DRN-4326581

Summary

1. This complaint is about the commission Clydesdale Financial Services Limited (trading as Barclays Partner Finance ("Barclays PF")) paid to a credit broker (the "Broker") when Miss L took out a conditional-sale agreement to buy a car in November 2018.

2. Miss L complains that Barclays PF acted unfairly by paying the Broker commission without her knowledge, and by operating a commission model that linked the commission the Broker received to the interest rate on the agreement, whilst allowing the Broker the discretion to adjust the interest rate (and therefore the amount of commission it received).

3. Barclays PF says that it complied with the legal and regulatory obligations that applied at the time and that Miss L wasn't in any event treated unfairly taking into account all the circumstances of the transaction.

4. I have read and carefully 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 have decided to determine the complaint in favour of Miss L and to require Barclays PF to pay her compensation.

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

    - The discretionary commission model Barclays PF used in Miss L's case, created an inherent conflict between the interests of the Broker and the interests of Miss L, as it gave the Broker an incentive to set a higher interest rate than Barclays PF would have accepted so that the Broker could receive more commission.

    - In introducing and operating the discretionary commission arrangement with the Broker on the terms it did, 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 of the Financial Conduct Authority's ("FCA") Principles for Businesses (the "Principles").

    - 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 Consumer Credit Act 1974 ("CCA") for any or all of three 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 commission and the Broker's ability to determine the interest rate (and therefore, the amount of commission the Broker would receive and the payments Miss L would have to make).

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

- In light of each of those considerations, whether taken individually or collectively, I consider that Barclays PF did not act fairly and reasonably in its dealing with Miss L.

- Whether or not the principles around the payment of commission considered in the court cases of *Wood & Pengelly*[1] are 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.

- To put things right, Barclays PF should compensate Miss L by:

  — paying her the difference between (i) the payments she made from time to time under the finance agreement so far (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%);

  — paying her 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 at the date of settlement: reducing, or paying 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%.

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

Background to the complaint

(a) The events leading up to this complaint – Miss L's conditional-sale agreement

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

8. In November 2018, Miss L was looking to buy a used car from a motor-dealer – the Broker. As well as selling cars, the Broker was authorised by the FCA to carry out, among other things, the regulated activity of credit broking.

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

10. The Broker offered to arrange finance to facilitate Miss L's purchase from it and, in doing so, it acted as a regulated credit broker. It introduced Miss L to Barclays PF and arranged a conditional-sale agreement between Miss L and Barclays PF.

11. Under the conditional-sale agreement, Barclays PF bought the car from the Broker, and Miss L was required to make a series of monthly payments to Barclays PF. If Miss L makes all the payments under the agreement, legal ownership of the vehicle will pass from Barclays PF to her at the end of the term.

12. My understanding is that the agreement remains ongoing, and Miss L continues to make payments under the agreement.

13. In this case, the conditional-sale agreement says:

    - The cash price of the vehicle was £19,133. Miss L paid a deposit of £5,800 (made up of a cash payment of £300 and the £5,500 exchange value of her existing vehicle) and borrowed the remaining £13,333.

    - The total charge for credit was £3,113, which was entirely made up of interest.

    - The total amount payable under the agreement was £22,246 (including the £5,800 deposit Miss L paid to the Broker).

    - Miss L was required to pay 60 monthly payments of £274.10.

    - The 'flat interest rate' – where the interest payable is worked out as a percentage of the credit amount – was 4.67% per year and the Annual Percentage Rate (APR) was 8.9%.

14. Miss L was due to make her final payment in November 2023, but she was granted a full payment deferral during the Covid pandemic in July 2020, in line with the regulator's guidance[2]. This meant Miss L did not make her payments in July 2020, August 2020 and September 2020. Those payments were deferred to, and tacked on to, the end of Miss L's agreement, so she is now due to make the final payment in February 2024.

'Flat interest rates'

15. The 4.67% flat interest rate is an important figure to keep in mind in this case because part of the commission the Broker received for introducing Miss L to Barclays PF was determined by reference to the flat interest rate Miss L paid.

[2] Finalised guidance – Motor finance agreements and coronavirus: updated temporary guidance for firms published in July 2020.

16. Flat interest rates are calculated assuming the interest charged is apportioned equally across the loan term based on the original amount borrowed. So, by way of example only, if a consumer borrowed £10,000 over 48 months, and the total amount of interest payable was £4,800, that would equate to a flat rate of 12% (or £1,200 per year).

17. But in my example, the effective interest rate required to generate £4,800 of interest in four years (given the decreasing capital balance) would be significantly higher than the flat rate of 12%. This is in part why consumers are encouraged to look at the APR when comparing the cost of loan products.

Commission

18. In this case, as I shall explain in more detail later in this decision, the Broker received payments totalling £1,593.26 from Barclays PF for arranging the conditional-sale agreement. Barclays PF paid £1,326.60 to the Broker's local dealership under a discretionary commission arrangement and made a second payment of £266.66 to the Broker's Head Office, equivalent to 2% of the credit amount (2% of £13,333 = £266.66).

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

Amount financed	Term	Total charge for credit	Flat interest rate	Discretionary Commission paid to Broker	Second Payment to Broker
£13,333	60 months	£3,113	4.67%	£1,326.60	£266.66

(b) Miss L's complaint

20. I will set out further information about Miss L's complaint later in this decision. But in essence, Miss L complains that she was treated unfairly and suffered loss because:

- Unbeknown to her, the Broker received commission from Barclays PF for arranging the conditional-sale agreement. She was not made aware of this before taking out the loan.
- The commission was linked the interest she paid on the loan. This meant that she wasn't given the best interest rate available, and she struggled to make her payments.
- She wasn't provided with all the information she needed at the time she took out the loan and was given unsuitable advice by the Broker. As a result, she ended up with finance that wasn't right for her.

21. Miss L says that she has experienced financial hardship since she entered into the conditional-sale agreement, and it has caused her increased stress and poor sleep.

(c) My provisional decision of 26 June 2023

22. I issued a provisional decision on 26 June 2023 setting out: my provisional findings and conclusions about whether Barclays PF acted fairly and reasonably in all the

circumstances of this complaint; and my provisional view about fair compensation. In essence and by way of summary only, I found that:

(1) In total Barclays PF paid the Broker £1,593.26 as a direct consequence of arranging the conditional-sale agreement. It paid:

- £1,326.60 of the commission to the Broker's local dealership under a discretionary commission arrangement, where the amount of commission the Broker received was linked to the interest rate on the finance agreement and the Broker was able to determine the interest rate and, in doing so, the commission it was paid and the interest payments Miss L would have to make to Barclays PF.

- £266.66 in the form of a second payment to the Broker's Head Office, equivalent to 2% of the credit amount (£13,333).

(2) Barclays PF was prepared to lend to Miss L at a flat interest rate of between 2.68% and 15.25% with any amount charged above 2.68% going to the Broker in commission. The Broker selected a flat interest rate, of 4.67%.

(3) Although the Broker disclosed that lenders *typically* paid it a fee for introductions, it did not disclose that Barclays PF *would* pay it a fee for arranging the specific conditional-sale agreement Miss L entered, or provide any further information or context as to the makeup, or structure of the commission model in use. This meant:

— The Broker failed to appropriately disclose the "existence of commission" or pay due regard to Miss L's information needs and communicate information to her in a clear, fair and not misleading way, as CONC and Principle 7 required.

— The Broker failed to fairly manage the conflict between its interests and the interests of Miss L as required by Principle 8.

(4) The discretionary commission arrangement was an agreement providing for "differential commission rates". As such, Barclays PF should only have offered, or entered into, the arrangement to the Broker where the differential commission payments were justified by extra work (CONC 4.5.2G). The discretionary commission arrangement in this case was not linked to the amount of work carried on by the Broker.

(5) Although the principles around the payment of commission considered in the cases of *Wood & Pengelly* are capable of applying to a car finance commission payment (whether half-secret or fully secret), a court would be unlikely to find that the principles set out in *Wood & Pengelly* apply in this case.

(6) Barclays PF failed to act fairly and reasonably in its dealings with Miss L, for each of a number of different reasons:

- By introducing and operating the discretionary commission arrangement with the Broker on the terms it did, 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.

- A court would likely find that the relationship between Barclays PF and Miss L was unfair to Miss L under s140A CCA for each of the following reasons:

    - The inherent conflict between the interest of the Broker and Miss L that the discretionary commission arrangement created, which incentivised and allowed the Broker to set the interest rate at a higher level than Barclays PF would have been prepared to lend at (as the Broker did in Miss L's case).

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

    - The Broker's failure to disclose the basis on which it would receive commission and fairly manage the conflict between its interests and those of Miss L, in circumstances where those failures are deemed to be a failure of Barclays PF under s56(2) CCA.

    - Barclays PF's failure to comply with Principle 6 and CONC 4.5.2G.

(7) If Miss L had been told about the structure of the commission arrangements (and in particular the discretionary commission arrangement), she would not have entered the conditional-sale agreement on the terms she did. Miss L would not have been prepared to pay the Broker such a significant amount for introducing it to Barclays PF (which was the effect of the discretionary commission arrangement and the direct link to her payments), particularly given that the Broker already stood to receive £266.66 as a result of the Head Office payment.

(8) Taking that into account, and the wide range of powers available to the courts under s140B CCA to address an unfair relationship, I provisionally concluded that, to fairly compensate Miss L, Barclays PF should pay Miss L the difference between the payments she made to the agreement at the flat interest rate set by the Broker and the payments she would have paid if the agreement had been set up at the lowest, zero discretionary commission paying, flat interest rate of 2.68%.

(9) In addition, I said that if the conditional-sale agreement has not concluded when I issue my final decision, Barclays PF should reduce (or pay Miss L an amount equivalent to have the same effect) the monthly payments on the agreement going forward, to reflect what the payment would have been had Miss L's agreement been written at a flat interest rate of 2.68%, rather than 4.67%.

(d) The parties' representations

23. Both parties have made substantial representations during the course of this complaint. I have read and considered them all carefully and will not restate them all here. I will instead summarise the most relevant points.

24. In summary, prior to my provisional decision, Barclays PF told us:

The commission disclosure was sufficient and met regulatory expectations

- The Broker appropriately disclosed the existence of commission in its Initial Disclosure Document ("IDD")[3]. The Broker did not receive commission from all lenders in all circumstances, so it would have been misleading to say that it 'would' receive commission.

- The terms of the credit agreement itself said: *"You agree to us paying commission to any broker or supplier acting as your agent in relation to the agreement".* Any reasonable customer would understand from this that the Broker would be paid commission.

- Miss L did not pay the Broker a fee for their credit broking – so must be assumed to know the Broker would likely be paid by someone for providing the service.

- There was no regulatory requirement on Barclays PF to disclose anything about commission, but it did in any event disclose the likely existence of commission.

The regulator's expectations at the time about discretionary commission arrangements

- It complied with the regulatory requirements at the time. The investigator wrongly relied on CONC 4.5.2G. CONC 4.5.2G is not relevant as it does not apply to discretionary commission models only "differential commission rates". In any event, it is non-binding guidance, not a rule that must be followed.

- Discretionary commission arrangements were clearly permitted by the regulator at the time, otherwise it would not have been necessary for the FCA to ban discretionary commission models from January 2021. The fact that Barclays PF entered into such an arrangement with the Broker cannot reasonably be used to justify a finding that it has breached Principle 6.

- The FCA has been clear to avoid saying that there were widespread conduct issues following its review of the motor finance market and the FCA itself acknowledged as part of the review that its rules and guidance on the disclosure of commission could be clearer.

- The investigator effectively, and incorrectly, retrospectively applied the FCA's 2021 ban on motor finance discretionary commission models.

It acted fairly and reasonably

- Miss L received a competitive and fair interest rate, which was the rate the Broker advertised at the time and one Miss L was content to proceed at – she could have shopped around and arranged her own finance but chose not to. There is no evidence that Miss L could have got a lower interest rate at the point of sale.

- Miss L also received a competitive price for the vehicle. The basic vehicle price was £18,998, more than £1,000 less than the CAP Retail price of £20,132.

[3] As I shall explain later in this decision the IDD formed part of a larger *'Thanks for Choosing Us'* sales pack given to Miss L.

— The complaint is ultimately that Miss L might have been charged less if the Broker had not received commission under the discretionary commission model. That is an unrealistic assumption to make and would not be fair in circumstances where the interest rate was a reasonable one and the price charged for the car was lower than the guide price value.

— It strongly disagrees with the investigator's suggestion that it allowed the Broker to set the interest rate depending on the commission the Broker wanted to earn. It imposed a number of safeguards to ensure customers were treated fairly, including: limiting the amount of commission and the circumstances in which the loan interest rate could be varied and requiring the Broker's staff to make it clear to customers if they were varying the interest rate on the loan.

— Miss L had all the information she needed to make an informed decision about whether the finance provided value for money and to compare products (using the APR).

Unfair relationships – s140A-C Consumer Credit Act

— A court would not find that the relationship between itself and Miss L was unfair having regard to all the circumstances of the transaction.

— In any event, even if a court were to find that the relationship was unfair, the appropriate remedy must reflect what is proportionate to the nature and degree of the unfairness.

— It is not accurate to say it allowed the Broker to set the interest rate depending on how much commission the Broker wanted to earn. The commission payment did not influence the interest rate – Miss L received the Broker's advertised typical APR.

There was no financial loss or unfairness

— Whilst it would, in principle, have lent at a flat interest rate of 2.68%, the Broker's local dealership would not have received any commission at that rate.

— Commission played an important role in the overall make up of motor vehicle sales. It is necessary to look at the transaction as a whole. 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.

— There is no evidence to suggest she 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.

— Had it entered into a different type of commission arrangement with the Broker, it is unlikely Miss L would have been offered a flat interest 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.

Secret commission – Wood & Pengelly

- Miss L had not raised a complaint about secret commission, but as the investigator found the principles did not apply in this case, it had no further comments.

25. Following my provisional decision, Barclays PF made extensive further representations about the merits of the complaint and my provisional findings. Again, I will not restate them all here, but I have read and considered those representations carefully in reaching my final decision. By way of summary only, I note, among other things, Barclays PF said:

FCA review of motor finance sector

- Whilst the FCA concluded that some customers were paying significantly more for their motor finance because of the way lenders choose to remunerate their brokers, the FCA did not conclude that all, or even the majority of customers, were paying more.

- My provisional decision is at odds with FCA's conclusions. My findings would effectively mean any customer, whose finance was arranged via a broker operating under a discretionary commission arrangement, overpaid and should be compensated.

- The FCA did not conclude or suggest that there should be any backward-looking remediation or review and the FCA did not prohibit discretionary commission models at the time. I should not assume that the FCA's findings render discretionary commission arrangements generally unfair.

Commission disclosure

- The Broker presented information about commission in compliance with CONC 4.5.3R (and therefore Principle 8) and in a way that was clear, fair and not misleading and would have been understood by the customer (or an average member of their group) as required by Principle 7, CONC 3.3.1R and CONC 3.3.1R(1A)(d).

- It does not accept my provisional conclusions about the extent of the disclosure required by the Broker. The Broker was required – as it did – to disclose only the existence of the fact that commission would be paid. This was sufficient to alert Miss L to the possibility of a conflict of interest.

- There was no regulatory requirement to go beyond that and to proactively disclose both the existence and nature of commission until FCA amended CONC 4.5.3R in January 2021. Nor was it what brokers did at the time.

- I applied the post January 2021 rules retrospectively and interpreted CONC 4.5.3R in a way that is at odds with the clear words of the provision. If that had been the requirement, the FCA would have said so in its Motor Finance Review and taken enforcement action against firms for non-compliance.

- If having been told about the existence of the fact of commission, Miss L was concerned about conflicts – which would likely depend on how competitive the

finance deal was – she was free to ask for more information.

— The rate offered in this case was both competitive and the Broker's advertised typical APR, so Miss L got what she expected, and was not concerned about possible conflicts of interest.

Miss L would not have acted differently

— Miss L would not have acted differently if there had been additional disclosure.

— Miss L says that she was not told about commission. That is incorrect and calls into question the reliability of her evidence generally.

— The reasoning for my conclusion that Miss L would have sought to renegotiate the terms of the finance agreement with the Broker to obtain a lower interest rate if there had been additional disclosure, is not supported by the facts.

— It would be unfair for me to reach that conclusion without asking Miss L directly what she would have done.

Barclays PF met its regulatory obligations

— My view that Barclays PF breached Principle 6 and failed to treat Miss L fairly is wrong in law and not supported by the evidence – Miss L received a competitive and fair deal.

— My interpretation of CONC 4.5.2G is wrong in law for a range of reasons which I summarise later in this decision at paragraph 204.

Section 140A-C CCA

— It understands from the Finance and Leasing Association (FLA) that, of the 86 motor finance commission related cases tried in court of which the FLA is aware, the courts have dismissed 55 of the claims. Other claims have been discontinued before trial.

— Barclays PF itself has only had one case proceed to trial so far. The case involved a similar discretionary commission arrangement where the lowest flat interest rate was 2.75% and the consumer was charged a flat interest rate of 4.75%.

— The case was dismissed by a District Judge sitting in the Derby County Court who concluded that the existence of commission was disclosed in accordance with CONC 4.5.3R and dismissed the claimant's claims under s140A-C of the CCA, saying, according to the note of Barclays PF's solicitors:

> *'I note the FCA introduced the DiC Ban in January 2021, four years after execution of this Agreement. Compliance with CONC is not determinative as to whether there is an unfair relationship, but I can't simply backdate the ban. These provisions did not exist at the time and DiC was lawful at the time. The subsequent ban does not necessarily render use of a DiC model unfair. I must look at the particular case facts. The reason for the ban was to prevent*

dealers being incentivised to increase the interest rate. I note that D2 [a broker] *reduced D1's* [Barclays PF's] *advertised rate to 4.75%*

I reject C's submission that the structure itself generates unfairness. There is no evidence to suggest that D2 took advantage of the structure here – that is clear from the reduction to the advertised rate.'

— Miss L says that she suffered financial hardship since entering the credit agreement, but she met Barclays PF's affordability assessment, has never fallen into arrears and when Barclays PF spoke to her about bounced payments in February 2019, Miss L confirmed she was not in financial difficulty, just that the date of the payment was unsuitable for her (which Barclays PF then changed).

— Taking into account the overall package and Miss L's circumstances, it would not be fair and reasonable to find that there was an unfair relationship.

— It does not agree that s56 of the CCA applies in the way that I have suggested. My conclusion about the application of s56(2) CCA is wrong in law. I imputed the Broker's regulatory breaches to Barclays PF. At most the relevant facts can be imputed applying the approach of the court at paragraph 150 in the joined cases of *R (on the application of Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd; and R (on the application of Clydesdale Financial Services Ltd (t/a Barclays Partner Finance)) v Financial Ombudsman Service* [2023] EWHC 1069 (Admin) ("*Shawbrook & Barclays PF*").

Secret Commission

— I misunderstood the legal issues which *Wood & Pengelly* decided. But as I did not find against Barclays PF on this basis in my provisional decision, it made no further comment.

Redress

— It does not agree that any redress is due, but if redress is due, it should be fair and reasonable in all the circumstances.

— Miss L received a fair and competitive interest rate and overall deal. It is reasonable to think that Miss L was attracted to the Broker for this reason. There is no suggestion that the interest rate was unfair or unreasonably high:

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

  — 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. The 'deal' covered the price of the car and the interest rate among other things.

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

  — If Miss L did not consider the APR to be competitive, it is unlikely she would

have proceeded with the transaction. She had the opportunity to shop around between 13 November when the deal was proposed and 20 November when it completed.

- Miss L did not pay a higher interest rate than she would have paid if she had known about the arrangements. It has obtained a report from another credit broker (the 'Third-Party') which shows the APR Miss L received was significantly lower than the average APR the Third-Party arranged at the time. And at the time the average APR charged to Barclays PF's own customers on conditional-sale agreements was 8.92% (and the average flat interest rate was 4.66%).

- 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.

- It is unrealistic to think that the Broker would have been willing to act as a credit broker and introduce Miss L for a modest 2% commission of £266.66 (the Head Office payment).

- Without the commission, Miss L would have had to pay more for the car.

26. I note Barclays PF has not presented any specific evidence directly relating to Miss L's transaction to support its view that Miss L would have had to pay more for the car if the Broker had not received £1,326.60 under the discretionary commission arrangement in addition to the £266.66 Head Office payment for arranging the conditional-sale agreement. But Barclays PF says (and it has provided a statement from a Barclays PF employee (as well as an email from an employee of the Broker) in support) if brokers did not earn commission on finance, that income stream would have to be replaced causing the price of vehicles to rise.

Miss L's recollections

27. Following my provisional decision, I asked Miss L a number of questions about her recollections. Among other things, she told us:

- She approached the Broker's car dealership when she decided to purchase a car in 2018 because it was close to where she lived.

- About what she understood about the information in the *"Thanks for Choosing Us"* sales pack provided by the Broker, particularly around commission:

  "I was not aware of any commission and did not know what it was and nor was it explained to me".

- About what she understood about the fees she might need to pay the Broker for arranging the conditional-sale agreement:

  "I was not aware I would have to pay any fees".

- On how she thought the Broker would be paid for arranging her agreement:

  "I did not know how the staff / company are paid".

- About what she would have done if she had been told that (1) the Broker would receive a commission payment tied to the interest rate on her agreement and that the Broker could select the commission rate and would receive more commission the higher the interest rate selected; and (2) the Broker would receive a second commission payment from Barclays PF tied to the amount she would be borrowing:

  "I would not have entered into any type of agreement at all".

- On why she initially applied for a hire-purchase agreement which included a service plan and warranty, but ultimately took out a conditional-sale agreement with lower payments and without the service plan and warranty two days later:

  "All I can recall is when I actually sat down with the sales man he verbally told me a price for the car and then asked me to sign a piece of paper that stated a much higher price than he had originally said. When I asked him why it said this he told me not too worry as they did this for there own records and I would not be paying the higher price however this made me confused and upset and another sales man had to come over and ask was I ok (as I was visibly distressed). At this point it was clear that the sales man had lied and was trying to make me sigh for a much higher price for the car than agreed. The other sales man told the first man to leave and then took over the sale, the whole interaction was confusing and I felt pressured. The salesman was deceitful and dishonest and something I still recall to this day. I am however unsure why this is recorded on both the 13 and 15 but may have been that I went looking on the 13 and was told to bring my own car in on the 15th to be valued as part of the part exchange and to complete the sale? [sic]*"*

- In response to whether she read the credit agreement and its terms and conditions, she said:

  "I believe I did look over this on the day of sale however due to the chaotic nature of the sale unsure if I was able to take in and retain the information provided".

- Miss L also told us that she didn't consider any alternative sources of finance and she went ahead with this conditional-sale agreement as she needed a reliable car for work.

Barclays PF's comments on Miss L's recollections

28. In relation to Miss L's comments, I note (among other things) Barclays PF told us:

— Miss L's comments suggest her complaint is not really about commission at all. But that the Broker should have searched the market for a better interest rate (which given the competitiveness of the rate Miss L received would not have been possible).

— Miss L says she was not made aware of commission, and it was not explained to her. But she was told in both the IDD and the conditional-sale Terms and Conditions about commission and had time to read the documentation before the agreement completed and afterwards during the 14-day cooling off period.

- Convenience was clearly important and of value to Miss L and her decision-making process. She went to the local garage and didn't consider alternative sources of credit. I need to take the value of convenience to Miss L into account.

- My assumption that Miss L would have negotiated a better rate is not supported by Miss L's own representations and so cannot be a finding in my final decision. It is also counter factual given the importance Miss L placed on convenience.

- It would be unfair for Miss L to be given a rate of interest that was lower than a comparable customer, who chose to shop around, would have received.

- Given the competitiveness of the offer and what was available in the market, Miss L would have taken the finance at the rate offered even if there had been detailed disclosure of the commission arrangement and Miss L had questioned it.

- The salesman did not 'lie' about the price, nor was the sales process chaotic. The Broker's records show Miss L made a specific appointment to view the car she ultimately bought. Having viewed the car, the Broker proposed a hire-purchase agreement on 13 November. There was a further discussion two days later when Miss L decided to remove the service plan and auto care warranty – reducing the price – and the Broker proposed the conditional-sale agreement.

Barclays PF's request for a hearing

29. Barclays PF also requested an oral hearing following my provisional decision. In essence, Barclays PF asked for the hearing to test Miss L's recollections and the plausibility of those representations, to enable me to ask questions of the Broker if it were asked to participate, and because of the wider importance of my decision.

30. I turned down Barclays PF's request for a hearing on 25 October 2023 for the reasons I set out in that letter. I shall not repeat them here, but in essence, I was satisfied that I understood the respective parties' positions as they had been clearly articulated. And above all else, I was satisfied that I had all that I needed to fairly determine Miss L's complaint without the need for an oral hearing. For the sake of completeness, I remain satisfied that I am able to fairly determine Miss L's complaint without convening a hearing.

My findings

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

(e) Relevant considerations

32. 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; and (iii) codes of practice; and (where appropriate), what I consider to have been good industry practice at the relevant time.

33. I will refer to and set out several regulatory requirements, guidance provisions and legal concepts in this 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 Miss L entered the conditional-sale agreement in November 2018 (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 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.*

Barclays PF's representations about the scope of Miss L's complaint

34. As a preliminary point, I note when commenting on Miss L's recollections following my Provisional Decision, Barclays PF has suggested that Miss L's complaint is not really about commission at all and instead her complaint is that the Broker should have searched the wider market for the most competitive rate.

35. I do not consider that fairly characterises her complaint or the representations she made following my provisional decision about what she recalls happening.

36. I accept Miss L has, during the course of her complaint, made representations (for example on the complaint form) to the effect that she was not given the best APR at the time and (when she spoke to Barclays PF in November 2021) if she had taken out a personal loan she might have got a better interest rate.

37. But her complaint has from the start been about the commission Barclays PF paid to the Broker and the impact on her interest rate. For example:

— When Miss L first complained to Barclays PF through a solicitor on 16 November 2021 (she is no longer represented), she expressed dissatisfaction about the disclosure of commission and the impact the discretionary commission arrangement had, including complaining that Barclays PF: failed to comply with CONC 4.5.2G; and was responsible for the actions of the Broker under s56 of the CCA (and the Broker failed to comply with CONC 4.5.3R). Miss L also complained that the discretionary commission arrangement meant the relationship between Barclays PF and her was unfair to her under ss140A-C CCA.

— When Miss L spoke to Barclays PF in November 2021, Barclays PF noted she explained that the commission of £1,326.60 was not disclosed to her.

— On the Financial Ombudsman Service complaint form she said, among other things: *"Unbeknown to me the car retailer received commission I was not made aware of this verbally or in my agreement which I feel was linked to the interest rate I was charged."*

38. Overall, I am satisfied, that Miss L's complaint is, in the main, about having to pay additional amounts on her conditional-sale agreement with Barclays PF because of

commission paid to the Broker by Barclays PF under a discretionary commission model that she says she was not informed about.

39. I will go on to consider those issues. But I think it's appropriate to start by setting out some additional background information about the FCA's 2017-2019 review of the motor finance market and its relevance to Miss L's complaint.

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

40. 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"*[4] .

41. 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?"*[5]

42. 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."* [6]

43. 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 FCA's "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]

[4] FCA Business Plan 2017-2018 page 74.
[5] FCA 'Our work on motor finance – final findings' para 1.2.
[6] FCA 'Our work on motor finance – final findings' para 1.5.

- *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.[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."*

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

44. Following a consultation[7] 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.

45. Whilst some of 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 November 2018.

46. I accept the FCA did not make a specific finding during its review that discretionary commission models led to consumer harm in all cases (and I note Barclays PF's representations about that), and instead found that discretionary commission models had the potential to cause consumer harm, gave rise to conflicts of interests, and were having a significant effect on the cost of motor finance for consumers.

47. I do not, however, as Barclays PF suggests, infer from the outcome and conclusions of the review (including the forward-looking ban on motor finance discretionary commission models) that motor finance discretionary commission models in place prior to the ban necessarily produce an unfair or unreasonable outcome in every case.

48. Instead, I find – as I did in my provisional decision – only that the FCA's review and Motor Finance Final Findings are a useful source of information both about commission arrangements like those found in this case (as I shall explain below) and

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

about the regulator's view of those arrangements, the interaction with its rules (the same rules that were in place in November 2018) and the potential for consumer harm.

49. I will now consider whether Barclays PF acted fairly and reasonably in its dealings with Miss L and, if not, whether Miss L suffered any harm in her particular circumstances.

50. In doing so, I make no findings about the position of any other consumers. But I accept there may be other consumers in similar circumstances to Miss L to whom this decision may be relevant, and I am also mindful that this decision may be relevant to Barclays PF's assessment of other complaints given the requirements of the complaint resolution rules set out at DISP 1.4.

(g) Miss L's complaint

51. As I've explained, I'm satisfied that in broad terms Miss L's complaint is that she believes that she was treated unfairly because of the impact of what she says were undisclosed commission arrangements made between Barclays PF and the Broker.

52. I will first consider a series of preliminary questions, which will be relevant to my broader consideration of whether Barclays PF acted fairly and reasonably in this complaint:

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

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

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

    (4) If not, what impact did the Broker's failure to act in accordance with its regulatory obligations have on Miss L?

53. I will then go on to consider whether Barclays PF acted fairly and reasonably in its dealings with Miss L, taking into account, in particular, the regulatory obligations that applied to Barclays PF at the time, the law relating to unfair relationships and the law relating to the payment of secret commission.

(h) How much commission did Barclays PF pay the Broker and how was it structured?

54. It is not disputed, and I am satisfied, that Barclays PF paid the Broker £1,326.60 under a discretionary commission arrangement for introducing Miss L to it. It also made a payment of £266.66 to the Broker's Head Office (calculated as 2% of the loan amount).

The discretionary commission arrangement

55. Barclays PF has told us – and it has provided the agreement[8] with the Broker in support – that in November 2018, the discretionary commission arrangement worked as follows:

- It agreed a minimum non-commission paying flat interest rate of 2.68% with the Broker – i.e. an interest rate at which Barclays PF would be prepared to lend, and which the Broker could offer to a borrower, but which would mean that the Broker would receive no commission under the discretionary arrangement.

- The Broker was then able to set an interest rate above the minimum rate (to a maximum flat interest rate of 15.25%), and the difference in the amount charged would be paid to the Broker as commission subject to a 'cap'.

- The cap applied in two ways: the discretionary commission payment could not exceed £2,500, nor could it exceed 50% of the total interest charges.

56. For completeness, I note that the terms of the agreement between the Broker and Barclays PF originally set out a minimum flat interest rate of 2.43% and a maximum rate of 15%. But Barclays PF increased those rates by 0.25% in September 2018 to reflect *"recent rises in the Bank of England's base rate and the subsequent effect on general interest rates"*.

57. It would appear therefore that from September 2018, a flat interest rate of 2.68% was sufficient to satisfy Barclays PF's income requirements from any conditional-sale agreement. But the effect of the commission caps in Miss L's case was that Barclays PF might receive more if the Broker had set the flat interest rate at a rate above approximately 5.36%.

58. In response to my provisional decision, Barclays PF has referred me to the commission agreement, which said that the 'Pricing' (which I take to be a reference to the interest rate range offered and linked commission arrangements) was based on a range of assumptions including that the average APR on customer agreements would be no less than 6.9% and the average advance no less than £7,000. The commission agreement said the assumptions would be reviewed on a quarterly basis and that Barclays PF reserved the right to review and change the pricing set out in the agreement.

59. Having considered Barclays PF's representations and all of the information provided, I am satisfied the *effective* minimum flat interest rate that Barclays PF was prepared to lend to Miss L at was 2.68%.

60. Although Barclays PF hasn't specifically described the commission arrangements in these terms, I think the arrangement described here has the features of what the FCA later described in its Motor Finance Final Findings as an 'Increasing Difference in Charges' (or 'Increasing DiC') model.

61. And I am satisfied that it was ultimately a 'discretionary commission model' of the type that the FCA's Motor Finance Final Report was concerned with (and the FCA later banned) because of the potential conflict of interest created, among other reasons.

62. In any event, and whatever terminology is used to describe the model, what is in my view important here is that Barclays PF's commission model linked the amount of commission the Broker received to the interest rate, and it allowed the Broker to

[8] The 'Rates and Terms Offer letter' dated 17 April 2018.

decide the interest rate Miss L had to pay (albeit within the range set by Barclays PF) and, in doing so, the Broker was able to determine the amount of commission the Broker would receive.

63. In this case, in effect, Barclays PF gave the Broker discretion to decide whether Miss L was charged a flat interest rate of 2.68%, a flat interest rate of 15.25%, or an interest rate in between these amounts. And the amount of commission Barclays PF paid to the Broker (and the amount of the payments Miss L would have to make) was directly related to the flat interest rate the Broker selected and controlled, subject to the application of the cap provisions. The higher the flat interest rate set, in the range set by Barclays PF, the higher the Broker's commission payment would be – subject to the cap. In this case, the Broker chose a rate 1.99% higher than the lowest available flat interest rate.

The Broker's discretion and the advertised typical APR

64. Barclays PF does not accept it allowed the Broker to set the interest rate Miss L would pay depending on the commission the Broker wanted to earn. It says:

- Miss L was given the interest rate the Broker advertised as the typical APR.
- It put in place safeguards around the variation of interest rates in a July 2018 document entitled: *Your partner in motor finance: A guide on what you should incorporate into your policies, practices and training when working with Barclays Partner Finance (*the 'Your Partner Guide'); and in its *Motor loan application process guide*.
- The commission agreement created an expectation that the average APR would be 6.9%.

65. I do not find Barclays PF's representations about that to be persuasive.

66. I note that the schedule to the commission agreement dated 17 April 2018 says:

> *"You shall be entitled to negotiate rates with Potential Customers as part of a commercial process that takes account of the price of the vehicle, the price of any service packages or related goods purchases and the cost of the loan provided that all Customer Agreements include a rate of interest within the range of rates set out in this paragraph and that you ensure the customer is treated fairly with respect to the product offered"*

67. This suggests Barclays PF's expectation was that the rates negotiated by the Broker on individual finance agreements would take into account a range of commercial factors, but it did not ultimately place any limitations or requirements on the Broker other than that the rate should fall within the permitted range and the Broker should treat the customer fairly.

68. I have also considered the documents Barclays PF has referred me to carefully. I note, for example, that in relation to the variation of interest rates, the Motor loan application process guide says:

Changing the interest rate

During the application process, there is the option to vary the interest rate (between the limits set within the system, currently including a maximum APR of 29.9%).

If you vary the interest rate, this must be in line with the training your employer has given you about Treating Customers Fairly and the Equality Act 2010. You must explain to the customer that you are changing the interest rate and the reasons why.

You must not change the interest rate based on an assumption that the customer is willing to or able to pay more, or for a reason which is not in line with the Equality Act (for example, based on the customer's age, sex or mental capacity, or to earn extra money from the sale).

An example of an acceptable reason for changing the interest rate would be to reduce the customer's monthly repayments to meet their budget. However, it would not be acceptable, for example, to increase the interest rate because the monthly repayments are below the customer's original monthly budget, or because the customer has told you that they have a very high income compared with the repayment amounts.

69. Miss L did pay the Broker's advertised typical APR. But I remain satisfied that the Broker had a free hand to set the advertised typical APR (and in doing so the flat interest rate a customer would pay) within the wide range permitted by Barclays PF. The higher the advertised typical APR the Broker set and arranged loans at, the higher the flat interest rate the borrower had to pay, and the more commission the Broker would receive (subject to the application of the commission cap).

70. I have not seen any evidence which persuades me that it is more likely than not that Barclays PF determined, or controlled, the setting of the typical representative APR at which the Broker advertised at, or that Barclays PF placed any additional restrictions on the Broker's freedom to choose the APR at which it advertised beyond the wide interest rate range set out in the commission agreement and broader requirements around the use of representative APR in advertising[9].

71. In particular, I am not persuaded that the safeguards Barclays PF has referred to, and some of which I have set out above, restricted the initial selection of the typical advertised APR as the interest rate on a customer's finance agreement (they only

[9] For example, the Your Partner Guide document said at 1.9.4.2 under the heading: *What is a representative example?*

"A 'representative example' is a term used in UK consumer credit advertising that aims to show consumers the typical cost of, and important details about, the finance on offer. It will show the consumer how much they might pay back over the length of the finance agreement by showing what their loan would look like if they borrowed a certain amount on relevant terms.

By displaying the representative example, we are helping the consumer make an informed decision about whether they can afford the finance and whether it is suitable for them.

The representative example should represent your APR and the terms you would expect at least 51% of customers to be offered as a result of the advert. It is a very important piece of information as it sets out the details of the finance or credit in a single place on the advert, so the customers can use it to compare finance products against other products that are available on the market, and also helps assess whether they can afford the finance …".

restricted – to some degree – the subsequent variation of the interest rate after it had been selected).

72. Overall, I am satisfied Barclays PF did as a matter of fact allow the Broker to set the flat interest rate Miss L and other customers would pay at a rate above 2.68%, based ultimately on the commission the Broker wanted to receive.

73. I accept that once the Broker *had* selected a rate in accordance with the discretion Barclays PF afforded it, Barclays PF did require the Broker to (among other things) make it clear to customers if the Broker was varying the interest rate, and I accept Barclays PF did not permit the Broker to depart from the interest rate selected solely because, for example, the customer could pay more.

74. But those requirements did not restrict the Broker's freedom to set the rate (whether the advertised typical APR or some other rate) in the first place. Nor did the average customer APR assumptions referred to in the commission agreement restrict the Broker's freedom to set the advertised typical APR. The average customer APR assumptions may have incentivised the Broker to set an advertised rate of at least 6.9% APR to ensure it continued to receive commission on the basis set out in the commission agreement, but they did not require the Broker to select or limit the APR to 6.9%.

75. I note in reaching that conclusion that whilst the Broker's advertised typical APR (the rate Miss L was given) was higher than the lowest rate Barclays PF would have lent to her at (the flat rate of 2.68% / APR of 5.2%), Barclays PF's own representations are that the Broker was not required to tell the consumer about that. If the "Changing the interest rate" safeguards were intended to apply to, or restrict, the setting of the Broker's advertised typical APR, then it would have been incumbent on the Broker to explain that it was changing the interest rate from the lowest 5.2% APR to an 8.9% APR in Miss L's case and the reasons why.

76. Overall, I am not persuaded that the intent or effect of the requirements in the Your Partner Guide or the Motor loan application process guide was to require the Broker to justify departing from the lowest 2.68% flat rate or to restrict the Broker from doing so.

The Head Office Payment

77. I also note from the commission agreement between Barclays PF and the Broker that in addition to the payment made directly to the individual dealership, Barclays PF agreed to make a further payment of 2% of the total advance to the Broker's Head Office on any agreement with a term of at least 36 months. This payment was subject to a maximum amount of £2,500 per agreement. I understand that this payment was made annually.

78. So in Miss L's case, where the advance was £13,333 the Broker's Head Office stood to receive a further commission payment of £266.66 (2% of £13,333) because Miss L entered the finance agreement.

79. If Miss L had not taken out the conditional-sale agreement, one way or another, the Broker would have been £266.66 worse off (as the final Head Office payment it would be paid and allowed to keep was 2% of the total amount of retail advances it arranged). Miss L's finance agreement increased that total figure by £13,333.

80. For completeness, I accept that unlike the discretionary commission payment, the Head Office payment made to the Broker did not directly affect the interest rate Miss L paid, and the Broker could not alter the basis on which the Head Office payment was calculated – it was a fixed percentage of the amount advanced.

81. Overall and based on the evidence presented, I'm satisfied that as a direct consequence of arranging Miss L's loan, the Broker received £1,326.60 under the discretionary commission arrangement and £266.66 under the Head Office payment arrangement.

The Broker's central processing team and the Broker's local car dealership

82. In its representations about the complaint, I note Barclays PF has at times sought to draw a distinction between the Broker's head office, central processing unit and the Broker's local dealership. Whilst in practice I accept different departments within the Broker's business may have carried out different functions, they are ultimately part of the same regulated entity and the regulatory rules apply to the Broker as whole.

83. For example, whilst the Broker's local dealer offered Miss L the advertised typical representative APR, that was not the limit of the Broker's role in setting the interest rate – the Broker also selected the advertised typical APR in the first instance (albeit that decision was presumably made by a different department).

(i) What, if anything, did the Broker disclose to Miss L about the commission it would receive?

84. Miss L says neither Barclays PF nor the Broker disclosed the existence, or the amount, of commission that the Broker would receive for arranging the conditional-sale agreement.

85. In contrast, as I have set out in more detail above, Barclays PF says that:

- There was a regulatory requirement on the Broker to disclose the existence of the fact of commission, and if asked, the amount. But there was no requirement to disclose the nature of the commission model or provide further information.
- The Broker disclosed the existence of the fact of commission in its IDD and Miss L signed a declaration to confirm she had been given the IDD.
- There was no regulatory requirement on Barclays PF to disclose anything about commission, but it did in any event disclose the likely existence of commission in the conditional-sale agreement Terms and Conditions.

86. I've considered the pre-contractual documentation that has been provided on this case. This includes the eight page *"Thanks for choosing us"* sales pack, provided by the Broker, which Miss L signed and which includes the IDD at page 2. This document set out the scope and nature of the services that the Broker offered to Miss L.

What did the IDD say about commission?

87. The IDD section of the sales pack is headed "Initial disclosure document - about our services" and sets out the credit and insurance services the Broker offered. Under the heading '*Whose products do we offer?',* the IDD says:

> *"We act as a credit broker sourcing credit to assist 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."*

Other documents

88. The Broker also presented Miss L with the conditional-sale agreement. Barclays PF has provided a copy of the conditional-sale agreement and separately an example copy of the Terms and Conditions which the conditional-sale agreement refers to. Whilst these documents were produced by Barclays PF, I am satisfied they are also relevant to the question of what the Broker disclosed about commission.

89. On the third page of the example Terms and Conditions it says:

> *"You agree to us paying commission to any broker or supplier acting as your agent in relation to the agreement".*

90. As Barclays PF has pointed out, the regulatory requirement to disclose the existence of commission was on the Broker, so I have considered the various commission statements made against the Broker's obligations in November 2018.

91. I will go on to consider the relevance of the Broker's actions to the question of whether Barclays PF acted fairly and reasonably later in this decision.

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

What were the relevant regulatory requirements[10] applying to the Broker in November 2018?

92. 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'.

93. 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 – 163 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.*

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

[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.

94. 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.

95. Principle 6 says:

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

96. 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'.

97. Principle 8 says:

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

98. 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'.

99. 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'.

100. "Communication" is not defined in CONC 3.1.1R(1A)(d) so it must be given its usual meaning. I am satisfied that the IDD was a 'communication' by the Broker to Miss L. So under the FCA's rules in place at the time, the Broker was required to ensure that the contents of the IDD were clear, fair and not misleading, and sufficient for – and presented in a way that is likely to be understood by – the average customer to which it was directed.

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

102. At the time Miss L entered into this agreement with Barclays PF, CONC 4.5.3R said:

> '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*]'

103. And CONC 4.5.4R states:

> "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]."*

104. By way of summary only, the effect of paragraph 3.7i(box) and 3.7j of CBG[11] was that:

- The Office of Fair Trading (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.

105. The box at paragraph 5.5 ILG[12] made similar points about disclosure in the context of irresponsible lending practices.

106. I also think it provides helpful context to set out what the FCA said in paragraphs 3.28 to 3.31 of its Motor Finance Final Findings about CONC 4.5.3R. It 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:*

[11] The Office of Fair Trading's Credit Brokers and Intermediaries Guidance published in November 2011.
[12] The Office of Fair Trading's Irresponsible Lending Guidance published in March 2010 (updated February 2011).

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

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."

107. While I recognise these paragraphs do not form part of the FCA's rules and guidance, they are informative about when and how the FCA expected a broker to have disclosed the existence of commission under CONC 4.5.3R as originally drafted – the same version of the rule that applied when Miss L was introduced to Barclays PF by the Broker in November 2018.

108. There were also rules and guidance for credit brokers on financial promotions and communications (like the IDD). 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]"

109. And CONC 3.7.4G(2) said:

"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*]

110. 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"*

…

111. 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."*

112. So the Broker had to ensure its communications were clear, fair and not misleading, and sufficient for – and presented in a way that was likely to be understood by – the average customer to which it was directed. In addition, the Broker should also in any financial promotion or communication have indicated in a prominent way the existence of any financial arrangement with Barclays PF that might impact the Broker's impartiality in promoting the conditional-sale agreement to Miss L.

Application to Miss L's complaint

113. In this case, I have found the Broker received a total of £1,593.26 for arranging the conditional-sale agreement. It received £1,326.60 under the discretionary commission arrangement and £266.66 under the Head Office payment arrangement.

114. I am satisfied that the existence or the amount of the commission in this case could actually or potentially affect the Broker's impartiality in recommending the finance agreement (CONC 4.5.3R(1)) and similarly knowledge of that could actually or potentially have a material impact on Miss L's transactional decision (CONC 4.5.3R(2)) as:

— The discretionary commission arrangement was one which allowed the Broker discretion to set the interest rate to earn more commission. I'm satisfied that it gave rise to a risk of a conflict of interest which could affect the Broker's impartiality in presenting, and arranging, the credit agreement to Miss L.

— The Broker had more incentive to select a higher rate for Miss L's credit agreement from the available range than the flat interest rate at the bottom of the range (2.68%). Selecting a higher rate would mean it would receive a more commission.

— Both the discretionary commission arrangement and the Head Office payment arrangement (whether viewed separately or collectively) could potentially have affected the Broker's impartiality in recommending the finance agreement. For example: if other lenders paid less or no commission.

— Both payments also created the possibility of a conflict of interest because it gave the Broker a possible incentive to encourage Miss L to borrow more money so that it would receive more commission – albeit, in the case of the Head Office payment, the sums involved were fairly small (2% of any increase).

— I'm satisfied that knowledge of the existence or amount of both, or either, element of the commission payments could at least *potentially* have had a material impact on Miss L's transactional decision (whether or not they ultimately would have done in the circumstances of her application).

115. In the circumstances, I consider both limbs of CONC 4.5.3R were engaged in relation to both commission payments (whether the FCA would view the commission the Broker received as one overall commission payment, or two separate commission payments for the purpose of the disclosure requirements under CONC 4.5.3R).

116. I'm satisfied this meant, to comply with CONC 4.5.3R, the Broker should have disclosed the existence of both payments it received as a direct consequence of arranging the conditional-sale agreement.

117. The potential impact of the financial arrangements on the Broker's impartiality in promoting the conditional-sale agreement meant that, following the guidance at CONC 3.7.4G(2), the Broker should also have indicated, in a prominent way, the existence of the financial arrangements with Barclays PF in its communications with Miss L (for example in the IDD).

118. In addition, to comply with the overarching Principle 8 requirement to fairly manage conflicts of interest between itself and its customers (particularly when viewed in the light of the Principle 6 requirement to pay due regard to the interests of Miss L and treat her fairly), I'm satisfied the Broker should, in any event, have disclosed the source of the conflict as a step to fairly manage the conflict between its interest and those of Miss L.

119. In this case, the commission arrangements created an inherent conflict between the interests of the Broker and the interests of Miss L. In particular, those arrangements gave the Broker an incentive to set a higher interest rate on the conditional-sale agreement. But they also incentivised the Broker to encourage Miss L to borrow more (to increase commission) and potentially also to select Barclays PF's product (to receive more commission) to the detriment of Miss L (for example if the interest rate available from another lender was lower).

120. In those circumstances, I consider that as an appropriate step to fairly manage the potential conflict of interest created by the commission arrangements, the Broker should have notified Miss L about the potential conflict between its interests and Miss L's interests and the reasons for that. This would have allowed Miss L to fairly evaluate the introduction made.

121. I note Barclays PF's view that:

- The suggestion that the Broker had more incentive to select a higher interest cannot be a basis for a finding in Miss L's case because she received the advertised typical APR.

- There is no evidence to support the suggestion that the commission arrangements potentially incentivised the Broker to select Barclays PF's products over other lenders to receive more commission.

122. But I am not persuaded by Barclays PF's representations because:

- Even though Miss L received the advertised typical APR offered by the Broker, the commission arrangements still gave the Broker an incentive to set the advertised typical APR at a higher level to receive more commission.

- Lenders offer a range of commission arrangements and commission amounts. This meant there was a possibility that the Broker might receive more commission for

arranging a Barclays PF conditional-sale agreement in preference to another lender's product (potentially affecting the Broker's impartiality). In those circumstances, the Broker should have disclosed the existence of Barclays PF commission payment to enable Miss L to evaluate – if she chose to do so – the introduction being made (including for example whether the commission might have encouraged the Broker to introduce Barclays PF in preference to another lender).

123. I also note Barclays PF's view that to fairly manage the conflict of interest created by commission payments (as Principle 8 required), the Broker needed only to comply with CONC 4.5.3R. It says CONC 4.5.3R required the Broker only to alert Miss L to the existence of the fact that commission would be paid.

124. I accept CONC 4.5.3R and the guidance at CONC 3.7.4G(2) are provisions concerned, at least in part, with managing conflicts of interest (among other requirements created by the Principles). They are, using the terminology of Ouseley J, examples of a specific application of a Principle to a particular requirement. But for the reasons I will go on to explain:

- I am not persuaded that the disclosure made by the Broker in this case (or by Barclays PF itself in the conditional-sale agreement Terms and Conditions) was sufficient to meet the regulator's requirements around commission disclosure (including CONC 4.5.3R and CONC 3.7.4G(2)), the provision of information and the fair management of conflicts of interest.

- But, even if I am wrong about the application of CONC 4.5.3R and CONC 3.7.4G(2) to the circumstances of this complaint, and Barclays PF is right that the Broker met the CONC requirements to disclose 'the existence of commission' by making the disclosure it did, I am satisfied that:

    i. Given the particular features of the discretionary commission arrangement and in particular the Broker's ability to control the interest rate Miss L paid for its own benefit, the overarching requirements of Principle 8 (coupled with those of Principle 6 and 7) required the Broker to do more than simply tell Miss L that *'Lenders typically pay Us a fee for these introductions'*, even if the specific rules and guidance provisions around commission disclosure in CONC did not.

    ii. It also required the Broker to do more than record Miss L's agreement to Barclays PF *'paying commission to any broker or supplier acting as your agent in relation to the agreement'* as the Terms and Conditions did.

125. I will now consider what the Broker should have told Miss L in the particular circumstances of this complaint to satisfy the regulatory requirements around commission disclosure, the provision of information and the fair management of conflicts of interest.

Did the Broker meet the regulatory requirements around commission disclosure and the provision of information?

126. As I have explained, the IDD said this about commission:

"We act as a credit broker sourcing credit to assist 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."*

127. In addition, the conditional-sale agreement Terms and Conditions said:

"You agree to us paying commission to any broker or supplier acting as your agent in relation to the agreement".

128. I accept that the Broker disclosed that it *typically* received a fee from lenders for introducing customers such as Miss L. And in my view, if Miss L had read this statement in the IDD she ought reasonably to have concluded that it was more likely than not – but not certain – that the Broker would receive a fee from the lender. The provision relating to commission in the conditional-sale agreement Terms and Conditions would not in my view have provided any additional clarification or certainty.

129. Barclays PF says the disclosures made were sufficient for the Broker to meet the regulatory requirements and the Broker did not need to elaborate further. I have considered Barclays PF's representations about this carefully. But I'm not persuaded by them.

130. As a preliminary point, I note the requirement under CONC 4.5.3R was to disclose the existence of commission payable to the Broker by Barclays PF relating to the particular conditional-sale agreement Miss L was entering. The requirement was not to disclose that it was likely that the Broker would receive a commission payment because lenders typically pay fees. The language of the provision suggests the Broker was required to make a more specific disclosure than it did in this case.

131. It also seems to me somewhat contradictory to argue the Broker couldn't say it '*would*' receive a fee or commission because it didn't know if it would receive commission at the time the disclosure was made and to also argue that Miss L ought to have known that Barclays PF 'would' be paying the Broker a commission for arranging her conditional-sale agreement as the rules required.

132. This is especially so given the Broker was also required to ensure that – as per CONC 3.3.1R(1), CONC 3.3.1R(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 the information in a way that an average customer seeking car finance would understand.

133. 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 Barclays PF 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 it could, actually or potentially, affect the impartiality of the Broker or have a material impact on Miss L's transactional decision), in mind.

134. In making that finding, I do not accept Barclays PF's view that I have expanded the requirement to disclose the existence of commission beyond what was required in November 2018. It is simply the effect of the various regulatory obligations which applied to the Broker at that time. In my view this approach is consistent with the comments made by FCA in paragraph 3.28 and 3.31 of its Motor Finance Final Findings, which I set out earlier in this decision.

135. In the circumstances of this complaint, where – among other things – the discretionary element of the commission payment was tied to the interest rate, which the Broker set, and the existence or amount of the commission could potentially affect both the impartiality of the Broker and Miss L's transactional decision, I think CONC 4.5.3R (taken together with CONC 3.3.1R(1), CONC 3.3.1R(1A)(d) and Principle 7 and the overarching requirement to fairly manage conflicts of interest at Principle 8) required the Broker to do more than simply say 'lenders typically pay us a fee for these introductions' as the IDD in this case said. It also required the Broker to say more than the provision about commission payments included in the conditional-sale agreement Terms and Conditions did.

136. These statements alone were not in my view a meaningful disclosure of the "existence of any commission or fee or other remuneration" payable by Barclays PF to the Broker in relation to the credit agreement Miss L was taking out to finance the transaction, having regard to the purpose of CONC 4.5.3R as well as to CONC 3.3.1R and Principle 7.

137. Neither were they meaningful disclosures of the existence of a financial arrangement that might impact on the Broker's impartiality in promoting the Barclays PF credit product for the purposes of the guidance at CONC 3.7.4G(2), nor in the circumstances was it a sufficient step by the Broker to fairly manage the conflict of interest between itself and Miss L as required by Principle 8.

138. In my view, given the features of the discretionary commission arrangement in place, to meet the requirements in CONC 4.5.3R and 3.7.4G(2), the Broker needed to convey information in a clear, fair and not misleading way that would have allowed Miss L to understand the existence of the financial arrangement between Barclays PF and the Broker (i.e. a structured commission model). In the circumstances of this complaint, I consider this meant the Broker would have needed to disclose to Miss L in some way and prominently**:**

    (1) That it *would* receive payments for arranging the loan in two ways.

    (2) That part of the commission it would receive was tied to the interest rate which it would select from a pre-determined range set by Barclays PF, with higher interest rates paying more commission.

    (3) That part of the money the Broker would receive was a fixed percentage of the loan amount selected.

139. For the avoidance of doubt, I do not consider CONC 4.5.3R (or for that matter CONC 3.7.4G(2)) required the Broker to disclose the amount of the commission payable. Although as I have explained under CONC 4.5.4R, it would have needed to tell Miss L the amount if she had requested it, as she may well have done here (I will return to this later in the decision). But I am satisfied that, in order to comply with CONC 4.5.3R and CONC 3.7.4G(2) the Broker should have told Miss L about the existence of the structured financial arrangements it had in place with Barclays PF before she entered into this conditional-sale agreement.

140. Nor – as I will explain later in this decision at paragraph 157 – 164 do I consider that taking this approach means I am incorrectly and retrospectively applying the rules relating to commission disclosure that have applied since January 2021.

141. In reaching these conclusions, I've considered Barclays PF's representations that:

— Disclosing the things I have set out at paragraph 138 would have required the Broker to offer a bespoke disclosure document for each lender.

— It would have been unworkable because the Broker's local dealership selected the proposed rate before knowing which finance company the deal would be proposed to by the Broker's central team.

142. But I am not persuaded by those representations. As I have already explained, the requirement on the Broker under CONC 4.5.3R was to disclose in good time before Miss L entered the conditional sale agreement with Barclays PF the existence of any commission, fee or other remuneration payable. As a regulated firm it was incumbent on the Broker to arrange its operations to meet those regulatory requirements.

143. In practice, the Broker would have known that Barclays PF had been selected as the finance provider for Miss L before it asked her to sign her conditional-sale agreement. So it had the necessary information to meet the disclosure requirements in CONC and the Principles before Miss L entered into the conditional-sale agreement.

In the alternative – Principle 7 and Principle 8

144. In the alternative, even if I am wrong about the effect of CONC 4.5.3R and CONC 3.7.4G(2), I am satisfied that:

— in the circumstances of this case and given the particular features of the discretionary commission arrangement, where: the Broker set the interest rate of the loan it was arranging and Miss L would have to pay higher interest payments if the Broker set a higher interest rate to receive more commission;

— it was incumbent on the Broker to do more than say as it did that *'Lenders typically pay Us a fee for these introductions'*, to manage fairly the conflict of interest as Principle 8 required (even if – as Barclays PF contends – that was all CONC 4.5.3R required the Broker to disclose in relation to commission payments generally) and to provide clear, fair and not misleading information as Principle 7 required.

145. Compliance with CONC 4.5.3R and CONC 3.7.4G(2) does not mean the Broker will necessarily have complied with Principles 7 and 8 in all circumstances. As I have already set out, it is well established that specific rules do not necessarily exhaust the application of the Principles.

146. The conflict between the interests of the Broker and those of Miss L created by the discretionary commission arrangement arose in two ways. The conflict created was not just from the fact of the commission payment itself, i.e. that the Broker had an incentive to introduce the customer to Barclays PF (for example in preference to another lender) in the hope of earning commission, potentially to Miss L's detriment – as might ordinarily be the case with commission payments.

147. The discretionary commission arrangement in this case created an additional conflict and risk to Miss L's interests which the Broker was required to manage fairly under the overarching requirements of Principle 8. In particular, the discretionary commission arrangement meant the Broker also controlled the setting of the interest rate on the finance agreement it was arranging. If it chose to set the rate at a higher level within

the permitted range, Miss L would pay more interest and it would receive more commission (subject to the application of the cap provisions).

148. I consider that to comply with Principles 7 and 8 (and being mindful of Principle 6), it was incumbent on the Broker to do more than Barclays PF suggests CONC 4.5.3R required.

149. I do not consider the Broker did enough to manage fairly the conflict and alert Miss L to the source of the conflict connected to the setting of the interest rate, nor did it pay due regard to the information needs of Miss L, and communicate information to her in a way which was clear, fair and not misleading, simply by saying: it sourced credit from a selected panel of lenders *and "Lenders typically pay Us a fee for these introductions".*

150. Knowing that commission would typically be paid, would not alert Miss L sufficiently, or fairly, to the true impact of the underlying commission arrangement, where the Broker was incentivised to set the interest rate at a higher level than was necessary for the Barclays PF conditional-sale agreement to be arranged.

Summary

151. Overall, for the reasons, I have explained I consider the Broker should have provided the information I have set out above (at paragraph 138) in relation to both elements of the commission as a consequence of CONC 4.5.3R.

152. But even if I am wrong about what the Broker needed to do to meet the regulatory requirement to disclose the existence of commission, under CONC 4.5.3R and/or CONC 3.7.4G(2), I am satisfied for the reasons I have explained, that:

— to manage fairly the conflict between its interests and Miss L's interests created by the discretionary commission arrangement and to communicate in a way which was clear, fair and not misleading,

— the Broker should in any event have disclosed to Miss L the existence of an arrangement by which it would receive a commission payment tied to the interest rate on the conditional-sale agreement and under which it had the discretion to select from a pre-determined range set by Barclays PF, with a selection of a higher interest rate paying more commission (subject only to the application of the cap).

153. These steps would have allowed Miss L to fairly understand the conflict and to ask more questions if she felt she needed to know more. I am not persuaded that is what happened in this case:

- There isn't anything else in any of the documentation I have been referred to which sets out the circumstances in which commission would be paid and where it wouldn't, such that Miss L could reasonably have been expected to understand whether (or not) the Broker would receive a commission payment for arranging the conditional-sale agreement it ultimately arranged with Barclays PF in her case.

- Even if the disclosure statement in the IDD could be said to have been enough to have alerted Miss L to the fact that the Broker *typically* received a commission, I can't see how by virtue of that statement alone Miss L could reasonably have been expected to understand anything of the structure of the commission arrangements relating to the conditional-sale agreement (and in particular that part of the

commission the Broker would receive was tied to the interest rate it had selected or, in the case of the Head Office payment, that the commission was tied to the amount of credit provided).

154. I've not been presented with anything else that indicates Miss L was, or that she ought reasonably to have been, aware of the existence or structure of commission the Broker would be paid for introducing Miss L to Barclays PF and arranging the conditional-sale agreement.

The January 2021 rule changes

155. In reaching my final conclusions about the Broker's regulatory obligations, I have considered carefully Barclays PF's representations that: the FCA did not require disclosure of the kind I have suggested at paragraph 138 until after the rule changes in January 2021; and if it had, the FCA would have said so in its review and would have brought enforcement proceedings against firms for non-compliance following the review.

156. I do not agree with Barclays PF's characterisation of FCA's Motor Finance Final Findings and subsequent actions.

157. The FCA was concerned – following its 2018 mystery shopping exercises – that some firms were not saying anything about commission. But it seems to me, having considered all of what the FCA said, that:

- The FCA was also concerned that firms were saying only that commission may or would be paid without elaborating on that.

- The purpose of the changes made in January 2021 to the commission disclosure rules was to make clearer what the existing rules required, in order to increase compliance with existing rules (and therefore help address some of the issues identified in its review of the motor finance market), rather than to introduce new requirements.

158. In reaching that view, I note, for example, in CP 19/28 in which the FCA proposed changes to the commission disclosure rules, it said:

"1.14 So we are proposing minor adjustments to some of our CONC rules commission disclosure rules and guidance to give greater clarity on their intention. As our proposed changes would be relevant to firms outside the motor finance sector, they would apply across all consumer credit markets.

1.15 These proposals should give firms greater certainty on how to comply. This would increase the likelihood of consumers receiving more relevant information about commission arrangements. We believe this can help consumers to make better informed decisions, consider alternative options, find a cheaper deal or negotiate on the finance or other price, or ancillary elements of the deal or transaction."

159. In the same paper, FCA described the practice of firms stating that *"a commission 'will or may be payable' without elaborating in any way – for example, by stating the amount may vary by lender or product"*[13] as an example of firms interpreting

[13] 4.7 CP19.28 Motor finance discretionary commission models and consumer credit commission disclosure.

commission disclosure rules inconsistently (and that it was one of the harms it wanted to address).

160. At paragraph 4.10, it went on to say that to prevent firms taking such a narrow interpretation, it was clarifying CONC 3.7.4G and CONC 4.5.3R to better reflect its intention that customers receive more relevant information about the existence of commission.

161. In PS20/8 'Motor finance discretionary commission models and consumer credit commission disclosure – feedback on CP 19/28 and final rules', it said in the section – *'Q3: Do you agree with our proposed commission disclosure clarification?'*::

> *"The rules and guidance we consulted on in CP 19/28 were not intended to be wholesale changes in how or when firms disclose commission. We have deliberately not proposed material changes in scope.*
>
> *Our rules and guidance are designed to make firms elaborate on the nature of commission arrangements where they could affect a customer's willingness to contract. This could include, for example, forms of variable commission that we are not banning in motor finance and those that exist in other markets.*
>
> *We saw evidence in our motor finance review that firms were not giving consumers enough or, in some cases, any detail of the nature of commission arrangements. We have asked firms involved in that review to make improvements. But we believe that the relatively minor changes we consulted on will help firms across all consumer credit markets consider what is right for customers to know.*
>
> *We accept that disclosure has limited benefits. We are not convinced that issuing more prescriptive rules and guidance would improve customer outcomes in a way that would justify the costs involved. Increased prescription on what to disclose, how and when, is likely to be counterproductive given the range of products and commission arrangements across the entire consumer credit industry."*

162. In my view, these examples support my conclusion that in 2018 (before the minor amendments made to CONC 4.5.3R and CONC 3.7.4G(2) in January 2021), the FCA required brokers to do more than simply say a commission or fee, may or typically or would be paid to comply with its rules and guidance.

163. But even if I am wrong about what CONC 4.5.3R and CONC 3.7.4G(2) required in 2018, for the reasons I have explained it remains my view that the Broker should have disclosed the structure of the discretionary commission arrangement – given the features and risks of that arrangement – as a step to fairly manage the conflict of interest created as Principle 8 required.

164. Overall, and for the reasons set out above, I'm not persuaded that – in the circumstances of this complaint – the Broker met its regulatory obligations around commission disclosure.

165. For completeness, I note Barclays PF has in its response my provisional decision drawn my attention to the final paragraph of the section I have quoted from PS20/8 at paragraph 161 above (starting *'We accept that disclosure has limited benefits'*) in support of its position that the Broker needed only to disclose the existence of the fact of commission in 2018.

166. I am satisfied the paragraph Barclays PF has referred me to should be read in the context of the section of the policy statement in which it appears. In that section the FCA set out the feedback it had received during its consultation to the question *'do you agree with our proposed commission disclosure clarifications?'* and its response to that feedback.

167. When viewed in that context, it seems to me that the paragraph Barclays PF has highlighted demonstrates only that: the FCA was not persuaded when it made the clarificatory amendments to the disclosure rules and guidance in January 2021 to go further and issue more prescriptive rules or guidance specifying what firms should disclose, how and when (as it explained firms and trade bodies responding to the consultation wanted it to do). The FCA said that would not be cost efficient and highlighted the challenges of issuing more prescriptive rules in a market with a wide range of products and commission arrangements. And the paragraph does not persuade me to reach a different view about what was required in November 2018.

(k) What impact did the Broker's failure to act in accordance with its regulatory obligations have on Miss L?

168. I am satisfied that if the Broker had:

- disclosed the existence of the commission arrangements, in a prominent way, in the way I have concluded it should have; and

- disclosed the source of the conflict to Miss L as a step to fairly manage the conflict between its interest and those of Miss L;

it's more likely than not that it would have given Miss L pause for thought and she would have questioned the arrangement – particularly given the direct link between the commission the Broker would receive under the discretionary commission arrangement and the amount she would have to pay under her conditional-sale agreement.

169. I think it is likely in those circumstances that Miss L would have asked for further information about the discretionary commission arrangement before deciding whether to proceed. I say this because I think it's more likely than not that Miss L would, as a minimum, have wanted to know more about the discretionary commission arrangement and the impact it would have on the cost of the finance agreement she was about to enter.

170. As I set out earlier in this decision, CONC 4.5.4R required the Broker to disclose – at Miss L's request – the precise amount (or if that was not known the likely amount) of any commission, fee or other remuneration payable to it by Barclays PF.

171. Whilst – as Barclays PF submits – it is possible Miss L may have expected the Broker to receive some commission from Barclays PF as she was not paying the Broker for its credit broking service, I think it is unlikely Miss L would have expected: part of the commission the Broker would receive to be linked to the interest rate she would have to pay, which the Broker would select from a pre-determined range, with higher interest rates paying more commission. I think it is more likely than not that Miss L would have wanted to know more about the commission payments in those circumstances.

172. It follows that if Miss L had asked, as I consider it more likely than not she would have done in the circumstances given the potential impact the arrangements might have had on her, it would have been incumbent on the Broker to disclose the exact amount of commission it expected to receive for arranging the loan. Such disclosure would have enabled Miss L to assess the potential impact on the Broker and her, and to determine whether to proceed on the basis suggested.

173. If the Broker had told Miss L that it stood to receive a payment of £1,326.60 under the discretionary commission arrangement at the APR proposed (the advertised typical APR of 8.9%), and a further £266.66 as a Head Office payment (calculated as a percentage of the loan amount), I think it's unlikely Miss L would simply have agreed to the finance agreement on the terms proposed.

174. Whilst it is possible that Miss L may have had concerns about the Head Office payment arrangement, I think it's unlikely that knowledge of the amount of the Head Office payment would have affected her decision: it was a modest amount of money (£266.66) and did not directly affect the interest rate she was being asked to pay.

175. In contrast, I consider it more likely than not that Miss L would have been concerned by the discretionary element of the commission and the impact that had on the amount she was required to pay Barclays PF in interest. I think that Miss L would have asked what she would have to pay if the Broker selected a lower rate that did not pay discretionary commission, and she would have been concerned that she was being asked to pay £1,326.60 more in interest than she would have had to pay if the Broker had selected the zero-commission paying rate.

176. I consider this to be the case, notwithstanding that the APR Miss L was offered was the Broker's advertised typical APR. The discretionary commission accounted for a significant amount (nearly 43%) of the total charge for credit. I think it is more likely than not that this would have given Miss L pause for thought and caused her to reappraise the APR offered to her, even if she had – as Barclays PF suggests – initially been attracted to the Broker's typical advertised APR and considered it to be a competitive rate.

177. Following my provisional decision, and at my request, Miss L provided her own representations about what she would have done had Broker disclosed the commission arrangements in the way I consider it should have done.

178. As I set out above, Miss L said: *"I would not have entered into any type of agreement at all",* when asked what she would have done if she had been told that (1) the Broker would receive a commission payment tied to the interest rate on her agreement and that the Broker could select the commission rate and would receive more commission the higher the interest rate selected; and (2) the Broker would receive a second commission payment from Barclays PF tied to the amount she would be borrowing.

179. Those representations arguably support the possibility that Miss L would not simply have proceeded to purchase the car on the terms she did without questioning the position further. But beyond that, I do not find them to be particularly persuasive evidence of what Miss L might have done.

180. I am mindful, in considering the weight to place on Miss L's representations about what she would have done, that:

    — Miss L's recollections of the sale and the discussion around the conditional-sale agreement are, owing to the passage of time, understandably likely to be

limited – particularly as her primary focus at the time is likely to have been on purchasing the car and not the finance required to facilitate it.

- Her representations about what happened and what she would have done are made in support of a claim for compensation.

- She is being asked to hypothesize some years after the events in question about what she might have done in different circumstances to those she was actually faced with.

181. Having considered the position carefully, whilst I have no doubt Miss L sought to do her best to accurately answer the questions put to her, I place little weight on what she now says she would have done differently had the commission arrangement been disclosed to her in line with the Broker's regulatory obligations.

182. I accept there is a possibility that Miss L would not, as she now says, have entered into any type of agreement at all. If she had taken that decision, she would – at least in theory – have been left with a range of options and choices:

- To not buy the car and stick with her existing car.

- To seek finance from another source to pay for the car she ultimately bought.

- To buy the car outright without finance, but given Miss L's comments about her limited means and given her previous reliance on finance, I am not persuaded this would more likely than not have been an option for Miss L.

- To go elsewhere to buy a different car with another source of finance.

183. But I think it is unlikely Miss L would – as she now says – have taken the decision not to enter into any type of agreement at all. I am mindful that:

- The Broker's records suggest Miss L made an appointment to view the car she ultimately ended up buying, which would suggest that Miss L was looking to buy a new car and keen to buy the car she ultimately did.

- It would appear that Miss L was ultimately (after the Broker removed the service plan and warranty) content with the deal – at least as she understood it at the time.

- As Barclays PF has pointed out, the APR selected was on its face a competitive rate even allowing for the impact of commission.

184. In those circumstances, I think it is unlikely Miss L would have decided not buy a car at all, or that she would have thought she was likely to get a sufficiently better deal to warrant going elsewhere for a different car or finance.

185. I accept it is also a possibility that Miss L would have gone ahead on the terms suggested. But again, I think it is unlikely even though the APR proposed was on its face a competitive rate. I say this because I think it is unlikely that Miss L would have gone ahead on the terms she did, if the Broker had prominently disclosed the existence of the discretionary commission arrangement (including that the Broker, rather than Barclays PF, set the interest rate) and at Miss L's request the amount of commission.

186. I think it's unlikely Miss L would have been prepared to pay the interest rate selected so that the Broker could receive the commission it did (£1,326.60) for arranging the conditional-sale agreement, when Barclays PF did not require her to pay that rate to take out the conditional-sale agreement.

187. Overall, I think it's more likely than not that Miss L would have questioned the basis on which the Broker selected the interest rate it did, and she would have sought to renegotiate the terms of the finance arrangements with the Broker (to obtain a lower rate of interest and pay less commission) if she had known about the discretionary element of the commission arrangements, the fact the Broker set the interest within the permitted range for its own benefit, and the impact on the interest rate she would have to pay.

188. I think that is particularly likely to have been the case if Miss L had known that the Broker would also receive £266.66 under the Head Office payment arrangement because it arranged the conditional-sale agreement, even if the Broker had selected the lowest interest rate (and therefore received no commission under the discretionary commission arrangement).

189. In reaching my findings, I have considered carefully and taken into account Barclays PF's representations, including its view that Miss L's decision was driven by convenience, and she is unlikely to have negotiated a better rate given the importance she placed on convenience. But I am not persuaded by them.

190. I accept, as Barclays PF suggests, that convenience played some part in Miss L's decision making – for example, she went to her local garage. But the changes made to the deal on 15 November 2018 suggest that Miss L was prepared to seek changes to the proposed deal to suit her requirements and what she was prepared to pay. In relation to the changes made to the finance on 15 November 2018, the Broker's notes which Barclays PF has provided in support of its position say:

> *'It also appears to be the case that the customer requested changes to the Order as the following two items were removed from the Order:*
> - [Broker] *Plan Service & MOT Plan (2 Years): £219.00*
> - *Autocare Warranty (2 Years): £485.00'*

191. Those changes reduced Miss L's payments by £14 a month.

192. For completeness, I do not think the fact that the Broker submitted finance applications to lenders through a central team (rather than through the Broker's local dealership) would have deterred, or prevented, Miss L from seeking to renegotiate the terms of the finance arrangement.

193. These findings are relevant to my consideration of whether a court would conclude that the relationship between Barclays PF and Miss L arising out of the credit agreement was unfair to Miss L under s140A CCA – see below: section *(n) Did Barclays PF's conduct mean that its relationship with Miss L was unfair under ss140A-C CCA?* And section *(q) Fair Compensation.*

(l) Did Barclays PF act fairly and reasonably towards Miss L?

194. I'll now consider whether Barclays PF acted (or failed to act) fairly and reasonably towards Miss L in all the circumstances of this case. In doing so, I will have regard to each of the following in turn:

(i) Barclays PF's own regulatory obligations.

(ii) The unfair relationship provisions set out in ss140A-C of the CCA.

(iii) The law relating to secret commission, in particular, the relevance of the Court of Appeal decision in *Wood & Pengelly*.

195. As a regulated firm Barclays PF was subject to the FCA's rules including the Principles and CONC. Principle 6 required it to pay due regard to the interests of its customers and treat them fairly, whilst CONC 4.5.2G provides guidance to lenders relating to some commission arrangements.

196. In my view, and as I will explain in more detail below, Barclays PF breached Principle 6 (and acted contrary to the guidance at CONC 4.5.2G) in circumstances where it entered into this discretionary commission model with the Broker which created a conflict between the interests of the Broker and Miss L, by incentivising the Broker, in order to obtain more commission for itself, to set the interest rate for Miss L's credit agreement at a higher rate than that at which Barclays PF had indicated it was prepared to lend.

197. As I will also explain below, in circumstances where, as a matter of fact, the Broker did in fact select a higher interest rate for Miss L's credit agreement than Barclays PF was otherwise prepared to lend to her at, I think this also made her relationship with Barclays PF unfair for the purposes of s140A CCA.

198. I will also explain why I do not think a court would be likely to find that Barclays PF, in paying commission to the Broker in the circumstances of this case, did so in breach of the principles in *Wood & Pengelly*.

(m) Did Barclays PF meet its regulatory obligations to Miss L?

199. Barclays PF does not accept that the guidance at CONC 4.5.2G is relevant to this complaint, so I will first address that question.

CONC 4.5.2G (Commissions lenders to credit brokers)

200. CONC 4.5.2G provides guidance for lenders on commission agreements. It says:

> "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*"

201. Paragraph 5.5 of the ILG appeared in a section of the OFT's irresponsible lending guidance on 'unsatisfactory business practices and procedures' relating to pre-contractual issues. Paragraph 5.5 set out one of the unsatisfactory practices. It said:

*"Promoting the sale of a particular credit product to an individual borrower under circumstances in which the creditor has reason to believe that the product is **clearly** unsuitable for that borrower given his financial circumstances and/or his intended use of the credit (if known)."*

202. The box at paragraph 5.5 of ILG, which CONC 4.5.2G refers to says (in full):

"For example, advising a borrower to take out a secured loan, or to replace or convert an unsecured loan to a secured loan, when it is clearly not in the borrower's best interests to do so at that time. Another example would be promoting a short-term loan product such as a payday loan, which would be expensive as a means of longer term borrowing, as being suitable for sustained borrowing over longer periods.

In the OFT's view, considerations of the 'suitability of intended use' would not cover such matters as whether a borrower should or shouldn't seek credit to, for example, pay for a holiday (as opposed to seeking credit to pay for more obvious 'essentials') – subject to the type of credit being provided not being unsuitable for its intended use[24] and an appropriate assessment of affordability being undertaken prior to granting the credit to the borrower.

We also consider that differential commission rates or 'volume over-riders'[25], should be offered to brokers or other intermediaries marketing the creditor's products only where these are justified in terms of the relative work involved.

*We further consider that under appropriate circumstances[26], the **existence** of any commission or other payment payable by the creditor, and of any other reward available from the creditor, in respect of the relevant credit agreement, should be disclosed by the broker or intermediary to the borrower before the credit agreement is made, whether or not the borrower has requested this information.*

*The **amount or likely amount** of any commission should be disclosed by the broker or intermediary, before the credit agreement is made, **on request by the borrower**, in order that the borrower should be enabled to take a view as to whether there is likely to be any conflict of interest."*

203. Footnote 25 said:

"Volume over-riders are additional payments made on the basis of business volume and profitability".

Is CONC 4.5.2G relevant to the circumstances of Miss L's complaint?

204. In summary, Barclays PF says:

— Whilst I am entitled to take into account relevant FCA guidance, I must interpret that guidance correctly. CONC 4.5.2G does not apply to the circumstances of this complaint and a finding that Barclays PF breached CONC 4.5.2G would be wrong in law and cannot be used to justify a finding that Barclays PF breached Principle 6.

— Even if CONC 4.5.2G is engaged, it is non-binding guidance rather than a rule and it is imprecisely drafted. It is only an illustration of ways (but not the only way) in

which a firm can comply with the relevant rule or requirement, and discretionary commission arrangements were clearly permitted by the regulator at the time.

- CONC 4.5.2G should be interpreted according to its overall purpose. The purpose should be ascertained from the ILG by considering the text in the box at paragraph 5.5 (including footnote 25) and paragraph 5.5 itself.

- Those sections of the ILG were concerned only with discouraging the promotion of unsuitable credit products. And on a proper interpretation of the provision, CONC 4.5.2G is only engaged where differential commission rates have the potential to incentivise a broker to inappropriately propose one product in favour of another.

- A discretionary commission arrangement does not encourage brokers to prefer or recommend unsuitable products to achieve higher commission any more than any other commission model might.

- In addition, CONC 4.5.2G covers 'differential commission rates' – that is where rates differ based on factors such as volume sales or sale targets. This is not the same as a discretionary commission arrangement, like the arrangement in Miss L's case. Discretionary commission arrangements are not linked to volume.

- An example of a differential commission rate is where a lender offers 5% commission for the first 250 loans, 10% commission for the next 250 loans, and 15% commission after that. Such arrangements are inappropriate because the work involved in the later cases is the same (or less).

- As the editors of *Butterworths Financial Regulation Service* ("*Butterworths*") note, CONC 4.5.2G should correctly be read as relating to 'differential commission rates based on both the volume and profitability of business' and 'payments based on both the volume and profitability of business'. The discretionary commission arrangement in this case did not involve differential commission rates based on both the volume and profitability of business, so CONC 4.5.2G is not relevant.

- Whilst the FCA said at paragraph 2.26 of its Motor Finance Final Findings that CONC 4.5.2G *could* include where the commission rate as a percentage of the amount of credit varies according to the interest rate charged to the customer, it did not say that it *would* (which it would have done if that was the FCA's view), nor did it take any enforcement action against firms for non-compliance.

- The effect of my provisional decision is to say that discretionary commission arrangements were banned from the outset of CONC (if not before) despite the FCA only banning them in January 2021. That is contrary to the views of the FCA, the OFT, the editors of Butterworths and the industry.

205. I've considered what Barclays PF has said carefully.

206. I accept that CONC 4.5.2G is guidance and not a rule. But, as Barclays PF accepts, I am required to take both the regulator's rules *and* guidance (where relevant) into account when deciding what is fair and reasonable in all the circumstances of this complaint.

207. Given the nature of the complaint before me and the fact CONC 4.5.2G provides guidance about the expectations on lenders when entering certain commission agreements, I'm satisfied it is appropriate for me to take this aspect of regulatory

guidance into account when considering whether Barclays PF met the overarching requirements of Principle 6 and whether Barclays PF acted fairly and reasonably towards Miss L.

208. I agree that each provision in the FCA Handbook is to be interpreted in light of its purpose. This is confirmed in GEN 2.2.1R. But GEN 2.2.2G goes on to state that the purpose of any provision in the FCA Handbook is to be gathered first and foremost from the text of the provision in question and its context among other relevant provisions.

209. The term 'differential commission rates' used in CONC 4.5.2G isn't defined in the FCA Handbook, the ILG, or in any other FCA publication and so it's appropriate to apply a plain and ordinary meaning to this term. In my view an arrangement that permits a broker to set different amounts of commission for arranging the same loan is one that allows for differential commission rates. And so I am satisfied that CONC 4.5.2G is relevant to the discretionary commission arrangement in this complaint.

210. In reaching that conclusion, I am mindful that CONC 4.5.2G notes paragraph 5.5 (box) of ILG and I am mindful of what paragraph 5.5 of the ILG and the box to paragraph 5.5 said. But I have not seen anything there which suggests to me that the term 'differential commission rate' (and CONC 4.5.2G) could not encompass the discretionary commission arrangement operated by Barclays PF in this case.

211. I accept that paragraph 5.5 of the ILG refers to a lender promoting products that are clearly unsuitable for the borrower given their circumstances or intended use of the credit. And the first two paragraphs of text in the box which follows paragraph 5.5 directly refer to matters relating to 'suitability'.

212. However, the rest of the wording in the box at paragraph 5.5 starting *"We also consider…"* , is – like CONC 4.5.2G – particularly concerned with commission and touches on wider matters such as conflicts of interest. In particular the third paragraph says:

> *"We also consider that differential commission rates or 'volume over-riders'[25], should be offered to Brokers or other intermediaries marketing the creditor's products only where these are justified in terms of the relative work involved.*

213. In my view, it is probable – although I note Barclays PF's arguments to the contrary – that the FCA had only the third paragraph in the box at paragraph 5.5 of the ILG in mind when drafting the guidance at CONC 4.5.2G, and the FCA's intention was simply to transfer the third paragraph in the box at paragraph 5.5 of the ILG into the FCA regime, as guidance at CONC 4.5.2G, when it took over the regulation of consumer credit in April 2014.

214. In reaching this conclusion, I am mindful that:

- CONC 4.5.2G does not directly connect the guidance to the suitability of products.
- Paragraph 5.5 itself and the other paragraphs in the box at paragraph 5.5 of the ILG (including those directly referencing suitability) were transferred to other FCA provisions in 2014. For example, FCA effectively adopted the examples of potentially unfair practices set out at:
    - paragraph 5.5 of the ILG through CONC 3.8.2R(3),

- paragraph 1 of the box to paragraph 5.5 through CONC 3.8.3G,
- paragraph 2 of the box to paragraph 5.5 through CONC 3.8.4G,
- paragraph 4 of the box to paragraph 5.5 through in CONC 4.5.3R,
- paragraph 5 of the box to paragraph 5.5 through CONC 4.5.4R.

215. Overall, I am not persuaded CONC 4.5.2G is solely concerned with arrangements that might encourage brokers to propose unsuitable products. I am satisfied that the principle being expressed by the OFT, which the FCA intended CONC 4.5.2G to reflect (as shown by the reference to the ILG in the note), was that agreements providing for differential commission rates should not ordinarily be made unless such payments are justified by the work involved.

216. But even if I am wrong about that and Barclays PF is right that the aim of CONC 4.5.2G is to stop lenders entering into arrangements with brokers that lead brokers to recommend unsuitable products to borrowers, I am not persuaded by Barclays PF's position that the loan was suitable for Miss L and so it followed the guidance in CONC 4.5.2G.

217. If Barclays PF is correct about the intended purpose of CONC 4.5.2G, I still consider it failed to follow the guidance. This is because I consider the loan Miss L entered into was not ultimately suitable for her because the interest rate of the loan was set at a higher rate than Barclays PF would have lent to her at. I consider the interest rate is a key component of a loan product, and an interest rate that has been increased by the Broker to a level higher than it needed to have been at (without the justification of extra work) resulting in increased payments, can make a product unsuitable for the borrower. In this case, even though the APR was the Broker's advertised typical rate, Miss L could still have taken out the same product at a lower cost than the Broker submitted her application at.

218. Barclays PF has also referred to paragraphs 231 and 231.1 of *Butterworths* in support of its position that CONC 4.5.2G should correctly be read as relating to differential commission rates 'based on the volume and profitability of business', a definition that it says would exclude discretionary commission arrangements as they are not based on the volume and profitability of business. Paragraphs 231 and 231.1 say:

> *"[231] … However, CONC 4.5.2G records that it is based on paragraph 5.5 of the OFT's Irresponsible Lending Guidance ('ILG'). This is important: the wording in the text underneath paragraph 5.5 of the ILG makes it clear that 'based on the volume and profitability of business' qualifies both 'differential commission rates' and 'payments'. It is therefore submitted that the proper interpretation of CONC 4.5.2G is that differential commission rates only need to be justified based on the extra work of the firm involved where the differential commission rates provide for payments based on the volume and profitability of business.*
>
> *To fall within CONC 4.5.2G, it is also submitted that the differential commission rate or payment must be based on the volume and profitability of the business being entered into (and not just one of them). This must be the proper interpretation of CONC 4.5.2G given the focus of paragraph 5.5 of the ILG was on volume overriders where credit brokers were paid more for introducing more business. If this is right, simply allowing a differential commission rate if a customer chooses a different product (which could have a higher interest rate and therefore be more profitable to a lender) does not fall within CONC 4.5.2G because the increase of commission is not based on increased volume of customers. Nothing in PS20/8 suggested this kind of practice breached CONC 4.5.2G, or was improper in any other way."*

219. I've considered this extract. But I don't think that this should necessarily be taken as the definitive, or correct, interpretation of CONC 4.5.2G. I say this because it appears to be at odds with what the provision actually says (and indeed what the ILG footnote 25 actually says).

220. CONC 4.5.2G refers to commission agreements providing for differential commission rates ***or*** [my emphasis] providing for payments based on the volume and profitability of business. I don't think that the provision suggests that these payments are the same or necessarily subject to the same 'based on the volume and profitability' qualification.

221. The footnote in the ILG was an explanation of what the term 'volume over-riders' meant and made no reference to differential commission rates. It said: *'volume over-riders are additional payments made on the basis of business volume and profitability*'. It would appear the FCA adopted that explanation, in preference to the arguably less meaningful term 'volume over-riders', when drafting CONC 4.5.2G.

222. Secondly and more importantly, while *Butterworths* offers an interpretation of CONC 4.5.2G, this is merely the interpretation of the author. And this appears to be at odds with what the FCA itself appears to have suggested in at least one of its own publications on motor finance commission. In paragraph 2.26 of its Motor Finance Final Findings, the FCA said:

> *"We may also consider changes to existing CONC rules and guidance. For example, CONC 4.5.2G states that a lender should only offer or enter into a commission agreement providing for differential commission rates, or for payments based on the volume and profitability of business, where this is justified based on the extra work for the broker.* ***This could include where the commission rate as a percentage of the amount of credit varies according to the interest rate charged to the customer****." [my emphasis]*

223. Paragraph 2.27 of the FCA Motor Finance Final Findings goes on to say that the onus is on a lender to show that any differences in commission rates are justified, based on the work involved for the broker.

224. These sections suggest the FCA considered its guidance at CONC 4.5.2G broad enough to include discretionary commission arrangements where the amount varies according to the interest rate charged to the customer, notwithstanding the view expressed in *Butterworths* to the contrary.

225. I note Barclays PF's view that the FCA's use of the words 'could include' rather than 'would include' at paragraph 2.26 of the Motor Finance Final Findings, coupled with the absence of subsequent regulatory enforcement means, FCA did not think CONC 4.5.2G *would* cover such arrangements. But I think it's unlikely FCA would have suggested that agreements providing for differential commission rates, or for payments based on the volume and profitability of business, could include where the commission rate as a percentage of the amount of credit varies according to the interest rate charged to the customer, if it did not think that was the case.

226. I also note that Barclays PF appears to suggest that if discretionary commission models like the one it operated in this case were caught by CONC 4.5.2G (or were not permitted by Principle 6), it would not have been necessary for FCA to ban discretionary commission models from January 2021.

227. I am not persuaded by that analysis.

228. I do not consider the FCA's decision to ban discretionary commission models in the motor finance market from January 2021 means that it was not concerned about those discretionary commission models before then, or that operating a discretionary commission model before January 2021 could not breach the rules in place before the ban.

229. Instead, it seems to me that the ban reflected FCA's concern that such models might be leading to consumer harm on a potentially significant scale in the motor finance market, its desire to *"eliminate the harm caused by discretionary commission models",* and its view *"that this is the most effective way of mitigating harm"*[14].

230. Overall, I am not persuaded by Barclays PF's conclusions about the application of CONC 4.5.2G to the discretionary commission arrangement in Miss L's complaint.

231. For the avoidance of doubt, it isn't my finding that differential commission rates and discretionary commission arrangements (or models) are one and the same. My finding is that the term differential commission rates is one that is broad, and which is undefined in the FCA Handbook. And the term differential commission rates when considered in terms of its plain and ordinary meaning and the related provisions in the FCA Handbook, is wide enough to encompass the discretionary commission model Barclays PF entered with the Broker in this case as well as other models and agreements such as the alternative ones Barclays PF has referred to in its submissions.

232. Taking all these things into account, I'm satisfied that the Rates and Terms Offer Letter Barclays PF sent to the Broker sets out that a discretionary commission arrangement was in operation in this case, and that this was a *"commission agreement providing for differential commission rates"* which falls within the broad umbrella of CONC 4.5.2G.

233. And it follows that I am satisfied that Barclays PF will only have followed the guidance in CONC 4.5.2G if it ensured that the payments it made to the Broker under its discretionary commission agreement with it were justified based on the extra work of the Broker.

234. For the avoidance of doubt, I do not consider the Head Office payment involved discretionary commission rates – whilst the size of the payment would vary depending on the size of the loan itself, the method by which the payment would be calculated was fixed and the Broker could not receive different commission amounts for arranging the same amount of credit.

Were the differential commission rates permitted by the discretionary commission arrangement with the Broker justified based on extra work carried out by the Broker?

235. Barclays PF has provided additional information from the Broker about its general sales process and as I've explained the Broker has supplied the entire "*Thanks for choosing us"* sales pack that it gave Miss L in November 2018.

236. As well as the IDD, this information includes an information summary, Miss L's order form, her finance application and proposal and the Broker's Terms and Conditions. I have taken all of this into account when considering the relevance of CONC 4.5.2G to

[14] CP 19/28: Motor Finance discretionary commission models and consumer credit commission disclosure – paragraph 3.10 and 3.14.

this complaint and whether the payments Barclays PF made in Miss L's case were justified based on extra work carried out by the Broker.

237. Barclays PF has said that the Broker would typically arrange finance through its centralised function. The sales staff would suggest finance where appropriate and state the likely rate that finance would be able to be obtained at. The main focus was on whether a customer could afford the monthly payments and, if necessary, to look to find a way of reducing the payments. This could include reducing the APR to make the payments more affordable. The rate could rise on application should there have – for example – been a greater credit risk. Once all of this was agreed the application was submitted to the centralised function.

238. The documentation provided suggests the Broker initially proposed a hire-purchase agreement to Miss L, rather than this conditional-sale agreement. The hire-purchase agreement had the same term and interest rate, but the credit amount was higher (to pay for the service plan and warranty, which Miss L did not ultimately take out).

239. It's not clear why Miss L ended up with a conditional-sale agreement, rather than a hire-purchase agreement, or whether an additional application (necessitating extra work) had to be submitted.

240. But, in any event, regardless of how much extra work the Broker may or may not have carried out here, under the terms of the discretionary commission agreement between Barclays PF and the Broker, the Broker was given the discretion to choose the interest rate irrespective of whether it carried out any extra work.

241. I note there isn't anything in the commission agreement, Your Partner Guide, or Motor loan application process guide Barclays PF has submitted to indicate that the interest rate selected under the discretionary commission arrangement should reflect the amount of extra work undertaken by the Broker. Nor is there anything to suggest that the interest rate and commission amount was linked to the amount of work carried out in any way – it was entirely at the Broker's discretion, subject only to the permitted range and application of the cap.

242. And as I have explained earlier in the decision, I have not seen anything to suggest that Barclays PF determined or otherwise controlled the interest rate the Broker advertised and offered consumers – the Broker had a free hand to set the advertised rate within the wide range permitted by Barclays PF and to arrange agreements at that rate.

243. In those circumstances, I am satisfied that any extra work the Broker carried out when bringing about Miss L's arrangement was incidental to the differential commission rate, rather than a justification for it.

244. Therefore, I'm not persuaded I can safely conclude that the commission agreement Barclays PF entered into with the Broker, which provided for differential commission rates, was justified based on extra work that the Broker carried out. It follows I find Barclays PF did not follow the guidance in CONC 4.5.2G.

245. And I'm satisfied, having considered all the circumstances of this complaint, that Barclays PF's failure to follow the guidance in CONC 4.5.2G means that Barclays PF failed to pay due regard to Miss L's interests and treat her fairly.

Principle 6 and CONC 4.5.2G – overall conclusions

246. As I have explained above, the discretionary commission arrangement Barclays PF entered with the Broker in this case handed the Broker the discretion to set the interest rate. And it also directly linked the amount of commission the Broker would receive to the interest rate Miss L paid, such that the Broker was incentivised to set the interest rate at a higher rate than Barclays PF would have lent at. In this case, the Broker selected a flat interest rate 1.99% higher than the 2.68% flat interest rate Barclays PF would have lent at.

247. This arrangement created an inherent conflict between the interests of the Broker and the interests of Miss L, by incentivising the Broker to set the interest rate at a higher rate, to obtain more commission for itself, than Barclays PF had indicated it was prepared to lend at. It created the possibility that Miss L might end up paying a higher interest rate than Barclays PF was prepared to lend to her at, for no other reason than the Broker deciding to take more commission.

248. Apart from the 'range' Barclays PF set and the cap on the overall amount of commission, there were no other limiting factors on the Broker's discretion, in particular, the size of the commission payment was not linked to extra work as envisaged by CONC 4.5.2G (and earlier OFT guidance).

249. In those circumstances I am satisfied that Barclays PF's introduction of the discretionary commission arrangement and use of it in connection with Miss L's conditional-sale agreement meant that Barclays PF failed to have due regard to Miss L's interests and treat her fairly.

250. I am satisfied that CONC 4.5.2G is relevant to the circumstances of this complaint for the reasons I set out above. But even if that were not the case, I am satisfied it is more likely than not that Barclays PF's introduction and operation of the discretionary commission arrangement which allowed the Broker to set the interest rate to receive more (or less) commission without reference to the level of work undertaken would, more likely than not, amount to a breach of Principle 6 in any event.

251. I am mindful that CONC 4.5.2G is but one example of something that might be indicative of a breach of Principle 6. It does not follow – even if Barclays PF is right about the application of CONC 4.5.2G to this complaint, that it must have paid due regard to Miss L's interests and treated her fairly.

252. Even if CONC 4.5.2G does not apply, I am satisfied that the discretionary commission arrangement allowed the Broker a discretion, limited only by the range and cap provisions, to set the interest rate at a higher level for the sole purpose of receiving more commission (whether in practice the interest rate it set was the advertised typical APR or a different rate). This meant Miss L ended up paying a higher rate of interest than Barclays PF was prepared to lend to her solely because of the commission arrangement and the Broker's appetite for earning more commission. And I am satisfied that meant Barclays PF failed to pay due regard to Miss L's interests and treat her fairly.

253. In addition, even if CONC 4.5.2G does not apply to the commission arrangement in this case, the principle being expressed by the OFT in the box to paragraph 5.5 of the ILG (that agreements providing for differential commission rates should not be made unless the differential commission is justified by reason of extra work by the broker) is a principle which it seems to me logically and fairly would apply to situations where arrangements providing for differential commission rates of the type in Miss L's case have been made.

254. In the absence of any extra work from a broker, it would ordinarily be unfair for a broker to receive extra commission where that results in an additional financial burden to the consumer, which is the case where the consumer is paying a higher interest rate than was in effect required by the lender to make the loan available. In offering and entering into an agreement with those characteristics in Miss L's case, I'm satisfied Barclays PF both failed to pay due regard to her interests and treat her fairly as Principle 6 required and it failed in any event to act fairly and reasonably in its dealing with Miss L.

255. In reaching these conclusions, I have carefully considered Barclays PF's representations that: Miss L received the advertised typical APR; that the APR was competitive and the circumstances in which the Broker could deviate from the advertised rate were limited; and that Barclays PF required brokers to treat customers fairly. But those representations do not persuade me to alter my conclusions.

256. Nor do I consider the fact that Barclays PF's intention was to allow the Broker to cover its costs and expenses, allow the Broker flexibility to make deals more competitive and to encourage the Broker to refer consumers to Barclays PF means Barclays PF paid due regard to Mrs L's interests and treated her fairly.

257. I am not persuaded Barclays PF paid due regard to the interests of Miss L and treated her fairly in circumstances where the discretionary commission arrangement operated to allow the Broker a free hand to set the interest rate within the wide range permitted, and consequently the commission the Broker received, without reference to extra work. I consider this to be the case whether the Broker exercised its discretion to set the interest rate by selecting a bespoke rate for Miss L from within the permitted range, or first selected and advertised a typical rate from within the permitted range and then arranged Miss L's agreement at that rate.

258. I note Barclays PF's view that: a finding the discretionary commission arrangement it operated breached Principle 6 would amount to a retrospective application of the ban on discretionary commission models; that the FCA has never suggested discretionary commission models breach Principle 6; and that notwithstanding its detailed and thorough consideration of the motor finance market, the FCA has not required lenders to remediate historic customers or taken enforcement action against firms. But I am not persuaded by these arguments.

259. I do not consider that the absence of a remediation exercise or enforcement action means that the regulator was unconcerned about arrangements made before the ban in January 2021, or that a lender operating a discretionary commission arrangement cannot have breached Principle 6.

260. I also note that the Motor Finance Final Findings set out the FCA's concerns that the way commission arrangements were operating in motor finance might already be leading to consumer harm and it made a number of comments in the Motor Finance Final Findings about the application of existing rules to discretionary commission models (see for example paragraph 3.29 of the Motor Finance Final Findings above). The FCA went on to say that it considered that change was needed across the market, to address the potential harm it had identified.

261. Overall, I am not persuaded Barclays PF paid due regard to Miss L's interests and treated her fairly in this case in relation to the discretionary element of the commission model. And for the same reasons I do not consider Barclays PF treated Miss L fairly and reasonably in all the circumstances.

262. I do not consider that unfairness extends to the Head Office payment arrangement. Whilst it was incumbent on the Broker in the circumstances of this complaint to disclose the existence of the Head Office payment arrangement, taking into account the features of that arrangement, I do not consider Barclays PF's implementation and operation of that agreement meant it failed to have due regard to Miss L's interest and treat her fairly.

(n) Did Barclays PF's conduct mean that its relationship with Miss L was unfair under ss140A-C CCA?

263. Under DISP 3.6.4R, I'm required to take into account 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 Miss L's complaint.

264. I'll start by considering the relevance of the unfair relationship provisions in ss140A-C CCA, and whether this may be another reason why (whether in addition to or independently of the reasons I have considered above) Barclays PF may not have acted fairly and reasonably towards Miss L.

The law relating to unfair relationships

265. Ss140A-C CCA apply to a creditor and a debtor who have entered into a credit agreement. In this instance, Barclays PF was Miss L's lender for this conditional-sale agreement. Therefore, it is a creditor for the purpose of s140A CCA and Miss L is a debtor, and the conditional-sale agreement is a credit agreement.

266. 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 Miss L'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.

267. 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)."

268. In *Plevin*[15] 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."

269. 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.

270. I think that, for a number of separate reasons, a court would likely find the relationship between Barclays PF and Miss L unfair, and I take this into account separately in determining whether Barclays PF acted fairly and reasonably towards Miss L as set out below.

Unfair relationships – conflict of interest

271. Firstly, having given careful thought to the matter, I'm satisfied that Barclays PF's introduction and operation of the discretionary commission arrangement (that is offering the model to the Broker, and allowing the terms of the model to operate for Miss L in the way that it did) was something done by the creditor within s140A(1)(c) which meant the relationship between it and Miss L could potentially be unfair to Miss L and in the circumstances of this case was ultimately unfair to Miss L.

272. Barclays PF's operation of this discretionary model meant, that subject to respecting the flat interest range of 2.68% and 15.25%, it delegated the setting of the interest rate Miss L would pay to the Broker.

273. As described above, Barclays PF's commission model not only delegated the power to set the rate to the Broker, but it also created an inherent conflict of interest between the interests of Miss L and the interests of the Broker by linking the amount of commission the Broker would receive to the interest Miss L would pay on her agreement, thereby incentivising the Broker to increase the interest rate. The higher the interest rate set within the range the more commission the Broker would receive (subject to the commission cap provisions).

274. So, the Broker was financially incentivised to choose a higher interest rate for Miss L. And the Broker's failure to manage the conflict between its interests and those of Miss L and its decision to select a flat interest rate of 4.67% - 1.99% above the flat interest rate Barclays PF was prepared to lend to Miss L at - ensured it received £1,326.60 commission and Miss L ended up with an agreement with a higher rate of interest, requiring her to pay £1,326.60 more over the term than Barclays PF required.

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

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