Indeed, 43% of the total charge for credit Miss L was required to pay was paid to the Broker as commission as a consequence of interest rate the Broker selected.

275. Whilst Miss L paid the Broker's advertised typical APR, in setting the advertised rate and then offering that rate to Miss L, the Broker was exercising the discretion afforded it by Barclays PF in accordance with the commission arrangement Barclays PF operated.

276. The unfairness here isn't so much that the Broker had the ability to set the interest rate as it is that Barclays PF's commission model: (i) created an inherent conflict of interest between the Broker's interests and Miss L's interests; and (ii) incentivised the Broker to increase the interest rate by virtue of the fact that the amount of commission the Broker would receive was linked to the flat interest rate it selected for Miss L's credit agreement.

277. The higher Miss L's interest rate was (to a maximum flat rate of 15.25% and subject to the application of the cap provisions) the more commission the Broker would receive. And in Miss L's case, the Broker ensured it received a significant commission payment at Miss L's expense.

278. As I explained earlier in this decision:

- The regulatory requirement to fairly manage the conflict between the Broker's interests and those of Miss L rested with the Broker.

- To meet the regulator's requirement to fairly manage the conflict, the Broker should have disclosed to Miss L that part of the commission it would receive was tied to the interest rate Miss L would pay, which it would select from a pre-determined range with higher interest rates paying more commission.

279. If the Broker *had* disclosed that information to Miss L, I accept a court might take the view that the unfairness to Miss L – created by Barclays PF's introduction and operation of the discretionary commission arrangement – was negated by the disclosure. But I think a court would find the arrangements Barclays PF established and operated which gave rise to the conflict of interest made the relationship unfair in circumstances where:

- the Broker did not in fact fairly manage the conflict of interest created by the arrangement, as I have found was the case here; and, as a result,

- Miss L paid more than Barclays PF required and more than I have found she would have done if the Broker had managed the conflict of interest fairly.

280. In this case (as I considered earlier in this decision) Barclays PF submits that: to comply with the regulatory requirement to fairly manage the conflict between the Broker's interests and those of Miss L, the Broker needed only to have disclosed the fact of the existence of commission and told Miss L that *'Lenders typically pay Us a fee for these introductions'*, as the Broker disclosed in this case. I do not agree with Barclays PF's view about that.

281. But, *if* Barclays PF is right, I think it's unlikely a court would find the limited disclosure made by the Broker in this case sufficient to negate the unfairness created by the introduction and operation of the discretionary commission arrangement (given the features of the discretionary commission arrangement, the impact it had on Miss L's

interest rate and nature of the unfairness created). I think a court would take that view even if it was the case that the limited disclosure made by the Broker to Miss L in this case was sufficient to meet the Broker's regulatory obligations.

282. And I do not think a court would find that an arrangement giving the Broker control of the setting of the interest rate payable on the loan (over and above the amount Barclays PF required for its own purposes) for the purpose of allowing the Broker to determine the commission it would receive was required to protect Barclays PF's legitimate interest. For example, I do not consider it was essential or necessary for Barclays PF to operate this discretionary commission arrangement to encourage the Broker to refer potential borrowers to Barclays PF.

283. For completeness, I do not think it is likely a court would find that operating the Head Office payment arrangement made the relationship unfair.

Unfair relationships – inequality of knowledge and understanding

284. I also find that Barclays PF's failure to disclose to Miss L the Broker's role in setting the interest rate (and, most importantly, that the commission it would pay the Broker would depend on the interest rate the Broker selected for Miss L's credit agreement) was another thing done or not done by, or on behalf of, the creditor which made Barclays PF's relationship with Miss L unfair to Miss L.

285. Both Barclays PF and the Broker knew about the discretionary commission arrangement and the effect that this was likely to have (and did have) on the interest rate Miss L would have to pay. Miss L did not.

286. I think it's more likely than not that, had Miss L known about the Broker's role in selecting the interest rate and the link to commission, Miss L would, as a minimum, have questioned whether to enter into the conditional-sale agreement, at least on the terms offered, and she is likely to have challenged why she was having to pay a much higher rate of interest than the lender was prepared to offer, simply because the Broker wanted to be paid a higher rate of commission, particularly as the commission payment accounted for nearly half (43%) of the cost of credit.

287. If Barclays PF had disclosed the basis on which it would be paying commission to the Broker that would have removed the unfairness as it would have allowed Miss L to make a properly informed decision about the conditional-sale agreement and the interest rate proposed.

288. In reaching my conclusions about the unfairness caused by the inequality of knowledge, I am mindful that – as I have explained earlier in this decision – that the regulatory requirement to disclose the 'existence of commission' and, if asked, the amount, rested with the Broker.

289. But I think it is more likely than not a court would still find the relationship unfair to Miss L by virtue of Barclays PF's failure to disclose the basis on which it would be paying commission (that is the discretionary commission arrangement it created and operated and in particular the Broker's role in setting the interest rate).

290. As before, if Barclays PF is right that the regulatory requirement on the Broker to disclose the existence of commission meant that the Broker needed only to have told Miss L that *'lenders may pay us a fee for these introductions'*, then I think this would provide further support for my conclusion that a court would conclude Barclays PF

should have disclosed the basis on which it would be paying commission and, most importantly, that the commission it would pay the Broker would depend on the interest rate the Broker selected for Miss L's credit agreement. In my view the disclosure made by the Broker in Miss L's case would have done little to alert her to the source of unfairness.

291. I am satisfied that the features of the discretionary commission arrangement, which created both a conflict of interest and meant the loan arrangements (and in particular the setting of, and basis for the setting of, the interest rate) operated in a very different way to what Miss L would reasonably have expected, meant that it was incumbent on Barclays PF to disclose information about the arrangements to her.

292. For the avoidance of doubt, I think it's very unlikely that a court would conclude the limited reference to possible commission payments in the conditional-sale Terms and Conditions, which I set out at paragraph 89, was sufficient to remove the unfairness.

293. Again, my findings in this respect are limited to the discretionary commission arrangement and do not apply to the Head Office payment arrangement.

Unfair relationships – Barclays PF's failure to comply with Principle 6 taking into account CONC 4.5.2G

294. I also consider it is likely that Barclays PF's failure to comply with Principle 6 taking into account CONC 4.5.2G (which I have already considered above) could also lead a court to find that the relationship between Barclays PF and Miss L was unfair to Miss L.

295. As I have set out in detail above, CONC 4.5.2G requires that a lender may only enter into a commission agreement providing for differential commission rates where such payments are justified based on the extra work of the firm involved in that business.

296. As I have found, the discretionary commission agreement between Barclays PF and the Broker did not require the Broker to conduct extra work in order to obtain a higher rate of commission, and overall Barclays PF failed to have due regard to Miss L's interest and to treat her fairly as required by Principle 6. I consider Barclays PF's failure to comply with CONC 4.5.2G and Principle 6 is yet another thing done by Barclays PF under s140A(1)(c) CCA, and is another reason (either in addition to or independently of the unfair relationship reasons I have identified above) why a court would be likely to find that Barclays PF's relationship with Miss L was unfair under s140A CCA.

297. Again my findings of unfairness relate only to the discretionary commission arrangement and do not extend to the Head Office payment arrangement.

298. The sources of unfairness I've set out (in paragraphs 271 to 298) are things done or not done by Barclays PF that I think would likely lead a court to find that Barclays PF's relationship with Miss L was unfair to Miss L under s140A CCA. I'll now explain why I think that the Broker's acts or omissions, in failing adequately to disclose the discretionary commission arrangement, are another thing done or not done on behalf of Barclays PF and why this reinforces my view that a court is likely to find that Barclays PF's relationship with Miss L was unfair under s140A CCA.

Unfair relationships – the Broker's regulatory breaches

299. I consider the Broker's own failure to adequately disclose the discretionary commission arrangement in breach of Principle 7, CONC 3.3.1.R, CONC 3.3.1R(1A)(d) and CONC 4.5.3R and Principle 8 (taking into account Principle 6) is – by virtue of the deeming effect of s56(2)[16] CCA – another thing to be regarded as done or not done by, or on behalf of, Barclays PF which made the relationship between Barclays PF and Miss L unfair to Miss L.

300. I've already explained when considering the preliminary questions earlier in this decision, why I consider that the wording of the Broker's IDD and the reference to commission in the conditional-sale agreement Terms and Conditions were not sufficient to adequately disclose the existence of commission and that the Broker was therefore in breach of CONC 4.5.3R (and CONC 3.7.4G). I have also explained why I consider that by failing to tell Miss L about the conflict of interest and the reason for that (the commission and the link to the interest rate), the Broker did not fairly manage a conflict of interest between itself and Miss L as it should have done as a step to comply with Principle 8 in any event.

301. 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)"*.

302. 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"*.

303. 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)".*

304. 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"*.

305. *Forthright Finance Ltd v Ingate*[17] 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 negotiations were about something which forms part of a single transaction under which the goods were sold.

306. In this case, Miss L entered into a restricted-use credit agreement under s11(1)(a) CCA when she entered into her conditional-sale agreement with Barclays PF. The finance she obtained from Barclays PF could only be used to purchase the motor vehicle she had already chosen and this meant that ownership of the vehicle reverted to Barclays PF unless and until Miss L made all of the payments, or settled the finance early. Miss L's conditional-sale agreement also met the definition of a debtor-creditor-supplier agreement under s12(a) CCA.

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[16] 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'.*

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

307. In my view, the term "antecedent negotiations" as used in s56(4) CCA is broad enough to cover failures by the Broker in this case to comply with its regulatory obligations in arranging the credit that Miss L used to purchase the vehicle – i.e. the Broker's failure to disclose the existence of commission in breach of CONC 4.5.3R and the other regulatory provisions I set out earlier in the decision (as I have already explained above).

308. As a result, in my view, the pre-contractual negotiations that took place between the Broker and Miss L 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"*.

309. In other words, when conducting the pre-contractual negotiations with Miss L, the negotiations conducted by the Broker in relation to the sale of the vehicle and the arranging of the loan are deemed to be conducted by the Broker both in its own capacity and in the capacity as an agent of Barclays PF.

310. 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.

311. Support for this can be found in the Court of Appeal's decision in *Scotland & Reast v British Credit Trust Limited*[18] ("*Scotland & Reast"*), which has recently been followed in *Smith v Royal Bank of Scotland Plc*[19].

312. 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 they would need to purchase payment protection insurance when taking out the loan.

313. 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).

314. 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.

315. Under s56(2), those negotiations by the salespersons 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.

316. 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

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

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).

317. It follows that the Broker's own regulatory breaches/failures when arranging the credit for Miss L (as described more fully earlier in this decision) are part of the negotiations conducted by the Broker which are deemed, under s56(2), to have been conducted by Barclays PF.

318. I note Barclays PF's view that *Shawbrook & Barclays PF* established that the Broker's regulatory breaches cannot be imputed to Barclays PF under s56(2). It says that at most the relevant facts can be imputed. I've carefully considered *Shawbrook & Barclays PF,* which ultimately concluded that the Ombudsmen had correctly applied s56(2).

319. The Broker's acts or omissions breached the Broker's regulatory obligations, as I have set out above. I'm satisfied that, on the facts, the Broker's acts or omissions in relation to the disclosure of commission were human action or inaction producing unfairness, and were part of the negotiations conducted by the Broker. And as such are deemed, under s56(2), to have been conducted by Barclays PF.

320. In turn, this is to be treated as constituting a thing done (or not done) by or on behalf of Barclays PF for the purposes of s140A(1)(c). And I think this is a further reason (either in addition to, or independently of the other unfair relationship reasons I have set out above), a court is likely to regard the relationship between Barclays PF and Miss L to have been unfair under s140A(1)(c).

Unfair relationships – overall conclusions

321. Overall, therefore, for the various reasons I have identified above I consider that a court would likely find that Barclays PF's relationship with Miss L was unfair under s140A CCA and that this is another reason why Barclays PF failed to act fairly and reasonably towards Miss L.

322. In reaching this conclusion, I've considered Barclays PF's representations that, according to the Finance and Leasing Association, the county courts have dismissed 55 of the 86 motor finance commission claims that have been tried to August 2023, including one involving Barclays PF. But I don't think that this is necessarily indicative, and certainly not determinative, of the approach that a court would be likely to take in this case given the facts I've set out.

323. In relation to the 86 cases Barclays PF understands the courts have heard, I do not know, and with the exception of the case involving Barclays PF in the Derby County Court, Barclays PF has not presented evidence about: the factual matrix of those cases, the arguments put forward by the parties, or the evidence presented and considered by the court. In those circumstances, and assuming Barclays PF's figures are correct, the only inference I can reasonably draw from this evidence is that it would appear some cases heard in court have lost (55), and some have won (31).

324. And whilst I have taken into account the note of the judgment of the District Judge in the Derby County Court case involving Barclays PF, it does not persuade me to alter my conclusions about what a court would likely conclude about whether Barclays PF's relationship with Miss L was unfair to Miss L in all the circumstances relevant to her relationship with Barclays PF.

325. Whilst I do not have the benefit of knowing everything the District Judge heard in Derby County Court case, it would appear from Barclays PF's note of the judgement that there were at least some differences in the underlying factual matrix of that case, to Miss L's.

326. I note by way of example only, that one aspect of the District Judge's reasoning was that the consumer's own evidence was that she would still have proceeded if the amount of commission had been disclosed. And it would appear the District Judge was mindful of a High Court decision where it was said it would be odd to award relief where there was no impact on the debtor's transactional decision.

327. That is not a feature of Miss L's relationship with Barclays PF, where I consider it is more likely than not that Miss L would have acted differently if the Broker (or indeed Barclays PF) had provided Miss L with the information I consider it should have in her particular circumstances.

328. Overall, I remain satisfied it is likely that a court would find Barclays PF's relationship with Miss L was unfair to Miss L for the reasons I have set out earlier in this section of my decision.

329. However, even if I am wrong about that, and even if a court did not find that there was an unfair relationship for the purposes of the CCA, I am satisfied that Barclays PF acting in breach of Principle 6 and against the guidance in CONC 4.5.2G (as I have explained above) meant that it failed to act fairly and reasonably towards Miss L in its dealings with her. This is independently of whether or not a court would also find that these breaches/failures are such as to make the relationship between Barclays PF and Miss L unfair under s140A CCA.

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

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

331. 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-secret or fully secret), a court would be unlikely to find the principles set out in *Wood & Pengelly* apply in this case because the Broker was not under a duty to provide disinterested advice, information or recommendations.

332. Neither Miss L nor Barclays PF made further submissions on this element of my provisional decision, save that Barclays PF reiterated its view that I had misunderstood the legal issues that *Wood & Pengelly* decided.

333. I will, however, briefly consider the application of this aspect of common law to my decision about what is fair and reasonable in all the circumstances of this case.

334. 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.

335. 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 arranging the credit for the borrower.

336. Barclays PF says *Wood & Pengelly* is not relevant to Miss L's complaint because, among other reasons, her complaint involves a "half-secret" rather than a "fully secret" commission. 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 Miss L. On the facts, it says, there was no such fiduciary relationship.

337. I note Barclays PF's 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.

338. I say that 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 recommendations to Miss L 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 Miss L for reasons I shall explain.

339. The IDD that the Broker provided Miss L when it was arranging her conditional-sale agreement, which set out the services the Broker could provide Miss L with, in the section entitled "Whose products do we offer?" states:

> *We act as a credit broker sourcing credit to assist you with your purchase from a carefully selected panel of lenders (listed on Our website* [Broker's website]*). Lenders typically pay Us a fee for these introductions.*
>
> And section 3 "Which service will we provide you with?" provides:
>
> *You will not receive advice or a recommendation from us for* ***Credit Broking, Guaranteed Asset Protection Insurance (VRI), Motor Insurance*** *and* ***Mechanical Warranty****. We may ask some questions to narrow down the selection of products that we will provide details on.*
>
> *You will then need to make your own choice about how to proceed. We are unable to provide you with independent financial advice.*

340. Having considered how the Broker explained its role in arranging this conditional-sale agreement with Barclays PF, I think it's unlikely that a court would consider this documentation gave rise to the Broker providing a contractual undertaking to provide advice, information or a recommendations to Miss L on an impartial or disinterested basis.

341. The IDD provides that the Broker acts as a credit broker sourcing credit from "a carefully selected panel of lenders" and the IDD states that a list of the lenders on the panel is available on the Broker's website. But the IDD goes on to explain that the Broker is unable to (and therefore will not) provide advice or a recommendation in relation to the credit broking it provides.

342. The IDD says that the Broker may ask some questions to help narrow down the selection of products it will provide details on to a customer. The IDD does not say how this narrowing will be carried out. Once the Broker has provided details of the product(s), the IDD states that the customer then needs to make their own choice about how to proceed. The IDD also confirmed that the Broker was unable to provide independent financial advice.

343. So from my review of the IDD, it does not appear that the Broker was under a duty to be impartial and to give Miss L disinterested advice, information or recommendations. The IDD made clear that the Broker would not provide advice or a recommendation to Miss L. And once the Broker had provided Miss L with information on credit products (which it first may have asked her some questions to narrow down the selection of products it provided details on), Miss L had to make her own choice on how to fund the purchase of her vehicle.

344. For these reasons, I do not think that a court would be likely to find that Barclays PF, in paying a half-secret commission to the Broker in the circumstances of this case, did so in breach of the principles in *Wood & Pengelly*.

345. However, for the reasons I've already explained in the two preceding sections of this decision, I, in any event, remain satisfied that Barclays PF did not act fairly and reasonably towards Miss L.

(p) Conclusions

346. As set out above, I'm satisfied that Barclays PF failed to act fairly and reasonably in its dealings with Miss L in all the circumstances of this case. In summary, this is for the following separate reasons taken individually (although taken cumulatively they reinforce my views):

- In introducing and operating the discretionary commission arrangement with the Broker, Barclays PF acted contrary to the guidance at CONC 4.5.2G and failed to have due regard to Miss L's interests and treat her fairly as required by Principle 6.

- It is likely a court would conclude that the relationship between Barclays PF and Miss L was unfair to Miss L under s140A of the CCA for each of any of the following separate reasons:

  (1) Barclays PF's introduction and operation of the discretionary commission arrangement which delegated the interest setting power to the Broker and created an inherent conflict between the interests of the Broker and those of Miss L by linking the amount of commission the Broker would receive to the interest Miss L paid. This created an unfair relationship both generally and because it meant Barclays PF failed to comply with Principle 6 and CONC 4.5.2G.

  (2) The inequality of knowledge and understanding created by Barclays PF's own failure to disclose the basis on which it would pay the discretionary commission payment and the Broker's ability to determine the interest rate (and, therefore, the amount of discretionary commission it would receive, and the payments Miss L would have to make).

(3) The Broker's failure to disclose commission in accordance with its regulatory requirements (in particular, CONC 4.5.3R, CONC 3.7.4G(2) and Principle 7 and 8) in circumstances where this failure is, under s56(2) CCA, deemed to be to be a failure of Barclays PF.

347. My findings that Barclays PF acted unfairly and unreasonably are limited to the discretionary commission arrangement in this case. I am not persuaded Barclays PF acted unfairly and unreasonably by operating and applying the Head Office payment arrangements.

348. I will now go on to consider what impact Barclays PF's failure to act fairly and reasonably had on Miss L and what would be fair compensation in all the circumstances of the complaint.

(q) Fair compensation

349. It seems to me that the appropriate starting point in determining fair compensation is to consider whether – had Barclays PF acted fairly and reasonably in its dealings with Miss L – Miss L would have ended up in a better position overall, including in relation to the credit agreement.

350. To that end, I will first consider the likely impact the different sources of unfairness had on Miss L and, the parties' comments about that, and their comments about how redress should be calculated.

What was the impact of Barclays PF's failure to pay due regard to Miss L's interests and treat her fairly?

351. I am satisfied in this case, the discretionary commission arrangements Barclays PF agreed and operated with the Broker created the potential for harm because:

- As the discretionary commission arrangement permitted, the Broker set the interest rate at a higher level than it could have within the permitted range and so received £1,326.60 under the discretionary commission arrangement. The amount of commission was determined without reference to the level of work the Broker undertook, or other lending related factors such as the credit risk Miss L presented.

- It is therefore possible that the interest rate Miss L paid on the conditional-sale agreement was higher than she would have paid had Barclays PF not given the Broker a free hand to choose the interest rate within the range, or if it had operated a different model altogether. The evidence in this case is that Barclays PF would have lent to Miss L at the flat interest rate of 2.68%, which would have satisfied Barclays PF's own income requirements [see paragraph 57 above].

What was the impact of the matters which led to the unfair relationship under section 140A CCA?

352. As I have explained I consider it is likely that a court would find that Barclays PF's introduction and operation of the discretionary commission arrangement created an unfair relationship both generally and because it meant Barclays PF failed to comply with Principle 6 and CONC 4.5.2G.

353. This discretionary commission arrangement created an inherent conflict of interest and incentivised the Broker to select a higher interest rate. So the impact of the unfairness created by the introduction and operation of the model is likely to be the possibility Miss L paid a higher interest rate than she would have done.

354. I have also found that it is likely that a court would find the Broker's failure to disclose the existence of commission as required by the Principles and CONC in circumstances where this failure is deemed, under s56 CCA, to be the failure of Barclays PF, and, separately, Barclays PF's own failure to disclose the Broker's role in setting the interest rate (and that the commission it would pay would depend on the interest rate selected) as a matter of fairness given the inequality of information and understanding, made the relationship unfair to Miss L.

355. As I explained earlier in this decision, in section k, (*what impact did the Broker's failure to act in accordance with its regulatory obligations have on Miss L?*), I think it's more likely than not that if the commission arrangements and structure and, ultimately at her request, the amount had been disclosed to her, it is more likely than not that Miss L would have questioned the basis on which the Broker had selected the interest rate it did and sought to renegotiate the terms of the finance agreement with the Broker.

356. So it seems to me that the unfairness in this case is likely to have manifested itself in Miss L paying a higher interest rate than she might otherwise have done because of the commission arrangements Barclays PF implemented and operated and also because the existence, structure and, ultimately, the amount of the discretionary commission payment was not appropriately disclosed to her.

357. I am also mindful when considering the question of fair compensation that where a court determines that the relationship between a creditor and debtor is unfair under s140A CCA, the court is empowered to make a variety of different types of orders under s140B CCA in order to remedy that unfairness.

358. These powers include altering the terms of the credit agreement or any related agreement, requiring the creditor to repay sums paid by the debtor, and reducing or discharging any sums payable. I am mindful in that context that this agreement is due to end in February 2024.

Barclays PF's comments about redress

359. In summary, Barclays PF says:

- Miss L received a fair and competitive interest rate (which was the Broker's advertised typical APR) and a competitive price for the car which was less than the CAP guide price. She didn't suffer any loss.

- Whilst it would in principle have lent at a flat interest rate of 2.68%, the Broker's local dealership would not have earned any commission at that rate and so it did not expect the Broker to offer deals at that rate as the Broker needed to cover its costs[20] and make a profit.

- It is unrealistic to think the Broker would have been willing to act as a credit

[20] Including those associated with FCA authorisation and compliance, staff training, operation costs, the costs of indemnifying Barclays PF against car related satisfactory quality claims and legal costs.

broker and introduce Miss L for a modest 2% commission of £266.66 (the Head Office payment).

- Had the broker not received the discretionary commission payment it is likely that would have had an impact on other elements of the overall deal – for example, Miss L may have had to pay more for the car.

- If brokers did not earn commission on finance, that income stream would have to be replaced causing the price of vehicles to rise.

- It is wrong to conclude Miss L could have negotiated a flat interest rate of 2.68%. The market did not and could not have operated that way.

- Had it entered into a different type of commission arrangement with the Broker, it is unlikely Miss L would have been offered a flat rate of 2.68% as it would almost inevitably have set the interest rate at a higher level to reflect the commission payment it would have had to make to the Broker.

- The APR was very competitive. There is no evidence to suggest Miss L would have got a better overall package if the interest rate had been lower, or that she would have got a better interest rate from another lender or from Barclays PF if it had operated a different commission model. For example:

    - In 2018, the Broker offered a 'best deal guarantee' where it promised to give back twice the difference if the consumer could find a better overall deal elsewhere.

    - In 2021, following the FCA ban on discretionary commission arrangements, the Broker's typical APR was 8.9%.

    - If Barclays PF had declined the proposal, the Broker would have proposed Miss L to other lenders at 8.9% APR.

    - The 8.9% APR compares very favourably with the broader industry average of 17.5% in 2017, as identified by the FCA in its research[21].

    - The Third-Party's report shows the 8.9% APR Miss L received was significantly lower than the average prime business APR arranged by the Third-Party (10.4%) and by aggregators (10.9%) at the time.

    - The average APR charged to Barclays PF's own customers on conditional-sale agreements was 8.92% (and the flat interest rate average 4.66%).

    - The terms of the discretionary commission arrangement was based on an assumed average APR of 6.9%.

- It would not be fair for Miss L to be retrospectively given a rate of interest that was lower than what a customer who chose to shop around at the time would have been able to obtain.

[21] This was from a sample of 16,402 loans. The FCA said, "The sample of loans is representative of the agreements entered into during 2017…": paragraph 3 and 4, Annex 3, CP19/28.

360. I have considered carefully Barclays PF's representations (including the Third Party report and the statement prepared by its senior pricing manager) about the competitiveness of the interest rate Miss L paid and rates offered at the time and after the FCA ban.

361. Whilst I do not rule out the relevance of the perceived competitiveness of the interest rate Miss L paid entirely, or the evidence about the Broker's advertised interest rate after the FCA's ban in 2021, I think these things are of limited relevance where the evidence suggests Barclays PF was – as a matter of fact – willing to enter into the same conditional-sale agreement with Miss L at a lower interest rate. In this case, the Broker could have submitted a conditional-sale application to Barclays PF on Miss L's behalf at a flat interest rate of 2.68% (5.2% APR) and Barclays PF would have accepted that rate.

362. I've also considered Barclays PF's submissions that:

- The market could not have operated if brokers were to have routinely submitted applications at the zero-discretionary paying rates as brokers needed to cover their costs.

- Had it entered into a different type of commission arrangement with the Broker, it is unlikely Miss L would have been offered a flat rate of 2.68%, as it would almost inevitably have set the interest rate at a higher level to reflect the commission it would pay to the Broker.

363. I accept that as a general proposition it's possible that if all loans linked to discretionary commission models had been taken out at the lowest rate offered by the lender, this may ultimately have had an impact on the lending rates and commission models offered by lenders. I also accept that if Barclays PF had not operated a discretionary commission model, it may have offered different interest rates. But it seems to me that these are ultimately hypothetical propositions.

364. I am required to determine complaints based on the individual circumstances of the complaint. In this case, Miss L could – as a matter of fact – have borrowed at a flat rate of 2.68% under the discretionary commission arrangement. Barclays PF was willing to lend to her at that rate (notwithstanding that was lower than average APRs generally available) and the commission and resulting interest rate was ultimately set by the Broker without reference to the amount of work carried out by the Broker.

365. So I think it's appropriate to approach the question of fair compensation, from the starting point that in Miss L's case, Barclays PF would have been prepared to lend to her at the flat interest rate of 2.68% and if it had done so the Broker would have received £266.66 under the Head Office payment arrangement, but nothing under the discretionary arrangement.

What interest rate would Miss L have paid if Barclays PF had acted fairly and reasonably?

366. Whilst Miss L could in principle have taken out the finance agreement at a flat interest rate of 2.68% (APR 5.2%) I am mindful, when considering the position Miss L would have been in if Barclays PF had acted fairly and reasonably, that it does not necessarily follow that Miss L would have received the lowest interest rate offered within the discretionary arrangement if the model had operated in a different way.

367. If Barclays PF had not agreed to and operated the discretionary commission arrangement in the way it did and had, for example, operated a different commission model, for instance, one which fairly linked the impact of commission on the interest rate to the level of work undertaken by the Broker, I accept it's possible the minimum interest rate on offer might have been higher.

368. But I have not been presented with any evidence to demonstrate with any likelihood what affect a different arrangement might reasonably have had on the interest rate Barclays PF was prepared to offer Miss L in November 2018, beyond Barclays PF's general and high-level representations, for example about the APRs offered at the time by other brokers and average APRs including the fact that that immediately following the ban on motor finance discretionary commission arrangements, the Broker's advertised typical APR was 8.9%.

369. I am also mindful that in this case, the Broker also stood to receive £266.66 for arranging Miss L's loan under the Head Office payment arrangement. So it is also possible that Barclays PF may have had limited or no further commission costs for it to pass on to Miss L under a different model.

370. Ultimately, I am mindful that in this case the only certainty is that Barclays PF would have lent to Miss L at a flat interest rate of 2.68% (APR 5.2%).

371. Whilst I accept its possible Miss L might have paid a higher interest rate than that under a different commission arrangement, ultimately, I think it's reasonable to place more weight, when considering what interest rate Miss L might have paid if Barclays PF had acted fairly and reasonably, on the rate the evidence shows Barclays PF would have lent to her at, than the other more hypothetical possibilities.

372. Overall based on the evidence presented, the mere possibility that the interest rate offered might have been higher if the commission model in place paid commission which was linked to and justified by the level of work, does not persuade me to depart from the starting proposition that Barclays PF would have lent to Miss L at a flat rate of 2.68%.

373. When considering what interest rate Miss L would have paid, I consider it is also appropriate to think about the position Miss L would have been in if she had known about the commission arrangements.

374. I think it is more likely than not that if the Broker had disclosed the commission arrangements in the way I consider it should have to comply with its regulatory obligations (for which Barclays PF is deemed responsible), or if Barclays PF itself had disclosed the position, Miss L would have thought very differently about the transaction she was entering and she would have sought to renegotiate the arrangements to agree a lower interest rate with the Broker.

375. I think it's unlikely that Miss L would have agreed to a higher interest rate and commission as that would have cost her more unnecessarily, particularly in circumstances where the Broker would also receive the Head Office payment – albeit the amount of Head Office payment the Broker would receive for arranging Miss L's credit agreement was a relatively modest amount.

376. In this case the events occurred in 2018 and the service the Broker provided was limited to introducing Miss L to a lender (the Broker did not give her advice). I consider it more likely than not that Miss L would have taken the view that the £266.66 payment the Broker stood to receive under the Head Office payment arrangement was sufficient

for introducing her to Barclays PF. And I think it's fairest to assume she would not have been prepared to pay more from her own funds (which was the effect of the discretionary commission model) for the service.

377. As a starting point therefore, I think it's reasonable to assume that if Barclays PF had acted fairly and reasonably towards Miss L, she would still have taken out the finance agreement but on better terms and she should be compensated for the difference in the two positions.

378. As I explained earlier in this decision, I am satisfied that if the Broker had disclosed the existence of the discretionary commission arrangement and how it was structured Miss L would have questioned the arrangement, particularly given the direct link between the commission payable and the interest she would have to pay.

379. I found that at Miss L's request, the Broker would ultimately have disclosed the amount of commission it would receive and Miss L would have sought to renegotiate the terms of the finance agreement to pay less commission (and interest).

380. Miss L would not have needed to know the interest rate floor to achieve the lowest rate – she would only need to know that any commission received under the discretionary arrangement increased the interest rate. If she was not prepared to pay the Broker the commission, the result would be to drive the interest rate down, ultimately to the interest rate floor.

381. I have also thought about the impact the commission the Broker received had on the wider transaction.

382. When I issued my provisional decision, I said that:

- It's not possible to know with any certainty what, if any, impact the commission had on the price agreed for the car she purchased.
- Barclays PF says the vehicle was sold at a price more than 5% less than the estimated value in the industry accepted valuation guide. It's possible the commission might have allowed the Broker to accept a lower price for the car than it might otherwise have done, alternatively it may not have had any impact.
- In this case I have not been presented with any evidence to support the assertion that the commission payments might have led to a reduction in the car price (so that the price was lower than it would have been if Miss L had bought the car outright with her own funds).
- So I did not consider that possibility alone provided me with a persuasive basis to reach a different conclusion about the likely interest rate Miss L would have paid.

383. I said that if Barclays PF has any contemporaneous evidence to support the assertion that, but for the interest being set by the Broker at the rate it did, the Broker would not have sold the car at the price it did, or evidence that another element of the overall package would have been altered, it should provide that evidence when responding to my provisional decision.

384. Since my provisional decision, Barclays PF has explained its view that if brokers generally did not receive commission that would inevitably increase vehicle prices. But Barclays PF has not provided any specific evidence relating to the agreement between

Miss L and the Broker to show that, in the particular circumstances of Miss L's car purchase:

- Miss L paid less for the car she purchased than she would otherwise have done because the Broker stood to receive the discretionary commission payment; or

- that another element of the overall deal was different to what it would have been because of the discretionary commission payment.

385. In fact, Barclays PF's representations that the Broker's local dealership would not have known at the point it agreed the sale with Miss L the amount of commission the Broker would receive, would suggest it is unlikely the Broker reduced the price of the car because of the commission it ultimately received.

386. Similarly, whilst I note Barclays PF's representations that the price Miss L paid was less than the CAP guide price, there is no evidence to support the assertion that the difference was a direct consequence of the payment of discretionary commission, rather than for other reasons (for example, because the price agreed represented the Broker's informed assessment of the appropriate marketing or selling price for the particular second-hand car it was selling).

387. Overall, I am not persuaded it is more likely than not that the discretionary commission payment did as a matter of fact have any impact on the price Miss L paid for the car in this case. I am not persuaded it is more likely than not that Miss L would have paid a different price for the car, or that another element of the overall deal would have changed, if there had been no discretionary commission payment.

388. Barclays PF also says it is unrealistic to think the Broker would have been willing to act as a credit broker for a modest 2% Head Office Payment or that the Broker's local dealership would have forgone all its commission.

389. I accept it is possible that the Broker might not have agreed to the lower rate and zero discretionary commission, as it would have meant the Broker's local dealership would not have received any commission and the Broker as a whole would have made less money from the overall transaction. But I am mindful that even if the Broker had received only the Head Office payment of £266.66 by way of commission, the Broker (including the local dealership) would still have had considerable incentive to proceed with the sale – it was selling a vehicle to Miss L for a profit.

390. Overall, whilst I accept it is possible that Miss L would have agreed an interest rate which gave the Broker some commission under the discretionary commission arrangement, I am not persuaded I can safely conclude it is more likely than not she would have done so. I think it is more likely than not that Miss L would have insisted on paying the zero-discretionary commission paying APR and the Broker would ultimately have agreed to that.

391. Having considered all the evidence and arguments about redress, my final decision is that Barclays PF should compensate Miss L by paying her:

- the difference between (i) the payments she has made from time to time under the finance agreement (at the flat interest rate of 4.67%) and (ii) the payments she would have made had the finance agreement been set up at the lowest (zero discretionary commission paying) flat interest rate permitted (that is 2.68%); together with

— interest on each overpayment at the rate of 8% simple per year calculated from the date of the payment to the date of settlement in accordance with my final decision. And:

— if the finance agreement has not concluded by the date of settlement: Barclays PF should also reduce, or pay Miss L an amount equivalent to have the same effect, the monthly payments left on the agreement to what they would have been had Miss L's agreement been written at a flat interest rate of 2.68%, rather than 4.67%.

392. I'm also satisfied that such an award isn't inconsistent, or incompatible, with what a court could award if it found the relationship between Barclays PF and Miss L to be unfair under s140A CCA, taking into account the court's wide discretion to remedy the unfairness of the relationship between Barclays PF and Miss L – as set out in s140B CCA which I referred to earlier in this decision.

393. In reaching my findings about fair compensation, I have also taken into account:

— Requiring Barclays PF to pay Miss L the difference between the payments she made under the finance agreement and the payments she would have had to make at the lowest (zero discretionary commission paying) interest rate means Barclays PF will potentially incur a loss from the transaction, as Barclays PF has already paid those interest payments to the Broker as commission.

— Miss L may also have cause to complain about the Broker which received the discretionary commission payment, but which is not the subject of this complaint.

394. But I am not persuaded to reach a different conclusion about fair compensation. I am required to determine the complaint in front of me (to which only Barclays PF is the respondent) and, having considered all the evidence and arguments, I am satisfied that Barclays PF should fairly compensate Miss L for the losses she suffered, notwithstanding the Broker's role in arranging the loan, that it was the Broker which benefitted from the commission payment, and that Miss L may also have had grounds to complain about the Broker.

395. By establishing and operating the discretionary commission model, Barclays PF created the environment which permitted the Broker to select a higher interest rate and to receive more commission without reference to the work involved, with the effect that Miss L paid more than she needed to on her conditional-sale agreement. And, as the finance provider, Barclays PF could itself have explained to Miss L the basis on which her interest rate was set, the Broker's role in setting that rate, and the commission resulting from that.

396. In those circumstances, whilst I recognise Barclays PF may be out of pocket as a consequence of paying both the commission and the compensation, and I am mindful that the Broker rather than Barclays PF was the ultimate beneficiary of the commission arrangements, I do not think it would be fair and reasonable to reduce the compensation Barclays PF should pay Miss L for those reasons.

My final decision

397. For the reasons I've explained, I uphold Miss L's complaint and direct Clydesdale Financial Services Limited (trading as Barclays Partner Finance) to put things right in the way I've set out at paragraph 391 above.

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

399. Barclays PF should calculate and pay the compensation within 28 days of the date on which Miss L accepts my final decision.

Jeshen Narayanan
Ombudsman