanwick Ltd., which received commission of £3,433.80 from the Respondent. This payment was presaged by clause 12.6 of the finance agreement which provided that *"A commission may be payable by us to the broker [i.e. the Dealer] who introduced this transaction to us. The amount is available from the Broker [i.e. the Dealer] on request."*

5. On 2 October 2023 the Appellant issued a claim seeking rescission of the agreement and compensation, although (no doubt with an eye to the issue fees payable) the claim form disclaims any claim for money. The somewhat diffuse particulars of claim amount to an allegation that the Respondent is liable as primary tortfeasor on the grounds that the payment of commission was a bribe or alternatively as an accessory to the dealer's breach of fiduciary duty. In the further alternative, rescission and compensation are sought on the basis that the agreement gave rise to an unfair relationship within the meaning of 140B of the Consumer Credit Act 1974.

6. Annexed to the particulars of claim is an 'Account Reconstruction' which seeks to demonstrate that the value of the claim following rescission is £24,367.69. This figure is arrived at by taking the total of the payments (capital and interest) made under the agreement, applying interest to them at the contractual APR and then giving credit for the advance plus £2,938.59 being 'Creditor cost of finance on sum advanced'. The rate used for this is not stated.

7. The defence denies the common law and statutory claims. In particular, it is denied that the Appellant is in any event entitled to the rescission of the agreement, relying in part on clause 13.6 of the agreement. It also alleges (somewhat optimistically) that the claim is barred by the operation of the Limitation Act 1980.

8. Following transfer to Basingstoke County Court, the file came before Deputy District Judge James in boxwork. He decided that the matter was suitable for allocation to the Fast Track. On 6 March 2024 the Respondent applied, as it was entitled to do and within the time set by the Deputy District Judge's order, to vary or set that order aside on the grounds that the matter was in fact suitable for allocation to the Small Claims Track. It was this application that District Judge Lynds acceded to on 3 June 2024.

The appeal.

9. On 7 June 2024 the Appellant filed an Appellant's Notice in Form N164. The grounds of appeal are formulaic and in large part identical to those deployed in a number of similar appeals. In oral argument, Mr Butters accepted that they could conveniently be divided into two categories; a challenge to the assessment by the District Judge of the value of the claim; and a challenge to the exercise of the District Judge's discretion. I refused permission to appeal on the papers. The Appellant renewed his application in accordance with CPR54.4(2).

The judgment.

10. The District Judge gave a short extempore judgment which has been transcribed. At the outset, he expressly states that he has considered the provisions of CPR13.6. He recognised that this consideration was 'weighted' in favour of the financial value of the claim. At paragraph 5, he states that in considering value there must be some reasonable factual and legal basis for a claim and not simply one put on a 'strategically hopeful' basis.

11. At paragraph 3, the District Judge turns to the issue of rescission. He held that:

> *"…on the basis of the contract as it currently presents this is not a secret commission claim. What might be argued is that it is a half-secret commission. And I say that because there is a written agreement in which the possibility of payment of commission to the claimant is explicit…"*

For this reason, he went on to find that rescission was an unlikely outcome even on a discretionary basis.

12. At paragraph 6, he nevertheless went on to address the issue of the consequences of rescission and the ability of the Appellant to make counter restitution. He notes that:

> *"…there is no calculation, or complete calculation, before the court which would account for the return of the car and its value, any depreciation, and the value attributable to the use of the car during the course of the contract. I simply have starting figures which are likely in my view to be subject to dramatic reduction even if…restitution were possible."*

13. Finally on the question of value, he held that there was no apparent justification for awarding interest based on the APR and that in reality it would be awarded at a much lower rate. He seems to have been of the view that no rationale had been offered for awarding interest 'to compensate for unfairness' which I take to be a reference to it being something other than interest in the conventional sense. In the round he preferred the Defendant's valuation. On the wider issues relation to allocation, he noted that there was some complexity but of the kind that the courts are now used to dealing with. He noted that there was unlikely to be any significant evidence. He reiterated that he had had regard to CPR26.13.

Submissions.

14. Mr Butters' original skeleton argument was prepared before the decision in *Johnson* had been handed down. Perhaps for this reason, he suggests in it that the law in this area, both as regards liability and as regards remedy, is not settled. He submits that this is not a case where the District Judge was entitled to reject the possibility of rescission and reinforces this in his subsequent written submissions as regards the decision in *Johnson*. Whilst precise *restitutio in integrum* might not be possible, he submits that rescission was still available where practical justice could be achieved by the making of appropriate adjustments and allowances. In this respect, he submitted that the Appellant could not be expected to account both for the value of the advance and for depreciation and/or the value of the use of the vehicle.

15. Mr Butters submits that the 'Account Reconstruction' represents an accurate statement of the value of this claim, whether as a consequence of rescission or following a finding of an unfair relationship. The District Judge was therefore wrong to discount this. There was no sound basis for his view that interest would not be awarded at the APR rate. In addition, interest did not fall to be discounted when considering the value of the claim; interest forming part of an award following rescission, and being an integral part of the remedy, was not 'interest' within CPR 26.13(2)(b). In oral submissions before me, he submitted that interest awarded as part of any compensation paid under the 1974 Act was also not 'interest' for these purposes.

16. On the wider issues, Mr Butters submits that the District Judge started in the wrong place. If he had correctly valued the claim, then the starting point was that the normal track was the Intermediate (or at the very least) Fast Track. The District Judge would then have needed to consider whether there were any factors that took it outside of that track. The complexity of the matter, the nature of the remedies sought, the fact that allegations of quasi-dishonesty are made, the need for legal representation and the

desirability of orders for disclosure made this matter unsuitable for the Small Claims Track, whether or not it was the normal track. Mr Butters reinforced his submissions in this respect by reference to a number of decisions at Circuit Judge level.

17. Mr Denner reminded me in both his printed case and oral submissions that this was an appeal against a case management decision and that I should be slow to interfere with it. He argued that the District Judge was not obliged to accept the Claimant's statement of value. He was entitled and obliged to make an assessment of the probable outcome when assessing likely remedies. He submitted (again, pre-*Johnson*) that the District Judge was correct in holding that this was not a case where rescission could or would be ordered.

18. He argued that interest (at whatever rate) is not in any event a matter that can be accounted for when considering the value of the claim. Whilst hypothetically the Claimant might expect to recover the monies paid under the agreement, he would have to give credit for the original advance and the value of the use of the vehicle. In practice, the District Judge did address the outcome that would have followed from rescission as it made little difference.

19. On the wider issues, he submitted that the District Judge explicitly had the considerations in CPR26.13 in mind in reaching his decision. There was unlikely to be any significant evidence of fact. There was no evidence that the Appellant would have go unrepresented if the matter remained within the Small Claims Track. He submitted by way of a conclusion that:

> *"The reality is that this claim is very much a Small Claims Track matter even putting value to one side. These cases are flooding the County Courts at the moment in their thousands. They require relatively limited factual evidence, the areas of dispute are well-understood by both sides and are narrow, and District Judges and Deputy District Judges routinely deal with these matters on the Small Claims Track on a daily basis."*

<u>The law.</u>

Secret commissions

20. *Johnson* was the first opportunity that the Court of Appeal have had to review an area of litigation that has seen explosive growth in the last few years. The facts of the conjoined appeal in *Wrench* (involving as it did finance provided by the Respondent to this appeal) are not dissimilar to those in this appeal. The Court held that the dealer in that case owed the disinterested duty considered in *Wood v Commercial First Business Ltd [2021] EWCA Civ 471*. In addition, the relationship was a fiduciary one.

21. On the facts in *Wrench* it held that there had not been sufficient disclosure to negate secrecy and that accordingly the Respondent had a primary liability to the borrower. The terms and conditions, which were identical to those in this case, were not in themselves sufficient to give rise to even partial disclosure. It was however in each case a question of fact to be considered in the light of what the borrower was told and, possibly, the extent to which he was financially sophisticated. The fact that there had

been non-, or partial, disclosure did not by itself render an agreement unfair within the meaning of Section 140A of the 1974 Act. This may to some extent depend on the ratio of the commission to the loan and the overall fairness of the bargain.

22. In refusing permission to appeal in Wrench, the Court described the case as "…a clear example of payment of a secret commission to a fiduciary". In the conjoined appeal of *Hopcraft* it added that *"The law in this area is well settled and in no need of any further clarification"*.

Remedies

23. The Court of Appeal was not concerned with the issue of remedies, save to observe that in a secret commission case the borrower is entitled to rescission as of right subject to counter-restitution. In *Johnson* the Court was constrained by virtue of a concession made to approach the matter as a partial disclosure case. It held that the agreement was plainly unfair and that:

> *"The commission of £1,650 should be repaid to Mr Johnson by the lender, together with the interest he paid on it under the hire purchase and personal loan agreements, and interest on the total of those two elements at an appropriate commercial rate from the date of the agreement…"*

The Court's final order awarded Mr Johnson an inclusive sum of £3,231.76. The commission was £1,650 and the agreement ran for about three and half years during which time I calculate that he would have paid approximately £800 in interest on the commission. This suggests that the 'commercial interest rate' was a modest single figure one.

24. The availability of 'rescission as of right' is in distinction to rescission granted as an equitable remedy. That does not mean however that rescission is always possible. The right to rescind can be lost or barred in a number of ways, including lapse of time, the intervention of third party rights and the inability of the innocent party to make complete *restitutio in integrum*. The common law treated this last requirement as a strict one, but equity adopts a more flexible approach in which the court will endeavour as a matter of practical justice to put the parties as nearly as possible into the position they would have been had the contract not been made (see e.g. *Salt v Stratstone Specialist Ltd [2015] EWCA Civ 745*).

25. Section 140B(1) of the 1974 Act confers on the Court a wide power to fashion a remedy to remedy unfairness. This includes an order requiring the creditor *"…to repay (in whole or in part) any sum paid by the debtor or by a surety by virtue of the agreement or any related agreement (whether paid to the creditor, the associate or the former associate or to any other person)…"*. The Court may also *"…otherwise set aside (in whole or in part) any duty imposed on the debtor or on a surety by virtue of the agreement or any related agreement…"*. I observe that there is no explicit reference to the award of interest or any other form of compensation beyond the repayment of monies already paid or received.

The Rules

26. The current CPR26.9(4) provides that *"...the small claims track is the normal track for any claim which has a value of not more than £10,000."* The Fast Track (subject to certain qualifications) is the normal track *"...for any claim - (a) for which the small claims track is not the normal track; and (b) which— (i) is a claim for monetary relief, the value of which is not more than £25,000; or (ii) is or includes a claim for non-monetary relief and— (aa) if the claim includes a claim for monetary relief, the value of the claim for monetary relief is not more than £25,000"*. The Intermediate Track is for the purposes of this appeal and in broad terms the normal track for claims above that value but not exceeding £100,000.

27. CPR26.12(1) provides that *"In considering whether to allocate a claim to the normal track for that claim under rules 26.9, 26.10 or 26.11, the court shall have regard to the matters mentioned in rule 26.13(1)"*. CPR26.13(1) states that those matters are as follows:

> *"(a) the financial value, if any, of the claim;*
>
> *(b) the nature of the remedy sought;*
>
> *(c) the likely complexity of the facts, law or evidence;*
>
> *(d) the number of parties or likely parties;*
>
> *(e) the value of any counterclaim or additional claim and the complexity of any matters relating to it;*
>
> *(f) the amount of oral evidence which may be required;*
>
> *(g) the importance of the claim to persons who are not parties to the proceedings;*
>
> *(h) the views expressed by the parties; and*
>
> *(i) the circumstances of the parties."*

CPR26.13(2) provides that *"It is for the court to assess the financial value of a claim and in doing so it shall disregard— (a) any amount not in dispute; (b) any claim for interest…"*

28. Paragraph 15 of the Practice Direction to Part 36 provides as follows:

> *"(1) The small claims track is intended to provide a proportionate procedure by which most straightforward claims with a financial value of not more than £10,000 can be decided, without the need for substantial pre-hearing preparation and the formalities of a traditional trial, and without incurring large legal costs…*
>
> *(2)The procedure laid down in Part 27 for the preparation of the case and the conduct of the hearing are designed to make it possible for a litigant to conduct their own case without legal representation if they wish.*
>
> *(3)Cases generally suitable for the small claims track will include consumer disputes…".*
>
> *(4)A case involving a disputed allegation of dishonesty will not usually be suitable for the small claims track.*

(5)The court may allocate to the small claims track a claim, the value of which is above the limits mentioned in rule 26.9(1). The court will not normally allow more than one day for the hearing of such a claim."

29. Finally, there is a reminder at paragraph 1(1)(a) of that Practice Direction of the need to have regard to the Overriding Objective in CPR1 of dealing with cases justly and at a proportionate cost, which in itself involves:

"a) ensuring that the parties are on an equal footing and can participate fully in proceedings, and that parties and witnesses can give their best evidence;

(b) saving expense;

(c) dealing with the case in ways which are proportionate—

(i) to the amount of money involved;

(ii) to the importance of the case;

(iii) to the complexity of the issues; and

(iv) to the financial position of each party;

(d) ensuring that it is dealt with expeditiously and fairly…"

Appeals

30. All appeals proceed as a review of the decision of the first instance judge. The appeal court will not interfere unless the decision is wrong in principle, is the result of overlooking material facts or is based on irrelevant ones. This is all the more so when the decision in question is a case management one. The Court of Appeal have recently again emphasised that:

"It is well established that it would be inappropriate for an appellate court to reverse or interfere with such a decision unless it is "plainly wrong in the sense of being outside the generous ambit where reasonable decision makers may disagree"

(Parsdome Holdings Ltd v Plastic Energy Global S.L. [2024] EWCA Civ 1293 citing Lewison LJ in *Broughton v Kop Football (Cayman) Ltd [2012] EWCA Civ 1743).* Where decisions (like that in this case) are made by District Judges at short hearings in pressured lists, a degree of latitude in expression of reasoning should be afforded to them.

<u>Conclusions.</u>

31. I agree with Mr Butters that the starting point for any decision on allocation is to identify the normal track. That in turn requires the Court to place a value on the claim. The Court is not required to take the stated value of the claim at face value. CPR 26.13(2) emphasises that the Court must instead make its own assessment, disregarding any sums that are not in dispute.

32. In my judgment, the correct approach is to ask whether there is a real prospect of the Claimant successfully recovering the sum claimed (or any given component of it). This is the same familiar threshold as that applied in other parts of the Rules and recently reviewed by Popplewell LJ in *Dos Santos v. Unitel SA [2024] EWCA Civ 1109*. I reject the suggestion made in the grounds of appeal in this case that this involves 'pre-judging' the claim.

33. I also reject the suggestion in the grounds of appeal (not pursued by Mr Butters in oral argument) that the District Judge failed to apply himself to the issue of value. Plainly he did, expressly recognising its primacy as a factor in identifying the correct track. He also, in my judgment, applied the correct test to the question of whether the value of the claim was to be taken as that advanced by the Appellant, albeit that he formulated it in a slightly different way.

34. Where the District Judge went wrong (or at least, where he took a view of the outcome of the matter that cannot be regarded as sustainable following *Johnson*) was in concluding that there was no realistic prospect of the Claimant establishing that this was a secret commission case. That on its own is a reason for granting permission to appeal. It is not however in my judgment a ground for allowing the appeal.

35. Having apparently rejected the possibility of rescission (either as a matter or right or judicial outcome), the District Judge nevertheless went on to consider the position as it would be in the event that the contract was rescinded, including issues of counter-restitution and rates of interest. It was on this basis that he proceeded to value the claim. The question is therefore whether he was wrong to value the claim as he did.

36. In my judgment, the 'Account Reconstruction' annexed to the particulars of claim does not accurately reflect an outcome for which there is a real prospect for success. To restore the parties to their original position would involve the Appellant receiving back the sums paid under the agreement and returning the benefits received under it i.e. the vehicle and the value of its use. This is plainly impractical in the case of a finance agreement that has run its course. The exercise in practical justice therefore has to recognise the realities and work with them.

37. As Mr Butters submits, and I agree, the agreement between the parties to this appeal was fundamentally a financial one. Whilst nominally the Respondent was hiring the vehicle to the Appellant with an option to purchase, the reality was that the Respondent's retention of title was a means of securing a money advance to enable the purchase of the vehicle from the dealer. Treating the matter in this way, I am willing to recognise that there is a real prospect of successfully arguing that the Appellant does not need to bring into the account the value of the vehicle, depreciation or its use as these are not relevant to the core financial transaction.

38. Ignoring for the moment issues of interest and commission, the outcome of this approach is that the Appellant would in effect end up in the position of having acquired the vehicle with the assistance of an interest free loan. The Respondent will be placed broadly in the position in which it would have been had the advance not been made, save that it will have paid out commission which it may or may not now be able to recover (something the Respondent can hardly be heard to complain about) and lost the use of the money over that period.

39. This outcome is highly relevant when one comes to consider the issue of the commission. In cases of bribery or the payment of a secret commission, it is well established that, alongside rescission, the innocent party has a choice of remedies. It can seek an account of the bribe or commission by way of a restitutionary action (or perhaps now in unjust enrichment) for monies had and received or alternatively it can seek damages for any loss that has occurred as a result.

40. The Court of Appeal in *Wood v. Commercial First Business Ltd. [2021] EWCA Civ 471* was not directly concerned with the issue of remedy but at paragraphs [95] onwards summarised the position at law, noting by reference to the decision of the Privy Council in *Mahesan s/o Thambiah v Malaysia Government Co-operative Housing Society Ltd [1979] AC 374* that these remedies are not cumulative but are alternatives. The restitutionary remedy is available where the innocent party would not otherwise be able to prove a greater loss but it is not an automatic consequence in all cases. It is not intended to be punitive, merely compensatory (see *Spence v Crawford [1939] 3 All ER 271*).

41. In *Johnson* the Court noted that:

> *"…at least until the Financial Conduct Authority ("FCA") introduced new rules with effect from 28 January 2021, the consumer may have been surprised to discover that the dealer, who arranged the finance on their behalf, also received a commission from the lender for introducing the business to them, financed by the interest charged under the credit agreement.*

42. In effect, the consumer in a case of this kind pays for the commission through the enhanced interest rate charged on the loan. If the Appellant in this case receives back all of the instalments paid, then in practice he has already had satisfaction for the commission paid by the Respondent. To go on and order repayment of the commission to the Appellant would in these circumstances amount in my judgment to double recovery. In the context of rescission, it would further substantially and unjustifiably tip the scales of practical justice in his favour.

43. Accordingly, in my judgment the best outcome from the Appellant's perspective for which there is a real prospect of success is that the balance of restitution and counter-restitution is (subject to the issue of interest) struck by leaving the parties in the position described in paragraph 38 of this judgment. Assuming for the present that the Appellant is able to establish that this agreement is unfair (something that is far from obvious), there is no real prospect that any greater award would be made in the exercise of the statutory jurisdiction.

44. I turn next to the issue of interest in terms of the rates that should be applied to the monies to be returned to (or credited to) the parties on restitution. I accept that prima facie these rates may differ. So far as the Respondent is concerned, I also accept that there is a real prospect of successfully arguing that it is entitled only to a sum to reflect its costs of borrowing in respect of the capital advance over the relevant period. That rate will inevitably be a modest one.

45. The issue of what rate the Appellant can realistically expect to recover is a more difficult one. There is in my judgment, and as the District Judge held, no proper basis

for using, and therefore no realistic prospect of recovering at, the rate of the APR set under the credit agreement. This is not least because this is a rate that, on the Appellant's own case, has been skewed by the payment of commission. In my judgment, the Appellant is at best entitled to recover the kind of 'commercial rate' referred to in *Johnson*. The trial judge will (assuming an award of interest is made at all) have in mind in setting that rate the fact that, as explained in paragraph 38, the Appellant will as a result of rescission in effect have had an interest free (or extremely low rate) loan to purchase the car. The margin (if any) between the two rates is therefore likely in my judgment to be small.

46. All this assumes that interest is in any event relevant in assessing the value of the claim. Mr Butters relies upon dicta taken from the decision of James Pickering KC sitting as a Deputy High Court Judge on the issue of remedies in *Wood [2021] EWHC 1403 Ch* following remission by the Court of Appeal.

> *"As explained above, the basic objective of equitable rescission is to restore the parties as near to their original positions as may be possible. This being the case, on rescission, the general rule is that money will be returned together with interest. This is not by way of damages but instead to reflect the fact that the receiving party has been kept from his or her money and that to restore them to their original position they ought also to receive interest on that money."*

47. In that context, I accept Mr Butters' submission that interest is an integral component of the remedy in the sense described by the Deputy Judge; a means of ensuring that the claimant is not out of pocket as a result of the exercise of restitution and counter restitution. This however only takes the matter so far. The award of interest is always a remedy, whether awarded at common law/equity (see *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v Inland Revenue Commissioners [2007] UKHL 34*) or by statute (see *Maher v Groupama Grand Est [2009] EWCA Civ 1191*).

48. In my judgment, CPR26.13(2)(b) seeks to draw a distinction between the primary financial remedy (whether that be debt, damages, statutory or equitable compensation or otherwise) on the one hand and any additional sum intended to compensate the claimant for being out of their money on the other i.e. precisely the interest award referred to in *Wood*.

49. Furthermore, I am unable to accept Mr Butters' argument that there is in this case no *"…claim for interest"*. This is a matter of substance rather than form. The assertion in the claim form in this case that *"The Claim is not a claim for money"* does not alter the fact that this is precisely what the Claimant seeks. A claim for rescission necessarily (on the Claimant's case) carries with it a claim for money and a claim for interest in order as nearly as possible to achieve *restitutio.* Similarly, a claim for statutory compensation includes a claim for interest to compensate the claimant for being without his primary compensatory award.

50. I conclude therefore that there is no real prospect of successfully arguing that interest forms part of the value of the claim for the purposes of identifying the normal track. It necessarily follows that the District Judge was right (even if his reasoning was somewhat less full) to conclude that the Defendant's valuation was likely to be the

more accurate and that the Small Claims Track was therefore the normal track for this claim.

51. Once that conclusion is reached, it was for the District Judge, properly weighing all the factors in CPR26.13(1), to decide whether there was anything which took this matter outside of the normal track. This was an exercise that he explicitly undertook and I can see no basis for interfering with his exercise of discretion. Indeed, even if I had concluded that I was in a position to exercise my own discretion, I would have come to the same conclusion.

52. The law as it applies to the primary issues that arise in cases of this kind is, as the Court of Appeal observed in refusing permission to appeal in *Johnson*, well settled. District Judges see ever increasing numbers of claims of this kind in which the same arguments are deployed by the parties, referring to the same authorities (whether properly so called or not). Evidence is likely to be limited. The District Judge's reference to Payment Protection Insurance claims was apposite. When such claims first came to the fore, it was routinely asserted that their complexity meant that they could only be tried on the Fast Track. Experience has shown that the Small Claims Track is well suited to such disputes.

53. The District Judge was right (and certainly entitled) to conclude that this matter was not unduly complex. The remedies available do not differ from track to track. Whilst it might be said that these cases involve allegations of dishonesty in the sense considered in *Johnson*, this is not in my judgment 'dishonesty' in the sense intended by PD36.15(4) or in any event by itself a factor that weighs heavily enough in the balance to take the matter out of its normal track.

54. Furthermore, the District Judge was right not to be deflected by the suggestion that allocation to the Fast Track was necessary in order to allow the matter to be tried fairly, either in terms of the directions required or as regards the Claimant's expressed need for representation. Whilst orders for disclosure are not automatic on the Small Claims Track (CPR27.2(1)(b)) this does not mean that appropriate orders cannot be made (see CPR27.2(3) and CPR27.4(1)(b)). Mr Butters was careful not to say that the Appellant's Solicitors would be unable to continue to act in the event of allocation to the Small Claims Track. The reality on the ground is that claimants in such cases continue to be represented on that track, albeit that the funding model may provide a less attractive basis for remuneration than an inter partes costs order.

55. In my judgment the District Judge was entitled to allocate this claim to the Small Claims Track. Accordingly, whilst I give permission to appeal, the appeal is dismissed.