DRN-4218349

Financial Ombudsman Service

Summary

1. This complaint is about the commission BMW Financial Services (GB) Limited ("BMW FS") paid to a credit broker ("the Broker") when Mr W took out a hire-purchase agreement to buy a car in March 2017.

2. Mr W complains that BMW FS acted unfairly by paying the Broker commission without his knowledge. He says that this commission payment incentivised his Broker to obtain credit from the lender that offered the most favourable commission terms.

3. BMW FS says that it complied with the legal and regulatory obligations that applied at the time.

4. I have read and considered all the evidence and arguments submitted by both sides to decide what is, in my opinion, fair and reasonable in all the circumstances of the case.

5. For the reasons I explain in detail below, I am determining the complaint in favour of BMW FS and make no award to Mr W.

6. This is my final decision. In summary, having considered the evidence and arguments submitted by the parties during the course of the complaint, my conclusions are as follows:

    (i) The commission BMW FS paid to the Broker for introducing Mr W's consumer credit business was a fixed flat fee of £500 determined by the model of vehicle Mr W purchased.

    (ii) The Broker had no discretion to vary or alter the interest rate Mr W received, or any other terms of the hire-purchase agreement, to increase its commission.

    (iii) The Broker disclosed the existence of commission in accordance with its regulatory obligations.

    (iv) BMW FS' use of this fixed rate commission arrangement didn't cause it to breach any of its regulatory obligations.

    (v) Nor is it likely that a court would conclude that the relationship between BMW FS and Mr W was unfair under s140A of the Consumer Credit Act 1974 ("CCA").

    (vi) Whether or not the principles around the payment of commission considered in the court cases of *Wood & Pengelly*[1] are also capable of applying to a half-secret commission payment, a court would be unlikely to find that the principles set out in *Wood & Pengelly* apply in this case in any event.

[1] *Wood v Commercial First Business Ltd & ors and Business Mortgage Finance 4 plc v Pengelly* [2021] EWCA Civ 471.

(vii) Overall, I am not persuaded BMW FS acted unfairly or unreasonably in its dealings with Mr W.

7. Under the rules of the Financial Ombudsman Service, I am required to ask Mr W either to accept or reject my decision before 10 February 2024.

Background to the complaint

(a) The events leading up to this complaint – Mr W's hire-purchase agreement

8. In March 2017, Mr W was looking to buy a brand-new BMW car from a motor dealer – the Broker. The Broker was authorised by the Financial Conduct Authority ("FCA") to carry out, amongst other things, the regulated activity of credit broking.

9. I have not referred to the Broker by name in this decision as my final decision will be published and the Broker is not the respondent to this complaint.

10. The Broker offered to arrange finance to facilitate Mr W's purchase from it and, in doing so, it acted as a regulated credit broker.

11. Mr W decided to take out a loan to purchase the vehicle and the Broker introduced him to the lender, BMW FS. BMW FS entered into a four-year hire-purchase agreement for the sum of £58,491.95 with Mr W.

12. Under the hire-purchase agreement Mr W hired the vehicle from BMW FS and paid a monthly amount to it in return. BMW FS remained the legal owner of the vehicle under the agreement until Mr W repaid the loan.

13. In this case, the hire-purchase agreement says:

- The cash price of the vehicle was £58,491.95. Mr W did not pay a deposit and borrowed the full amount.

- The total charge for credit was £8,298.63 and the total amount repayable was £66,790.58 over 48 months.

- Mr W was required to pay 47 monthly 'rental' payments of £839.90 and, if he wanted to keep the car, a final optional payment of £27,315.28 (made up of a balloon payment and a £1 'option to purchase' fee).

- The Annual Percentage Rate ("APR") was 4.9%.

14. The Broker received a commission payment of £500 from BMW FS for arranging the hire-purchase agreement.

15. So, in summary, the key numbers were:

Amount financed	Term	Total charge for credit	APR	Commission paid to Broker
£58,491.95	48 months	£8,298.63	4.9%	£500

16. Mr W settled the agreement in full in October 2019.

(b) Mr W's complaint

17. In summary, Mr W says that he was treated unfairly and has suffered loss because:

    (1) He placed his trust and confidence in the Broker, with the expectation that it would arrange finance on the best possible terms for him. The Broker owed him a fiduciary duty to act in his best interests and not put itself in a position where there might be a potential conflict of interest. He now understands that the Broker received a commission he did not know about.

    (2) By paying a secret commission to the Broker BMW FS breached its regulatory obligations, including the FCA's Principles for Businesses ("the Principles") and the Consumer Credit Sourcebook ("CONC").

    (3) BMW FS also acted contrary to common law principles concerned with the consequences of a person in BMW FS' position paying a secret commission to the Broker which it knew to be arranging the credit for Mr W.

    (4) The Broker also breached regulatory obligations by giving preference to the credit product of a particular lender for personal gain and failing to explain the key features of the agreement to Mr W.

    (5) These failures rendered Mr W's relationship with BMW FS unfair under s140A of the CCA.

18. To put things right Mr W argues that BMW FS should:

    — reimburse all sums paid under the hire-purchase agreement plus interest at the rate of 8% from the date of each payment made; or

    — reimburse all the unfair interest payments that he paid under the agreement plus interest at the rate of 8% from the date of each payment made; or

    — repay the commission payment plus interest at the rate of 8% from the date that BMW FS made the commission payment to the Broker.

(c) BMW FS' response to Mr W's complaint

19. In summary BMW FS said:

    — The commission it paid was justified and in accordance with CONC 4.5.2G. The amount of commission that it paid to the Broker was fixed at £500. The APR was also a predetermined fixed interest rate. The Broker had no discretion to vary the amount of commission or the interest rate.

    — It disclosed the existence of commission in the Explanation Document that was provided to Mr W at the time he entered the finance agreement.

    — It complied with all its legal and regulatory obligations, including those under the FCA Principles and CONC (in terms of commission disclosure and otherwise), the

CCA and all other relevant laws. Its relationship with Mr W wasn't in any way unfair.

(d) My provisional decision

20. I issued a provisional decision on 14 April 2023. Having considered the evidence and arguments submitted by the parties, I was minded to determine the compliant in favour of BMW FS because:

    (i) The commission BMW FS paid to the Broker for introducing Mr W's consumer credit business was a fixed flat fee of £500 determined by the model of vehicle Mr W purchased.

    (ii) The Broker had no discretion to vary or alter the interest rate Mr W received, or any other terms of the hire-purchase agreement, to increase its commission.

    (iii) The Broker disclosed the existence of commission in accordance with its regulatory obligations.

    (iv) BMW FS' use of this fixed rate commission arrangement didn't cause it to breach any of its regulatory obligations.

    (v) Nor was it likely that a court would conclude that the relationship between BMW FS and Mr W was unfair under s140A of the Consumer Credit Act 1974 ("CCA").

    (vi) Whilst the principles around the payment of commission considered in the court cases of *Wood* & Pengelly were capable of applying to a car commission payment (whether half or fully secret), a court would be unlikely to find that the principles set out in *Wood & Pengelly* applied in this case.

    (vii) Overall, I was not persuaded BMW FS acted unfairly or unreasonably in its dealings with Mr W.

(e) BMW FS' response to my provisional decision

21. BMW FS responded to my provisional decision. It confirmed that it agreed with the outcome and that it had no further questions or comments. It also provided further details and evidence to confirm that Mr W chose to receive the £7,200 part-exchange value for his existing vehicle in cash and this was the reason it was excluded from the finance agreement.

(f) Mr W's response to my provisional decision

22. Mr W also responded to my provisional decision. He initially asked to be provided with a copy of the broker's Terms of Business. After having been provided with a copy of

the document, he said that he had no recollection of receiving it when he was sold his vehicle and he wished for this to be taken into account.

My findings

23. I have read and considered all the evidence and arguments available to me from the outset to decide what is, in my opinion, fair and reasonable in all the circumstances of the case.

(g) Relevant considerations

24. In considering what is fair and reasonable in all the circumstances of the complaint, I am required under DISP 3.6.4R to take into account: relevant (i) law and regulations; (ii) regulators' rules, guidance and standards; (iii) codes of practice; and (where appropriate), what I consider to have been good industry practice at the relevant time.

25. I will refer to and set out several regulatory rules, guidance provisions and legal concepts throughout the course of this final decision, but I am satisfied that of particular relevance to this complaint are:

    — The FCA's Principles and CONC rules and guidance that applied when Mr W entered into the hire-purchase agreement in March 2017 (and had applied to similar arrangements since April 2014 when the FCA began regulating consumer credit activities).

    — The law relating to unfair relationships between creditors and debtors as set out in ss140A-C of the CCA which has applied to credit agreements like this entered into since April 2007 (and in some cases before).

    — The law relating to secret commission, including the Court of Appeal's decision in the cases of *Wood & Pengelly.*

26. I have set out further information about each of these considerations at relevant points in this final decision.

27. But for now, I think it's appropriate to set out some additional background information about the FCA's 2017-2019 review of the motor finance market and its relevance to Mr W's complaint.

(h) The FCA's review of the motor finance market

28. In April 2017, the FCA announced a review of the motor finance sector because it had concerns *'that there may be a lack of transparency, potential conflicts and irresponsible lending'*[2].

29. In July 2017, it set out some key questions for the review to answer, including: *"are there conflicts of interest arising from commission arrangements between lenders and dealers and, if so, are these appropriately managed to avoid harm to consumers?"*[3]

[2] FCA Business Plan 2017-2018 page 74.
[3] FCA 'Our work on motor finance – final findings' para 1.2.

30. It published an update in March 2018 and committed to focusing the remainder of the review on the issues of greatest potential harm to consumers, including: *"Whether lenders are adequately managing the risks around commission arrangements, and whether commission structures have led to higher finance costs for customers because of the incentives they create for brokers."* [4]

31. In March 2019 the FCA published the final findings of its review of the motor finance sector entitled '*Our work on motor finance – final findings'* (the "Motor Finance Final Findings"). In the Executive Summary, the FCA explained that:

"Commission arrangements

• We are concerned that the way commission arrangements are operating in motor finance may be leading to consumer harm on a potentially significant scale.

• Some customers are paying significantly more for their motor finance because of the way lenders choose to remunerate their brokers.

• In particular, we are concerned about the widespread use of commission models which link the broker commission to the customer interest rate and allow brokers wide discretion to set the interest rate. This gives rise to conflicts of interest and creates strong incentives for the broker to charge a higher interest rate.

• We found that these incentives have significant effects on the cost of motor finance for consumers, even after controlling for other factors which might affect interest costs, such as the customer's credit score, loan value or length of the agreement. For commission models where the broker has discretion over the interest rate, increases in broker commission are associated with higher increases in interest rates, particularly for difference in charges (DiC) models. [1]

• Across the firms in our analysis (around 60% of the market) we estimate that commission models which allow broker discretion over the interest rate could be costing customers £300m more annually when compared against a baseline of Flat Fee models [my emphasis] [2]*. We estimate that on a typical motor finance agreement of £10,000, higher broker commission under the Reducing DiC model can result in the customer paying around £1,100 more in interest charges over the four-year term of the agreement.*

• It is not clear to us why brokers should have such wide discretion to set or adjust interest rates, to earn more commission, and we are concerned that lenders are not doing enough to monitor and reduce the risk of harm.

• Such commission arrangements can also break the link that might otherwise be expected between credit risk and the customer interest rate. This can impact on pricing and affordability for individual customers.

• We consider that change is needed across the market, to address the potential harm we have identified. We have started work with a view to assessing the options for policy intervention. Subject to analysis of the costs and benefits of potential interventions, this could involve consulting on changes to our consumer credit rules to strengthen existing provisions or other policy interventions such as banning DiC and similar commission models or limiting broker discretion.

[4] FCA 'Our work on motor finance – final findings' para 1.5.

[1] The different commission models are explained in paragraph 2.3 below and the associated footnotes.
[2] See paragraphs 2.14 - 2.17 below."

32. And following a consultation[5] published in October 2019, the FCA announced in July 2020 that it would ban discretionary commission models in the motor finance market with effect from 28 January 2021.

33. Whilst the FCA's review and the publications of its Motor Finance Final Findings took place after the events complained about here, the regulatory requirements against which the FCA considered the behaviours of firms during the review were the same as applied in March 2017.

34. And for that reason, I am satisfied that the FCA's review and Motor Finance Final Findings is a useful source of information both about commission arrangements like those found in this case (as I shall explain below) and about the regulator's view of those arrangements, the interaction with its rules, and the potential for consumer harm.

(i) Mr W's complaint

35. Mr W's complaint is essentially, and in the main, that he believes that he was treated unfairly because of the commission arrangement between BMW FS and the Broker, primarily because that arrangement was not disclosed to him.

36. I will first consider a series of preliminary questions, which will be relevant to my broader consideration of whether BMW FS acted fairly and reasonably (keeping in mind that this complaint is about BMW FS not the Broker):

    (1) How much commission did BMW FS pay the Broker and how was it structured?

    (2) What, if anything, did the Broker disclose to Mr W about the commission it would receive?

    (3) Did this meet the Broker's regulatory obligations at the time?

    (4) Did the Broker comply with its wider regulatory obligations?

37. I will then go on to consider whether BMW FS acted fairly and reasonably in its dealings with Mr W, taking into account, in particular, the regulatory obligations that applied at the time, the law relating to unfair relationships and the law relating to the payment of secret commission.

(j) How much commission did BMW FS pay the Broker and how was it structured?

38. In Mr W's initial complaint to BMW FS, he referred to the FCA's Motor Finance Final Findings in support of his position that the commission arrangements meant BMW FS had treated him unfairly when he took out the hire-purchase agreement.

[5] CP 19/28: Motor finance discretionary commission models and consumer credit commission disclosure.

39. I have referred to the FCA's Motor Finance Final Findings above and set out some of the FCA's Executive Summary. Having considered the FCA's findings, it seems to me that the commission arrangements the FCA was particularly concerned about were ones where the amount of commission paid to the broker was tied to the interest rate that the customer received, and where the broker had the discretion to set the interest rate (often known as "discretionary commission models").

40. This was because the FCA was concerned that discretionary commission models gave rise to conflicts of interest, incentivised brokers to increase customers' interest rates and had the potential to break the link between credit risk and the interest rate paid. It said discretionary commission models might be costing customers £300m more annually when compared against flat fee models (like the one BMW FS says it used in this case).

41. Since making his complaint, Mr W has been told the commission arrangement between BMW FS and the Broker which applied at the time he purchased his vehicle was <u>not</u> a discretionary commission model and instead BMW FS paid the Broker a fixed fee of £500. Mr W says he hasn't been provided with evidence to confirm that.

42. I have carefully considered the representations of both sides about the commission model used in this case.

43. BMW FS has provided the Financial Ombudsman Service with information to show that Mr W bought his vehicle during a period where it was operating a 'Retail Tactical Campaign' with the Broker. It says during this period:

    - It paid a fixed fee commission for each customer the Broker introduced who purchased a vehicle on finance.
    - The amount of the fixed fee commission the Broker received depended on the BMW model sold on finance. For the BMW model Mr W purchased, the flat fee commission amount was £500.
    - Each BMW model had its own pre-determined interest rate that was set by BMW FS.
    - The Broker had no discretion to alter or vary the interest rate (or any other terms) on a prospective finance agreement to get more commission. The commission the Broker received was a fixed amount.

<u>My findings</u>

44. I've considered the information BMW FS has provided. The quarter 1 of the 2017 'Retail Tactical Campaign' booklet (which set out the terms between BMW FS and the Broker) does show that the BMW model Mr W chose would lead to a finance application (if successful) being written at an APR of 4.9%.

45. The booklet also shows vehicles in 'Tier 2' (like Mr W's) did not attract any commission or performance bonus, only a 'document fee'. The document fee for the BMW model Mr W chose was £500.

46. I note Mr W's loan did have an APR of 4.9% and, overall, I am persuaded it is more likely than not that BMW FS did pay the Broker a fixed fee payment, in the form of a 'document fee' of £500, for introducing Mr W's business.

47. I have not seen any persuasive evidence to suggest BMW FS used a discretionary commission model in this case.

48. So while the FCA's Motor Finance Final Findings may have caused Mr W to have concerns about the commission arrangements connected to his hire-purchase agreement, I'm satisfied that the arrangement between BMW FS and the Broker wasn't of the type the FCA was primarily concerned about.

49. In summary, I am satisfied it's more likely than not that:

— The commission arrangement between BMW FS and the Broker saw the Broker receive a fixed fee of £500 (called a 'document fee'). This was based on the BMW model Mr W chose.

— The Broker could not vary the interest rate to generate a higher commission for arranging the finance to buy that vehicle.

— The interest rate was a predetermined and fixed rate by BMW FS and ultimately determined by the model of vehicle Mr W selected.

(k) What, if anything, did the Broker disclose to Mr W about the commission BMW FS paid to it?

50. Mr W says neither BMW FS nor the Broker disclosed the existence or the amount of commission that the Broker would receive for arranging this hire-purchase agreement.

51. BMW FS says it disclosed the existence of commission in the Explanation Document it provided Mr W with when he bought the car. It has also provided us with a copy of the Broker's terms of business for insurance and credit brokerage ("the Broker Terms of Business"), which also refers to commission payments.

52. I've considered these documents carefully. The Broker Terms of Business has a version number stating "GROUP_V32_OCT_2016". BMW FS says that this version of the Broker Terms of Business was in use at the time Mr W purchased his vehicle from the Broker in March 2017 and therefore would have been presented to him.

53. Mr W says that he has no recollection of receiving this document. Given Mr W would have been provided with a significant amount of paperwork to review and sign during the process of being sold his vehicle, it isn't surprising that he might not specifically recall receiving this document a number of years later. This is especially as Mr W wasn't required to sign a copy of the Broker Terms of Business, in the same way as say his hire-purchase agreement. So I do not think that Mr W not recalling the Broker Terms of Business in itself means that it was not presented to him during the course of being sold his vehicle in March 2017.

54. Furthermore, as it was a regulatory requirement for the Broker to have presented a document of some description setting out the services that it could provide for a customer, I do think it is more likely than not that it will have done so. And given what is set out in the version number of the copy of the Broker Terms of Business provided,

whilst I cannot be certain, I am satisfied it is more likely than not that the Broker would have presented a version of this document to Mr W in March 2017, notwithstanding the fact that Mr W may not recall seeing it at this time.

55. For the sake of completeness, I also wish to make it clear that even if I were to accept that Mr W was not provided with a copy of the Broker Terms of Business, given its content and what it explains (which I set out in more detail in the rest of this section as well as sections l and m of this decision), I'm not persuaded that Mr W seeing this document in March 2017 would, in any event, have made a difference to his decision to proceed with his hire-purchase agreement.

56. I'll now proceed to consider the content of the Broker Terms of Business.

57. The Broker Terms of Business is a two-page document headed "TERMS OF BUSINESS – Insurance and Credit Brokerage".

58. The section at the top of page two is headed "OUR CREDIT BROKERAGE TERMS". It contains information about the Broker's status generally and what action the Broker would take if applications for credit are declined. It states:

CREDIT BROKER STATUS DISCLOSURE

We provide credit broking services and can introduce you to a limited number of finance providers to assist with your finance. Those finance providers may reward us for introducing you to them. We have permission to carry out the regulated activity of credit brokerage.

59. The next section headed "GENERAL" contains information about commission. It states:

COMMISSION

We receive commission from your finance provider for introducing your consumer credit business to them. You are entitled, at any time, to request information regarding any commission which we may have received as a result of placing your business with a finance provider. If we do not know the exact amount of commission we will provide you with the likely amount.

60. As the Broker Terms of Business was a document provided by the Broker rather than by BMW FS, I have considered it against the Broker's obligations in March 2017. I will go on to consider the relevance of the Broker's actions to the question of whether BMW FS acted fairly and reasonably later in this decision.

(l) Did this meet the Broker's regulatory obligations at the time?

<u>*What were the relevant regulatory obligations[6] applying to the Broker in March 2017?*</u>

61. The FCA's Principles set out the overarching requirements which apply to all authorised firms carrying on regulated activities and (in relation to consumer credit activities and some other activities) 'ancillary activities'.

[6] Terms that are italicised in any rules and guidance quoted are defined in the Glossary to the FCA's Handbook.

62. In *R (British Bankers Association) v Financial Services Authority* [2011] EWHC 999 (Admin), Ouseley J considered the Principles and the potential impact on any rules contained in the relevant sourcebook pertaining to an authorised firm's activities. Paragraph 162 – 166 of Ouseley J's judgment said:

> *[162] The Principles are best understood as the ever present substrata to which the specific rules are added. The Principles always have to be complied with. The specific rules do not supplant them and cannot be used to contradict them. They are but specific applications of them to the particular requirements they cover. The general notion that the specific rules can exhaust the application of the Principles is inappropriate. It cannot be an error of law for the Principles to augment specific rules.*
>
> *[163] That role for the Principles has been clear from the language describing their role in the Handbook; see PRIN 1.1.7G to 1.1.9G, and paragraphs 29-31 above. That was also clear from what the FSA said in the 1998 Consultation Paper and the Supplementary Memorandum on which [counsel for the BBA] relied in submission on the first ground.*

63. And when considering the Principles in relation to an ombudsman's decision making, in paragraph 77 of his judgment Ouseley J said:

> *[77] Indeed, it is my view that it would be a breach of statutory duty for the Ombudsman to reach a view on a case without taking the Principles into account in deciding what would be fair and reasonable and what redress to afford. Even if no Principles had been produced by the FSA, the FOS would find it hard to fulfil its particular statutory duty without having regard to the sort of high level Principles which find expression in the Principles, whoever formulated them. They are of the essence of what is fair and reasonable, subject to the argument about their relationship to specific rules.*

64. Principle 6 says:

> 'A *firm* must pay due regard to the interests of its *customers* and treat them fairly'

65. Principle 7 says:

> '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'.

66. Principle 8 says:

> 'A firm must manage conflicts of interest fairly, both between itself and its *customers* and between a *customer* and another *client*.'

67. In a similar way to Principle 7, CONC 3.3.1R says:

> 'A *firm* must ensure that a communication or a *financial promotion* is clear fair and not misleading'.

68. Under CONC 3.3.1R (1A)(d), a firm must ensure that each communication:

'is sufficient for, and presented in a way that is likely to be understood by, the average member of the group to which it is directed, or by which it is likely to be received'.

69. "Communication" is not defined in CONC 3.3.1R(1A)(d) so it must be given its usual meaning. I consider that the Broker's Terms of Business was a communication by the Broker to Mr W. So under the FCA rules in place at the time, the Broker was required to ensure that the contents of the Terms of Business were clear, fair and not misleading, and sufficient for – and presented in a way that is likely to be understood by - the average consumer to which it was directed.

70. The specific requirements in relation to the disclosure of commission by Brokers are contained in CONC 4.5.3R and 4.5.4R.

71. At the time Mr W entered into this agreement with BMW FS in March 2017, CONC 4.5.3R stated:

A *credit broker* must disclose to a *customer* in good time before a *credit agreement* or a *consumer hire agreement* is entered into, the existence of any commission or fee or other remuneration payable to the *credit broker* by the *lender* or *owner* or a third party in relation to a *credit agreement* or a *consumer hire agreement*, where knowledge of the existence or amount of the commission could actually or potentially:

(1) affect the impartiality of the *credit broker* in recommending a particular product; or

(2) have a material impact on the *customer's* transactional decision.
[**Note**: paragraph 3.7i (box) and 3.7j of *CBG* and 5.5 (box) of *ILG*]

72. At the time, CONC 4.5.4R stated:

"At the request of the *customer,* a *credit broker* must disclose to the *customer*, in good time before a *regulated credit agreement* or a regulated *consumer hire agreement* is entered into, the amount (or if the precise amount is not known, the likely amount) of any commission or fee or other remuneration payable to the *credit broker* by the *lender* or *owner* or a third party.
[**Note**: paragraph 3.7i(box) of *CBG].*"

73. By way of summary only, the effect of paragraph 3.7i(box) and 3.7j of CBG[7] was that

— The OFT said 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.

— 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.

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

74. The box at paragraph 5.5 ILG[8] made similar points about disclosure in the context of irresponsible lending practices.

75. There were also rules and guidance for credit Brokers on financial promotions and communications. CONC 3.7.3R required:

> "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 or more *lenders* or works independently.
> [**Note**: section 160A(3) of CCA]
> [**Note**: article 21(a) of the Consumer Credit Directive]"

76. And CONC 3.7.4G (2) states:

"A *firm* should in a *financial promotion* or in a communication with a *customer*:

> (2) 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*;
> [**Note**: paragraphs 2.2, 6th bullet and 4.6 of CBG]"

77. The OFT's guidance referred to in the note to CONC 3.7.4G(2), set out at paragraph 2.2 of the CBG a list of overarching principles of consumer protection and fair business practice applying to credit brokers. The relevant section and 6th bullet said:

> *"In general terms, where applicable, credit brokers and intermediaries should take appropriate steps with a view to:*
> …
> - *Clearly disclosing their status (including any links with creditors)[24] and the level of service offered"*
>
> …

78. Footnote 24 of the CBG said "*'Status' in this context means any contractual or non-contractual links between the broker or intermediary with a potential creditor which* ***may*** *affect the impartiality of any advice given or recommendations made by the broker or intermediary to the borrower. Relevant details should be set out in full – normally in writing – before the borrower enters into the credit agreement."*

79. I also think it provides helpful context to set out what the FCA said in paragraph's 3.28 to 3.31 of the Motor Finance Final Findings about CONC 4.5.3R.

80. Paragraphs 3.28 to 3.31 of the Motor Finance Final Findings said:

> *"3.28 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:*
>
> - *affect the broker's impartiality in recommending a particular product; or*
> - *have a material impact on the customer's transactional decision.*

[8] The Office of Fair Trading's Irresponsible Lending Guidance – published March 2010.

3.29 This would include DiC 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. If the customer is aware of the existence of such arrangements, they can take this into account, and probe further if they want or request an indication of the amount or likely amount of the commission (which the broker must provide upon request).

3.30 It may also apply in other cases, where the broker does not have discretion but the amount of commission may vary by lender or product, as the customer may be unaware of this and so may not factor it into their decision making.

3.31 In accordance with CONC 3.3.1R (and Principle 7), such disclosure should be clear fair and not misleading. As above, it should be sufficient for, and presented in a way that is likely to be understood by, the average customer, and the firm must not disguise, omit or diminish important information."

81. While I recognise these paragraphs do not form part of the FCA's rules and guidance, they are informative about when the FCA expected a broker to have disclosed commission under CONC 4.5.3R – the same rule that applied when Mr W was introduced to BMW FS by the Broker in March 2017.

<u>Application to Mr W's complaint</u>

82. In this case, I have found that the Broker received a total of £500 for introducing Mr W to BMW FS.

83. I'm satisfied that knowledge of the existence or amount of commission could <u>potentially</u> have both affected the Broker's impartiality in introducing Mr W to BMW FS (for example if other lenders paid less commission).

84. Separately, the payment could at least potentially have had a material impact on Mr W's transactional decision (although in the circumstances of this transaction where the APR was low and the value of the transaction high, I view that potential as very small indeed).

85. In those circumstances, I'm satisfied that both qualifying limbs of CONC 4.5.3R were engaged by the commission arrangements and the Broker should have disclosed 'the existence' of the document fee payment to comply with that rule and similarly CONC 3.7.4G (2).

86. It's important to note, however, it does not necessarily follow from my finding that the knowledge of the existence of commission could *potentially* affect the Broker's impartiality or Mr W's transactional decision, that the payment did or would ultimately affect those things.

87. It is also arguable that to comply with the Principle 8 requirement to fairly manage any conflict of interest between itself and Mr W (particularly when viewed in the light of the Principle 6 requirement to pay due regard to the interests of Mr W and treat him fairly), the Broker should have disclosed the potential conflict of interest created by the fact it would receive a payment for arranging the agreement to allow Mr W to fairly evaluate the introduction the Broker made.

88. It is not clear, however, whether the payment of commission did in fact create a conflict of interest in the circumstances of this case. Neither party has presented evidence about the other lending options that might have been available from the *'limited number of finance providers'* the Broker could select (and the resulting impact on the commission the Broker would have received and the cost of credit to Mr W).

89. But even if there was a conflict of interest in this case and Principle 8 was engaged, given the amount and type of commission payment, I do not consider the Broker needed to do more to fairly manage any conflict of interest than disclose the existence of commission in the way required by CONC 4.5.3R.

<u>Did the Broker meet the regulatory requirements around information provision and disclosure?</u>

90. For the reasons I explain further below – I am satisfied that the Broker presented the information about the commission it would receive in a way that was clear, fair and not misleading – as per the Broker's obligations in Principle 7 and CONC 3.3.1R, and I am persuaded that it disclosed the existence of commission appropriately in accordance with CONC 4.5.3R, CONC 3.7.4G(2) and Principle 8.

91. As noted above, the Broker Terms of Business stated the following about commission:

> *CREDIT BROKER STATUS DISCLOSURE*
>
> *We provide credit broking services and can introduce you to a limited number of finance providers to assist with your finance. Those finance providers may reward us for introducing you to them. We have permission to carry out the regulated activity of credit brokerage.*
>
> *COMMISSION*
>
> *We receive commission from your finance provider for introducing your consumer credit business to them. You are entitled, at any time, to request information regarding any commission which we may have received as a result of placing your business with a finance provider. If we do not know the exact amount of commission we will provide you with the likely amount.*

92. I accept that the wording in the Credit Broker Status Disclosure section of the Broker Terms of Business said that the Broker *may* be rewarded for introducing Mr W to a lender. BMW FS' own Explanation Document included a similar message. It said in a section entitled 'BMW Financial Services relationship with intermediaries':

> "*BMW retailers introduce customers to a limited number of lenders for vehicle finance. They commonly introduce to us (BMW Financial Services). The BMW retailer may receive a payment from us for the introduction. A BMW retailer's introduction of you to us or one of our finance products does not amount to independent financial advice*".

93. If these had been the only disclosures made to Mr W, I do not think it would have been sufficient to disclose the existence of commission in Mr W's case.

94. The Broker was required to ensure that - as per CONC 3.3.1R(1), (1A)(d) and Principle 7 (which the detailed obligations in CONC were building upon) – it was meeting the information needs of its customer, ensuring that its communications were clear, fair

and not misleading, and presenting information in a way such that its average customer would understand.

95. In my view, the requirement under CONC 4.5.3R to disclose the existence of any commission or fee or other remuneration payable to the Broker by the lender should be viewed with both these broader regulatory information provision requirements, and the nature of the circumstances that meant disclosure was required (i.e. where knowledge of the existence or amount of commission might affect the Broker's impartiality and / or have a material impact on Mr W's transactional decision), in mind.

96. In the circumstances of this complaint – where there were both potential impartiality and material impact considerations requiring disclosure, I think that CONC 4.5.3R (taken together with CONC 3.3.1R(1), (1A)(d) and Principle 7) required the Broker to do more than simply say that "finance providers may reward us for introducing you to them". This alone would not have been, in my view, a meaningful disclosure of the "existence of commission", having regard to the purpose of CONC 4.5.3R as well as to CONC 3.3.1R and Principle 7.

97. But in this case the Broker's Terms of Business went on to make a specific disclosure about commission in the section specifically headed Commission. In that section, the Broker said it would receive commission from the chosen finance provider for introducing any consumer credit business.

98. The statement in the commission section of the Broker Terms of Business regarding receipt of commission was, in my view, not only clear, but also categorical. And I consider that when taken overall, Mr W would reasonably have known from the terms of business that the Broker would receive a commission payment in his particular case. As set out above, the Broker said:

> *"We receive commission from your finance provider for introducing your consumer credit business to them. You are entitled, at any time, to request information regarding any commission which we may have received as a result of placing your business with a finance provider. If we do not know the exact amount of commission we will provide you with the likely amount."*

99. The commission paid in this case was a fixed sum payment not linked to the size of the loan, or the interest rate charged, or determined in some other way that a consumer might not ordinarily expect.

100. The Commission section also set out clearly that Mr W could request further information about the commission and the Broker would tell him the exact amount if requested.

101. In those circumstances, I am not persuaded the Broker needed to do more to explain how the commission was structured in order to meet its overall regulatory obligations to disclose the existence of commission in a clear, fair and not misleading way that would have allowed Mr W to understand the financial arrangement between BMW FS and the Broker.

102. In the circumstances of this simple fixed commission payment, I am satisfied it was sufficient for the Broker to tell Mr W simply that it would receive commission for introducing Mr W to BMW FS.

103. In my view, this disclosure, together with the explanation that he could request details of the exact amount, allowed Mr W the opportunity to request further information if he

considered it to be an important factor in his decision to take out finance with the Broker in order to complete his transaction, or to assess whether commission might have played a part in the selection of the product presented to him.

104. In any event, had the Broker said more about the structure of the commission (for example it had said that it would receive a payment of a fixed amount), I think it is unlikely to have made any difference to Mr W's decision as to whether to request the amount.

105. I am also satisfied that disclosing the existence of commission in this way was an appropriate step to manage any potential conflict of interest between the Broker and Mr W for the purposes of Principle 8.

106. Overall I'm satisfied that in the circumstances of this complaint that the Broker did disclose the existence of the commission that the Broker would receive from BMW FS for arranging this hire-purchase agreement, in a clear, fair and not misleading way – and in a way that achieved the high level overarching requirement of Principle 7 and the obligations set out in CONC 3.3.1R(1A)(d).

(m) Did the Broker comply with its wider regulatory obligations?

107. Mr W has referred to other regulatory requirements including Principle 1, which requires "a *firm* must conduct its business with integrity" and CONC 2.5.8R(13) which relates to unfair business practices, and says:

"A *firm* must not:
…
(13) give preference to the credit products of a particular *lender* where the object of doing so is for, or can reasonably be concluded as having been for, the personal gain of the *firm* or of a *person* acting on its behalf, rather than in the best interests of the *customer*;
[**Note**: paragraph 4.41k of *CBG*]"

108. I am not persuaded I can safely conclude the Broker breached those requirements when receiving the £500 commission payment in this case. I have not seen any specific evidence to suggest the Broker preferred BMW FS' products for personal gain, it disclosed that it would receive commission and that Mr W could ask for the amount, the commission payment was not unusually high, and the APR on the loan was low.

109. Mr W has also referred to Principle 9 which says: "a *firm* must take reasonable care to ensure the suitability of its advice and discretionary decisions for any *customer* who is entitled to reply upon its judgment", but I don't think it applies in this case as that was not the nature of the relationship between the Broker and Mr W. I have not seen anything (whether in the documentation provided or otherwise) to indicate that the Broker, provided Mr W with advice, or made any discretionary decisions on his behalf.

110. These findings and my findings in the previous section are relevant to my consideration of what is fair and reasonable in all the circumstances of this complaint – see below: *section (p) Did BMW FS' conduct mean that its relationship with Mr W was unfair under ss140A-C CCA?*

(n) Did BMW FS act fairly and reasonably towards Mr W?

111. I'll now consider whether BMW FS acted (or failed to act) fairly and reasonably towards Mr W in the all the circumstances of this case. In doing so, I will have regard to a number of factors, including:

    (i) BMW FS' own regulatory obligations.

    (ii) The unfair relationship provisions set out in ss 140A-C of the CCA.

    (iii) And finally, as this is a complaint, which at its heart, relates to an alleged failure to disclose a secret commission, I will consider relevant common law principles in this area of law which may be applicable and, in particular, the relevance of the Court of Appeal decision in *Wood and Pengelly*.

(o) Did BMW FS meet its regulatory obligations to Mr W?

112. I'll start by considering whether BMW FS acted fairly and reasonably towards Mr W in light of its regulatory obligations.

113. I've already explained that as an authorised and regulated lender BMW FS was subject to the rules of the FCA - including the Principles and CONC - at the time it entered into this hire-purchase agreement with Mr W. And I've kept these in mind when determining whether BMW FS acted fairly and reasonably towards Mr W, bearing in mind its regulatory obligations.

114. I will start by considering BMW FS' actions in the context of the Principles.

The FCA's Principles for Businesses

115. The FCA's Principles set out the overarching requirements which apply to all authorised firms. Mr W says that BMW FS breached Principles 1, 6, 7, 8 and 9.

116. I have not seen anything to suggest BMW FS failed to conduct its business with integrity as required by Principle 1. Integrity is typically considered to be the quality of being honest and having strong moral principles.

117. Commission payments are common in the financial services industry and the mere act of paying commission is not in itself a dishonest or unfair practice. Brokers are entitled to expect to be paid in some form whether by the lender or directly by the consumer for arranging credit.

118. Mr W has also referred to Principle 8 (conflicts of interest) and Principle 9, but I do not think either are particularly relevant to this complaint.

119. Principle 8 is concerned with conflicts between firms and their clients, but in this case the potential conflict of interest was between the Broker and Mr W, not between BMW FS and Mr W. So, whilst Principle 8 is relevant to the Broker's actions (as I considered earlier in this decision), I do not consider it to be relevant to BMW FS' own actions in the circumstances of this complaint.

120. As I explained when considering the Broker's obligations, Principle 9 requires firms to take reasonable care to ensure the suitability of its advice and discretionary decisions for any customer who is entitled to reply upon its judgment. As in the case of the

Broker, I don't think Principle 9 applies in this case, there is nothing to indicate BMW FS provided Mr W with advice or made any discretionary decisions on his behalf.

121. Principle 7 requires firms to provide clear, fair and not misleading information. I have not seen anything in the information BMW FS provided in this case which suggests BMW FS failed to provide clear, fair and not misleading information to Mr W.

122. Whilst the Explanation Document said only that BMW FS might (or 'may') pay commission to a BMW retailer for introducing it, I do not consider that meant BMW FS breached Principle 7, or that it was in any event critical to the outcome of this complaint.

123. BMW FS' statement described its broader relationship with BMW retailers, but the regulatory requirement to disclose the existence of commission in Mr W's actual situation sat with the Broker, and, for the reasons I have already set out I am satisfied the Broker met its own regulatory requirements to disclose the existence of commission to Mr W.

124. I've also considered whether BMW FS acted fairly and reasonably in its dealings with Mr W taking into account Principle 6 and the CONC rules Mr W has referred to.

Principle 6, 7 and CONC

125. Principle 6 requires a firm to pay due regard to the interests of its customers and treat them fairly. Principle 7 requires a firm to 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.

126. Mr W says that BMW FS failed to pay due regard to his interests and information needs by failing to explain: the key features of his hire-purchase agreement to enable him to make an informed choice as required by CONC 2.3.2R and CONC 4.2.5R.

127. CONC 2.3.2R states:

> *A firm* must explain the key features of a *regulated credit agreement to* enable the *customer* to make an informed choice as required by *CONC 4.2.5R* (adequate explanations)

128. And the most relevant sections of CONC 4.2.5R state:

> Pre-contractual adequate explanations
>
> (1) Before making a *regulated credit agreement the firm* must:
>
> (a) provide the *customer* with an adequate explanation of the matters referred to in (2) in order to place the *customer* in a position to assess whether the agreement is adapted to the *customer's* needs and financial situation
>
> (b) advise the customer:
>
> (i) to consider the information which is required to be disclosed under section 55 of the CCA; and
> (ii) where the information is disclosed in person, that

the customer is able to take it away;

(c) provide the *customer* with an opportunity to ask questions about the agreement; and

(d) advise the *customer* how to ask the firm for further information and explanation.
[**Note**: section 55A(1) of *CCA*]

(2) The matters referred to in (1)(a) are:

(a) the features of the agreement which may make the *credit* to be provided under the agreement unsuitable for particular types of use;

(b) how much the *customer* will have to pay periodically and, where the amount can be determined, in total under the agreement;

(c) the features of the agreement which may operate in a manner which would have a significant adverse effect on the *customer* in a way which the *customer* is unlikely to foresee;

(d) the principal consequences for the *customer* arising from a failure to make payments under the agreement at the times required by the agreement including, where applicable and depending upon the type and amount of *credit* and the circumstances of the *customer*:

(i) the total cost of the debt growing;
(ii) incurring any default charges or interest for late or missed payment or under-payment;
(iii) impaired credit rating and its effect on future access to or cost of *credit*;
(iv) legal proceedings, including reference to charging orders (or, in Scotland, inhibitions), and to the associated costs of such proceedings;
(v) repossession of the *customer's* home or other property; and
(vi) where an article is taken in *pawn*, that the article might be sold, if not redeemed; and

(e) the effect of the exercise of any right to withdraw from the agreement and how and when this right may be exercised.
[**Note**: section 55A(2) of *CCA* and paragraph 3.13 of *ILG*]

(3) The adequate explanation and advice in (1) may be given orally or in writing, except where (4) applies.
[**Note**: section 55A(3) of *CCA*]

(4) Where the matters in (2)(a), (b) or (e) are given orally or to the *customer* in person, the explanation of the matters in (2)(c) and (d) and the advice required in (1)(b) must be given orally to the *customer.*

[**Note**: section 55A(4) of *CCA*]

(5) Paragraphs (1) to (4) do not apply to a lender if a credit Broker has complied with those sub-paragraphs in respect of the agreement. [**Note**: section 55A(5) of *CCA*]

…

129. I've considered what Mr W has said about CONC 2.3.2R and CONC 4.2.5R. It's unclear exactly what information Mr W believes BMW FS should have provided him with but didn't. However, I've referred back to the pre-contract credit information, which is BMW FS' Explanation Document.

130. As this document was electronically signed by Mr W, on 7 March 2017, I'm satisfied that it was provided to him when he took out the hire-purchase agreement and it formed part of the pre-contractual credit information.

131. The Explanation Document:

- Said the agreement was not suitable for any purpose other than to purchase his choice of vehicle.
- Set out how much Mr W would have to pay each month and the total amount he'd have to pay should the agreement run to term and should he exercise his right to purchase the vehicle.
- Explained the consequences of missing payments.
- Told Mr W he could withdraw from the hire-purchase agreement should he change his mind.

132. Mr W hasn't specifically suggested there were features of his agreement which operated in a manner which would have had a significant adverse effect on him in a way he is unlikely to have foreseen. Although given the main reason for his complaint, it is possible that he considers the commission arrangement in place to fall under this.

133. However, I can't see how the commission arrangements between BMW FS and the Broker was a feature of the agreement which might have made using the funds from a hire-purchase agreement to purchase a car unsuitable, or that it was a feature of the agreement which would have a significant adverse effect on Mr W in a way he was unlikely to foresee.

134. In any event, having considered the content of the Explanation Document, I'm satisfied that BMW FS did explain the key features of Mr W's hire-purchase agreement in a way that enabled him to make an informed choice on whether to proceed with it, pursuant to CONC 2.3.2R and CONC 4.2.5R. Accordingly, I'm satisfied that BMW FS met its CONC 2.3.2R and CONC 4.2.5R obligations to Mr W.

135. Mr W also originally complained that BMW FS breached Principle 6 taking into account CONC 4.5.2G. At the time he believed BMW FS had operated a discretionary commission model.

136. CONC 4.5.2G is headed "Commissions lenders to credit brokers" and states:

"A *lender* should only offer to, or enter into with, a *firm* a commission agreement providing for differential commission rates or providing for payments based on the volume and profitability of business where such payments are justified based on the extra work of the *firm* involved in that business.
[**Note**: paragraph 5.5 (box) of ILG]"

137. Having considered the commission arrangement in place and the wording in CONC 4.5.2G, I don't consider that this guidance applies, in this instance given the facts and circumstances of this case.

138. I say this because, as set out earlier in my decision, BMW FS paid the Broker a fixed commission of £500, which was based solely on the vehicle Mr W purchased. And the commission model used here didn't allow the Broker to alter or vary the commission payment and/or interest charged on the credit agreement. The commission model did not provide for differential commission rates or payments based on volume and profitability.

139. So overall I am not persuaded BMW FS failed to follow the guidance at CONC 4.5.2G, nor do I consider implementing and operating the fixed payment commission model it used in this case meant that BMW FS treated Mr W unfairly.

140. Mr W has also argued that BMW FS is responsible for any breaches of CONC carried out by the Broker. He says that this is because under CONC 1.2.2R BMW FS had to:

    (1) ensure that its employees and agents comply with CONC; and
    (2) take reasonable steps to ensure that other persons acting on its behalf comply with CONC.

141. I've considered what Mr W has said and I accept that the Broker was, in at least some aspects of the transaction, acting on behalf of BMW FS and therefore under CONC 1.2.2R(2) BMW FS had to take reasonable steps to ensure that the Broker complied with CONC. But I don't think that a lender being required to take reasonable steps to ensure that other persons acting on its behalf comply with CONC is the same as BMW FS being liable for any and all breaches of CONC by a Broker at an individual transaction level, in the way that Mr W is suggesting.

142. In my view, this provision and in particular *'taking reasonable steps'* is more concerned with the overall checks and balances a lender should have in place to ensure that other persons acting on its behalf comply with CONC, rather than making a lender liable for any breaches of CONC at an individual transactional level.

143. So I don't think that the regulator would be likely to conclude that BMW FS failed to act in accordance with its obligations under CONC 1.2.2R in its dealings with Mr W. In any event I have not found that the Broker breached its regulatory obligations in this case.

144. To the extent that BMW FS was required to take reasonable steps to ensure that the Broker complied with its obligations under CONC, I have not seen anything to persuade me that BMW FS did not take such reasonable steps.

145. That said, I do think that any potential breaches of CONC by the Broker could be relevant to whether the relationship between BMW FS and Mr W was unfair under s140A of CCA as I shall explain later in the decision.

Did BMW FS meet its regulatory obligations – conclusions

146. Overall, I'm not persuaded BMW FS breached its regulatory obligations in this case, or that it failed to act fairly and reasonably for that reason.

(p) Did BMW FS' conduct mean that its relationship with Mr W was unfair under ss140A-C CCA?

147. As I've mentioned in paragraph 24 of this final decision, under DISP 3.6.4R I'm required to take into account any relevant law (as well as other considerations, such as a firm's regulatory obligations) when considering what is fair and reasonable in all the circumstances of the case. So, I'll now proceed to consider the relevant law in relation to Mr W's complaint.

148. I'll start by considering the relevance of the unfair relationship rules in ss140A-C CCA, and whether this may be a reason why (notwithstanding my findings above) BMW FS may not have acted fairly and reasonably towards Mr W.

The law relating to unfair relationships

149. Ss 140A-C CCA apply to a creditor and a debtor who have entered into a credit agreement. In this instance, BMW FS was Mr W's lender for this hire-purchase agreement. Therefore, it is a creditor for the purpose of s140A CCA and Mr W is a debtor, and the hire-purchase agreement is a credit agreement.

150. So, I'm satisfied that the law in ss140A-C CCA is relevant law that I am required to take into account when considering what is fair and reasonable in all the circumstances of Mr W's case. This includes considering whether a court is likely to find, based on the evidence available, that an unfair relationship existed in this case under s140A(1)(c) CCA and what it may order as a result.

151. s140A CCA states:

"140A Unfair relationships between creditors and debtors

(1) The court may make an order under section 140B in connection with a credit agreement if it determines that the relationship between the creditor and the debtor arising out of the agreement (or the agreement taken with any related agreement) is unfair to the debtor because of one or more of the following-

(a) any of the terms of the agreement or of any related agreement;

(b) the way in which the creditor has exercised or enforced any of his rights under the agreement or any related agreement;

(c) any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement).

(2) In deciding whether to make a determination under this section the court shall have regard to all matters it thinks relevant (including matters relating to the creditor and matters relating to the debtor)."

152. In *Plevin v Paragon Personal Finance Ltd*[9] *("Plevin"),* Lord Sumption (in paragraph 10) stated:

> "Section 140A is deliberately framed in wide terms with very little in the way of guidance about the criteria for its application, such as is to be found in other provisions of the Act conferring discretionary powers on the courts. It is not possible to state a precise or universal test for its application, which must depend on the court's judgment of all the relevant facts."

153. It is my understanding that Mr W's agreement ended in October 2019. Nonetheless, I'm satisfied that s140A remains a relevant consideration as s140A(4) provides that *"A determination may be made under this section in relation to a relationship notwithstanding that the relationship may have ended."*

154. The application of s140A is fact specific. And s140A(1)(c) CCA allows for anything done or not done by, or on behalf of the creditor either before or after the making of the agreement to be considered by a court when determining whether there was an unfair relationship between the parties.

155. Having thought about all the circumstances of Mr W's complaint, I consider a court would be unlikely to find the relationship between BMW FS and Mr W unfair. I set out why I think this below.

Unfair relationships – the commission arrangement

156. As I have previously explained, BMW FS paid the Broker a commission of a fixed amount, which was linked to Mr W's selection of vehicle, rather than the amount of credit being advanced, or any of the terms of the finance agreement. The Broker didn't have the ability to alter or vary the interest rate Mr W would pay, or any other terms of the agreement, in order to secure itself a higher commission payment.

157. Having considered the facts and circumstances, whilst I can see that the introduction of a fixed payment commission model was something done by BMW FS, I don't consider it likely that a court would conclude the existence of the model, or its operation, caused the relationship between it and Mr W to be unfair.

158. In common with most commission payments, the fixed payment made in this case had some potential to affect the impartiality of the Broker, but it did not create the clear conflict of interest that a discretionary commission model might.

Unfair relationships – inequality of knowledge and understanding

159. BMW FS did not itself tell Mr W the structure or amount of commission it would pay to the Broker for introducing Mr W, which I'm satisfied a court would consider to be something done or not done by the creditor. But I am not persuaded a court would find this made the relationship between BMW FS and Mr W unfair.

160. I am mindful that the Broker did disclose the existence of commission and tell Mr W that it would tell him the amount if he requested. But in any event, I'm not persuaded that the fact BMW FS did not tell Mr W about the commission structure or amount in

[9] *Plevin v Paragon Personal Finance Ltd [2014] UKSC 61; [2014] 1 WLR 4222*

this case meant there was a sufficiently extreme inequality of knowledge and understanding causing the relationship between a creditor and a debtor to be unfair to the debtor.

161. In this particular case, BMW FS paid the Broker a fixed payment of £500 for arranging a nearly £58,500 loan with a total charge for credit of £8,298.63. There was no direct link between the interest rate Mr W paid on the agreement and the £500 commission payment, and the £500 payment represented a very low percentage of the total charge for credit.

162. So, in these circumstances, I do not consider that a court would be likely to find that this made Mr W's relationship with BMW FS unfair for the purposes of s140A CCA.

Unfair relationships – anything done or not done on behalf of BMW FS - the Broker's acts/omissions when bringing about Mr W's hire-purchase agreement

163. I also consider that – by virtue of the deeming effect of s56(2)[10] – a court is likely to consider that, for example, a failing by the Broker to adequately disclose the commission arrangements in accordance with its regulatory obligations could be "a thing done or not done by, or on behalf of, the creditor" (here BMW FS). So this could also cause make the relationship between BMW FS and Mr W unfair to Mr W.

164. But, in this case, I have found that the Broker complied with its regulatory obligations so I do not think a court would regard the relationship between BMW FS and Mr W to be unfair under s140A. But for completeness, I will explain how the deeming effect of s56(2) CCA arises.

165. S56(1) CCA defines "antecedent negotiations". These include, under s56(1)(b), any negotiations with the debtor or hirer "conducted by a credit-broker in relation to goods sold or proposed to be sold by the credit-broker to the creditor before forming the subject-matter of a debtor-creditor-supplier agreement within s12(a)".

166. S56(4) CCA clarifies that *"antecedent negotiations" shall be taken to begin when the negotiator and the debtor or hirer first enter into communication (including communication by advertisement), and to include any representations made by the negotiator to the debtor or hirer and any other dealings between them"*.

167. S12(a) CCA relates to debtor-creditor supplier agreements and provides *"A debtor-creditor-supplier agreement is a regulated consumer credit agreement being - (a) a restricted-use credit agreement which falls within s11(1)(a)"*.

168. S11(1)(a) provides that *"A restricted-use credit agreement is a regulated consumer credit agreement - (a) to finance a transaction between the debtor and the creditor, whether forming part of that agreement or not"*.

169. *Forthright Finance Ltd v Ingate*[11] considers the meaning of s56. In essence, it identifies that s56 is to be construed widely and that antecedent negotiations can relate to the goods to be sold even if they are not about the goods themselves, provided those

[10] s56(2) says: *'Negotiations with the debtor in a case falling within subsection (1)(b) or (c) shall be deemed to be conducted by the negotiator in the capacity of agent of the creditor as well as in his actual capacity'.*

[11] *Forthright Finance Ltd v Ingate (Carlyle Finance Ltd, third party)* [1997] 4 All ER 99.

negotiations were about something which forms part of a single transaction under which the goods were sold.

170. In this case, Mr W entered into a restricted-use credit agreement under s11(1)(a) CCA when he entered into his hire-purchase agreement with BMW FS. The finance he obtained from BMW FS could only be used to purchase the motor vehicle he had already chosen and this meant that ownership of the vehicle reverted to BMW FS unless and until Mr W made all of the payments, or settled the finance early. Mr W's hire-purchase agreement also met the definition of a debtor-creditor-supplier agreement under s12(a) CCA.

171. In my view, the term "antecedent negotiations" as used in s56(4) CCA is broad enough to cover any failures by the Broker in this case to comply with its own regulatory obligations in arranging the credit that Mr W used to purchase the vehicle – i.e. any potential breaches of CONC – such as breaches of CONC 4.5.3R, and CONC 2.5.8R (13) - by the Broker as alleged by Mr W.

172. As a result, the pre-contractual negotiations that took place between the Broker and Mr W are caught by s56(1)(b) of the CCA. And as a result of the operation of s56(2) CCA these negotiations "shall be deemed to be conducted by the negotiator in the capacity of agent of the creditor as well as in his actual capacity".

173. In other words, when conducting the pre-contractual negotiations with Mr W, the negotiations conducted by the Broker in relation to the sale of the vehicle are deemed to be conducted by the Broker both in its own capacity and in the capacity as an agent of BMW FS.

174. I'm also satisfied (for the reasons I'll explain below) that the words in s140A(1)(c) CCA referring to *"any other thing done (or not done) by, or on behalf of, the creditor"* includes antecedent negotiations which are deemed by s56(2) to have been made by the Broker as an agent of the creditor.

175. Support for this can be found in the Court of Appeal's decision in *Scotland & Reast v British Credit Trust Limited*[12] which has more recently been followed in *Smith v Royal Bank of Scotland Plc*[13].

176. In summary, in *Scotland & Reast*, a salesperson sold double-glazed windows and doors to a consumer. The salesperson offered to arrange a loan to fund the purchase of the double-glazing and told the consumer that the consumer would need to purchase payment protection insurance when taking out the loan.

177. In doing so, the salesperson was found to have made a misrepresentation and to have also sold the insurance in breach of the FCA's Insurance Conduct of Business rules ("ICOB") (particularly because the salesperson had failed to communicate with the consumer in a way that was clear, fair and not misleading, and had failed to take reasonable steps to ensure that the policy was suitable for the consumer).

178. In summary, the Court of Appeal held that the salesperson's misrepresentations and breaches of ICOB in relation to the need to purchase payment protection insurance when taking out the loan were negotiations "in relation to the transaction financed or to be financed...." for the purposes of s56(1)(c) – i.e. the agreement for the sale and supply of the double-glazed windows and doors.

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[12] *Scotland & Reast v British Credit Trust Limited* [2014] EWCA Civ 790.
[13] *Smith v Royal Bank of Scotland Plc* [2023] UKSC 34.

179. Under s56(2), those negotiations by the salesperson were deemed to be conducted by it as agent of the creditor (as well as in the salesperson's actual capacity), It followed that the representations constituted "any other thing done (or not done) by, or on behalf of, the creditor" within the meaning of s140A(1)(c) CCA, thereby making the relationship between the consumer and the creditor in that case unfair.

180. Although the above case fell within s56(1)(c) – whereas in this case s56(1)(b) is the applicable provision – given the Court of Appeal's reasoning (and its reliance on s56(1)(b) case authorities such as *Forthright Finance Ltd v Ingate*, in my view, the Broker's arranging of the credit formed part of the same package as, and was in relation to, the sale of the vehicle by the Broker for the purposes of s56(1)(b).

181. It follows that any regulatory breaches/failures of the Broker when arranging the credit for Mr W, are part of the negotiations conducted by the Broker which are deemed, under s56(2), to have been conducted by BMW FS. In turn, this is to be treated as constituting a thing done (or not done) by or on behalf of BMW FS for the purposes of s140A(1)(c).

182. But as I have already explained, I'm satisfied the Broker complied with its regulatory obligations in this case and I do not consider a court would likely regard the relationship between BMW FS and Mr W to have been unfair under s140A(1)(c).

Unfair relationships – overall conclusions

183. Overall, I do not consider that a court would likely find that BMW FS' relationship with Mr W was unfair under s140A CCA, or that this meant BMW FS failed to act fairly and reasonably in its dealings with Mr W.

184. I will now proceed to consider the relevance and impact of the Court of Appeal's March 2021 judgment in *Wood* & *Pengelly.*

(q) Secret commission - What did the Court of Appeal decide in Wood & Pengelly?

185. In my provisional decision I concluded that whilst the principles around the payment of commission considered in the court case of *Wood & Pengelly* are capable of applying to a car commission payment (whether half or fully secret), a court would be unlikely to find the principles set out in *Wood & Pengelly* do apply in this case because the Broker was not under a duty to provide disinterested advice, information or recommendations.

186. Neither BMW FS nor Mr W disagreed with my ultimate conclusion not to uphold the complaint for this reason.

187. In *Wood & Pengelly*, the Court of Appeal held that where a lender pays a secret commission to a broker without the borrower's informed consent and in circumstances where the broker is under a contractual or other legal duty to provide information, advice or recommendations to its customer (e.g. the borrower) on an impartial or disinterested basis, then it is to be presumed that the borrower has been wrongfully deprived of the disinterested assistance and judgment of its broker.

188. Depending on the circumstances of the case, this is a wrong for which the borrower could potentially claim various remedies against either their broker, who received the

secret commission, or their lender, who paid the secret commission to the broker knowing that the broker was acting on the borrower's behalf.

189. BMW FS has said it doesn't consider *Wood & Pengelly* to be relevant to Mr W's complaint because, among other reasons, his case involves a "half-secret" rather than a "fully secret" commission payment. Instead, the Court of *Appeal's* decision in *Hurstanger Ltd v Wilson* [2007] EWCA Civ 299 (*"Hurstanger")* remains applicable, which requires the existence of a fiduciary relationship between the Broker and Mr W. On the facts, it says there was no such fiduciary relationship and, although Mr W originally argued that a fiduciary relationship existed, Mr W no longer argues this is the case.

190. I note BMW FS' representations about the relevance of *Wood & Pengelly* to half-secret commission payments, but in the circumstances of this complaint I do not think the application of Wood & Pengelly to half-secret commission payments is ultimately critical to my decision about what is *fair* and reasonable. I say this because I am not persuaded – for the reasons I shall go onto explain – a court would consider the Broker was under a contractual or other legal duty to provide information, advice or recommendation to Mr W on an impartial or disinterested basis. In those circumstances, the remedies that might sometimes be available at law in relation to the payment of secret or half-secret commission would not in any event be available to Mr W for the reasons I'll now explain.

191. The Broker set out what it could do for Mr W in the Broker Terms of Business. As I have set out above, the relevant section setting out its credit-brokerage terms provided:

> *"CREDIT BROKER STATUS DISCLOSURE*
>
> *We provide credit broking services and can introduce you to a limited number of finance providers to assist with your finance. Those finance providers may reward us for introducing you to them. We have permission to carry out the regulated activity of credit brokerage.*
>
> APPLICATION DEADLINES
>
> *Where we carry out any negotiations with you in relation to your finance agreement we will inform you if your application has been declined. We will also provide you with the details of any credit reference agency consulted by the finance provider."*

192. Having considered the commitment the Broker made to Mr W in this case, I am not persuaded it could be said to have been under a duty to provide advice, recommendation, or information on an impartial or disinterested basis. It committed only to *'introduce [Mr W] to a limited number of finance providers to assist with your finance"*.

193. It did not say that it would provide Mr W with advice or recommend which finance product or lender to choose. It said only that it would put Mr W in touch with one or more finance providers – and tell Mr W if an application had been declined (if it was one where the Broker had carried out negotiations with Mr W) and provide him with details of any credit reference agency consulted by the finance provider.

194. For these reasons, I don't think that a court would be likely to find that BMW FS, in paying commission to the Broker in the circumstances of this case, did so in breach of the principles in *Wood & Pengelly.*

(r) Conclusions

195. In summary, having considered all of the evidence and arguments submitted from the outset, my conclusions are as follows:

- The commission BMW FS paid to the Broker for introducing Mr W's consumer credit business was a fixed flat fee of £500 determined by the model of vehicle Mr W purchased.
- The Broker had no discretion to vary or alter the interest rate Mr W received, or any other terms of the hire-purchase agreement, to increase its commission.
- The Broker disclosed the existence of commission in accordance with its regulatory obligations.
- BMW FS' use of this fixed rate commission arrangement didn't cause it to breach any of its regulatory obligations.
- Nor is it likely that a court would conclude that the relationship between BMW FS and Mr W was unfair under s140A of the CCA.
- Whether or not the principles around the payment of commission considered in the court cases of *Wood & Pengelly* are capable of applying to a (half or fully) secret commission payment, a court would be unlikely to find that the principles set out in *Wood & Pengelly* do apply in this case in any event.
- Overall, I am not persuaded BMW FS acted unfairly or unreasonably in its dealings with Mr W.

My final decision

196. Overall, having considered all the evidence and arguments to decide what is, in my opinion, fair and reasonable in all the circumstances of this complaint and for the reasons I have set out in detail above, my final decision is that I do not make an award or direction in favour of Mr W.

197. Under the rules of the Financial Ombudsman Service, I am required to ask Mr W either to accept or reject my decision before 10 February 2024.

Jeshen Narayanan
Ombudsman