

Loan Distributor Column

"When is the AFB going to make a decision as to whether or not brokers need to disclose commission following the Hurstanger case?"

Robert Sinclair replies:-

With the House of Lords refusing leave to appeal to the borrowers, I believe that the decision is made. The ruling of the court required disclosure, but it was a ruling against a Lender. Therefore whilst I consider disclosure is required, it is for Lenders and those who represent them to make any consequent decision.

By way of explanation, it is important to accept that this commissions disclosure issue is a particularly complex problem and I am aware that there are a series of subtly conflicting legal views as to what is required – especially on linked transactions like PPI and on over-ride commission.

What is important to remember here is that this was a decision against a Lender for attempting to breach the fiduciary relationship between the broker and the customer by paying a commission, the amount of which was not disclosed. It is therefore incumbent on Lenders to give guidance on what disclosure they want the broker to make, to protect the Lender from breaching the secret commissions ruling.

- In order to limit any future potential claims all brokers should initially be considering whether they are required by their existing agreements with Lenders to disclose the amount of any loan commission they are to receive from a Lender or via a master broker, if they are not doing so already.
- Additionally, brokers should formally ask any Lenders with whom they place business what action the Lender wants them to take.

It remains the view of the AFB that Lenders need to come to a view on what disclosure they want brokers to make and explain that clearly to all relevant parties, be they master brokers, brokers or introducers. The AFB understands that this is a complex area and wants to give Lenders time to arrive at considered decisions and not make hasty judgements which could require subsequent further action. It is important that FISA, as our industry self regulatory body, is also give time to help Lenders arrive at these decisions.

Equally, I am aware that some Lenders have already made the decision to make full disclosure from day 1 to customers regarding;

- a) the broker fee
- b) additional commissions, whether or not deducted from the advance
- c) any commissions on PPI or other linked transactions

But these issues cannot be determined on legal interpretation alone – it is intertwined with secondary layers of regulation including the FSA’s Treating Customers Fairly principle and on what is fair and reasonable by the Financial Ombudsman’s yardstick, not to mention the Office of Fair Trading’s interpretation of the new unfair credit relationships test.

I am confident that FISA, through their Lender Council, will address this issue shortly and the AFB will continue to press them to reach a conclusion on this matter. The AFB is and will always be available to help in any of these discussions with Lenders and FISA, from the perspective of the broker.

Robert Sinclair
AFB Director
Robert@theafb.net