DRN-4188284

Summary

1. This complaint is about the commission Black Horse Limited ("Black Horse") paid to a credit broker (the "Broker") when Mrs Y took out a hire-purchase agreement to buy a car in April 2016.

2. Mrs Y complains that Black Horse 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. Black Horse says that it complied with the legal and regulatory obligations that applied at the time and that Mrs Y wasn't in any event treated unfairly, as she received a reasonable and competitive interest rate.

4. I have read and carefully considered all the evidence and arguments submitted by both parties 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 Mrs Y and to require Black Horse to pay her compensation.

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

   — The discretionary commission model Black Horse used in Mrs Y's case, created an inherent conflict between the interests of the Broker and the interests of Mrs Y, as it gave the Broker an incentive to set a higher interest rate than Black Horse 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, Black Horse acted contrary to the guidance at CONC 4.5.2G and failed to have due regard to Mrs Y'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 Black Horse and Mrs Y was unfair to Mrs Y under s140A of the Consumer Credit Act 1974 ("CCA") for any or all of three reasons:

      (1) Black Horse'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 Mrs Y by linking the amount of commission the Broker would receive to the interest Mrs Y paid. This created an unfair relationship both generally and because it meant Black Horse failed to comply with Principle 6 and CONC 4.5.2G.

(2) The inequality of knowledge and understanding created by Black Horse'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 Mrs Y would have to make).

(3) The Broker's failure to disclose the structure of the discretionary commission arrangement in accordance with its regulatory requirements and guidance (in particular, CONC 4.5.3R, CONC 3.7.4G(2) and Principle 7 and 8) in circumstances where this failure is, under s. 56(2) CCA, deemed to be a failure of Black Horse.

— In light of each of those considerations, whether taken individually or collectively, I consider Black Horse did not act fairly and reasonably in its dealing with Mrs Y.

— 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, Black Horse should compensate Mrs Y by paying her:

  — the difference between (i) the payments she made from time to time under the finance agreement (at the flat interest rate of 5.5%) and (ii) the payments she would have made (including when she settled the loan early) had the finance agreement been set up at the lowest (zero discretionary commission paying) flat interest rate permitted (that is 2.49%);

  — 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.

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

Background to the complaint

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

8. In April 2016, Mrs Y 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, amongst other things, the regulated activity of credit broking.

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

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

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

11. Black Horse has provided evidence which shows that the Broker made proposals to four different lenders unsuccessfully before introducing Mrs Y to Black Horse. Black Horse accepted the proposal and entered into a hire-purchase agreement with Mrs Y.

12. Under the hire-purchase agreement, Mrs Y hired the vehicle from Black Horse and paid a monthly amount to it in return. Black Horse remained the legal owner of the vehicle under the agreement until Mrs Y paid off the loan. The information provided by Black Horse suggests the agreement was settled early, in June 2017.

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

- The cash price of the vehicle was £7,619.13.[2] Mrs Y did not pay a deposit and borrowed the full amount.
- The total charge for credit was £2,096.47, made up of a £2,095.47 hire-purchase charge (essentially interest) and a £1 purchase fee.
- The total amount repayable under the agreement was £9,715.60 over 60 months.
- Mrs Y was required to pay 59 monthly payments of £161.91 and one final payment of £162.91, which included the £1 purchase fee.
- The interest rate on the finance agreement was 10.01% per year and the Annual Percentage Rate ("APR") was 10.5%.

14. Whilst the actual interest rate was 10.01% and the APR 10.5%, if the hire-purchase charge (that is the interest payable) had been expressed as a "flat interest rate", the flat rate would have been 5.5%.

15. The flat interest rate is an important figure to keep in mind in this case because the commission the Broker received was determined by reference to the flat interest rate Mrs Y paid.

Flat Interest Rates

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

[2] The £7,619.13 cash price figure shown on the hire-purchase agreement was in fact made up of three elements: (1) the price Mrs Y paid for the car itself – £5,488; (2) the cost of additional services connected to the car purchase, including a service plan and warranty – £714; and (3) the amount required to repay the shortfall – after deducting the part-exchange value of her existing car – on Mrs Y's previous finance agreement – £1,417.13.

18. In this case, as I shall explain in more detail later in this decision, the Broker received a commission of £1,146.67 from Black Horse for arranging the hire-purchase agreement at a flat interest rate of 5.5% under a 'discretionary commission arrangement'. It also received a separate payment ("the Support Payment") equivalent to 2% of the credit amount (2% of £7,619.13 = £152.38).

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

Amount financed	Term	Total charge for credit	Flat interest rate	Discretionary commission paid to Broker	Support Payment to Broker
£7,619.13	60 months	£2,096.47	5.5%	£1,146.67	£152.38

(b) Mrs Y's complaint

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

(1) Black Horse operated a discretionary commission model which meant that the Broker was incentivised to select a higher interest rate for her hire-purchase agreement than was otherwise available to her, so that the Broker would receive more commission.

(2) By paying a secret commission to the Broker, Black Horse breached its regulatory obligations, including the Principles and those set out in the Consumer Credit Sourcebook ("CONC").

(3) Black Horse acted contrary to common law principles concerned with the consequences of a person in Black Horse's position paying a secret commission to the Broker which it knew was arranging the credit for Mrs Y.

(4) The failure to disclose the commission arrangements rendered Mrs Y's relationship with Black Horse unfair under s140A CCA.

21. To put things right, Mrs Y says Black Horse should:

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

— repay the commission payment plus interest at the rate of 8% from the date that Black Horse made the commission payment to the Broker; or

— reimburse all the unfair interest payments paid during the duration of the agreement plus interest at the rate of 8% from the date of each payment made.

(c) My Provisional Findings

22. I issued a Provisional Decision on 14 April 2023 setting out my provisional findings and conclusions about whether Black Horse 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 Black Horse paid the Broker £1,299.05 as a direct consequence of arranging the hire-purchase agreement. It paid:

- £1,146.67 of the commission under a discretionary commission arrangement with the Broker, 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 Mrs Y would have to make to Black Horse.

- £152.38 in the form of a Support Payment to the Broker's Head Office, equivalent to 2% of the credit amount.

(2) Black Horse was prepared to lend to Mrs Y at a flat interest rate of between 2.49% and 5.5% with any amount charged above 2.49% going to the Broker in commission. The Broker selected the highest flat interest rate within the permitted range of 5.5%.

(3) Although the Broker disclosed that lenders *may* pay it fees for introductions, it did not disclose that Black Horse *would* pay it a fee or commission for arranging the specific hire-purchase agreement Mrs Y 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 Mrs Y'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 Mrs Y as required by Principle 8.

(4) The discretionary commission arrangement was an agreement providing for "differential commission rates". As such, Black Horse 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 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) Black Horse failed to act fairly and reasonably in its dealings with Mrs Y, for each of a number of different reasons:

- By introducing and operating the discretionary commission arrangement with the Broker on the terms it did, Black Horse acted contrary to the guidance at CONC 4.5.2G and failed to have due regard to Mrs Y's interests and treat her fairly as required by Principle 6.

- A court would likely find that the relationship between Black Horse and Mrs Y was unfair to Mrs Y under s140A CCA for each of the following reasons:

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

    - The inequality of knowledge and understanding created by Black Horse'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 Mrs Y would have to make).

    - The Broker's failure to disclose commission and fairly manage the conflict between its interests and those of Mrs Y, in circumstances where those failures are deemed to be a failure of Black Horse under s56(2) CCA.

    - Black Horse's failure to comply with Principle 6 and CONC 4.5.2G.

(7) If Mrs Y had been told about the structure of the commission arrangements (and in particular the discretionary commission arrangement), she would not have entered the hire-purchase agreement on the terms she did. Mrs Y would not have been prepared to pay the Broker such a significant amount for introducing it to Black Horse (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 £152.38 under the Support Payment.

(8) Taking that in to 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 Mrs Y, Black Horse should pay Mrs Y 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.

(9) But I said I might take a different approach to the calculation of compensation if Black Horse were able to provide further evidence to support its contention that the cash price of the car was inflated on the hire-purchase agreement to allow Mrs Y to repay the shortfall on an existing car finance agreement and this created an additional VAT payment for the Broker which part of the discretionary commission payment funded.

(d) The parties' representations

23. Both parties have made substantial representations during the course of the complaint, including recently about the other's representations made in response to my Provisional Decision. 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, Black Horse told us:

- Mrs Y received a fair outcome and would ultimately have taken out the hire-purchase agreement irrespective of the commission arrangements.

- The 10.5% APR she received was reasonable – for example personal loan rates offered by the Lloyds Banking Group and other mainstream lenders at the time ranged from 3.49% to 29.9%.

- There is no evidence to suggest Mrs Y could have obtained a cheaper rate elsewhere, particularly as applications to four other lenders were declined before the Broker approached Black Horse with a modified 'reshaped' application.

- The Broker appropriately disclosed the existence of commission. There was no requirement to disclose the nature or amount of commission (unless asked).

- Mrs Y 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).

- The Broker had a reasonable framework in place to determine the rate that would be offered to customers.

- It complied with the regulatory requirements at the time. CONC 4.5.2G is guidance, not a rule that must be followed, and is not in any event relevant as it does not apply to discretionary commission models. The FCA did not conclude in its review of the motor finance market that operating a discretionary commission model was a breach of Principle 6.

- To uphold the complaint is to effectively, and incorrectly, retrospectively apply the FCA's 2021 ban on motor finance discretionary commission models.

- The FCA has not suggested that discretionary commission models were unlawful or contrary to the FCA rules prior to January 2021 and its conclusions about the limited financial impact of the ban (£165 million per year), relative to the far larger amount of commission paid to dealers in the motor finance market, suggests the FCA did not think all discretionary commission models created harm.

- A court would not find that the relationship between itself and Mrs Y was unfair, and in any event, only a court can make that decision and it would be irrational and an error of law for the Ombudsman to speculate about what a court might do.

- The law relating to secret commission as set out in the case of *Wood & Pengelly* does not apply to this complaint as those cases were concerned with fully secret commissions, not half-secret commissions (like the commission payment in Mrs Y's case).

25. Black Horse also made representations both before and after my Provisional Decision about the circumstances in which Mrs Y took out the hire-purchase agreement. In summary, it says:

    - The commission agreement set out a standard flat interest rate for hire-purchase agreements of 5.5%, equivalent to 10.5% APR. It considered the standard rate to be a fair and competitive rate for the relevant product and customer base. The dealer was permitted to reduce the flat interest rate to the 2.49% minimum rate.

- At the time, the Broker used and advertised a general headline APR for finance agreements of 9.5% (representative) – equivalent to a flat rate of around 5%. The Broker's sales staff had some discretion to make small downward adjustments to the APR by exception.

- Mrs Y wanted to part-exchange her existing car, but it was worth £1,517.13 less than the amount required to settle the finance agreement connected to that vehicle. Mrs Y was able to pay £100 towards the shortfall, so, she needed to raise an additional £1,417.13 to repay the shortfall.

- The Broker attempted (on 3 April 2016) to arrange four Motor Loan Products (all at 8.6%[3] APR) with different prime lenders to pay for both the new car and the £1,417.13 shortfall, but the lenders all declined. All four lenders operated differential commission models.

- As a last resort and to avoid approaching a sub-prime lender, the Broker tried a different approach and reshaped the deal. It applied to Black Horse for a hire-purchase agreement assuming an inflated 'cash price' of the new car, thereby increasing the credit amount so that it was sufficient to pay for the new car (and the other services Mrs Y purchased in connection with the new cart) and to repay the £1,417.13 shortfall on Mrs Y's existing agreement.

- The Broker also increased the finance rate to 10.5% to earn more commission. The additional commission allowed the Broker to cover the extra VAT costs it incurred (because the inflated cash price increased the VAT it had to pay on the car) whilst maintaining the margin on the deal.

The shortfall on Mrs Y's existing loan and VAT

26. At the point I issued my Provisional Decision, my understanding based on Black Horse's representations at the time was that the shortfall on Mrs Y's existing loan was £1,400 and so it was Black Horse's case that inflating the 'cash price' of the new car in this way generated an additional £280 VAT bill (20% of £1,400), which the increased commission covered.

27. Black Horse has since provided evidence which shows the cash price of the car was increased by £1,417.13 *including* VAT. So the additional VAT from 'reshaping' the deal was £236.19 (£1,180.94 + £236.19 = £1,417.13). The higher cash price would also have increased the Support Payment by £28.34 (that is 2% of £1,417.13).

28. Black Horse has also provided evidence from its own systems which suggests the Broker submitted an application to it on 5 April 2016 at an APR of 9.6% based on a shortfall of £1,400 and a second application on 7 April 2016 at an APR of 10.5% based on a shortfall of £1,417.13. The 0.9% higher APR on the second application increased the discretionary commission payment to the Broker by £192.52.

29. Black Horse says, although it has not provided anything from the Broker to support this, the Broker submitted the second application at the higher interest rate to cover the VAT charge. It says this was necessary because the Broker miscalculated the

[3] Before my Provisional Decision Black Horse said the rates were 8.9%. Following the Provisional Decision, it said the rates were 8.6%. The car order form dated 3 April 2016, which Mrs Y signed, suggests the original rate was expected to be 8.6%.

increase to the cash price required (the Broker increased the cash price by £1,417.13 including VAT, instead of by £1,417.13 plus VAT). From this Black Horse draws the following conclusion:

> *"Furthermore, [the Broker's] records show that a previous proposal made on 5 April 2016 was rejected as it was not at a level [the Broker] was prepared to transact at. A second proposal was then made on 7 April 2016 which was accepted by [the Broker] and agreed with Black Horse. This is further evidence to support that, but for the interest rate being set at the rate it ultimately was, [the Broker] would not have proceeded with the transaction.*

30. I note that Black Horse has not provided any corroborating evidence from the Broker to support its own conclusion that the Broker increased the interest rate to 10.5% APR for the specific purpose of funding the payment of the extra VAT (rather than for some other reason). Black Horse's explanation seems to be one (whether ultimately correct or not) that Black Horse has identified as a possible explanation to account for the differences in the loan applications appearing on its records.

31. Ultimately the evidence Black Horse has submitted shows only that the Broker submitted two applications to it and the second application had a higher interest rate generating more commission. Everything else is conjecture. The evidence does not explain why the Broker submitted two applications to Black Horse or shed light on its reasons for increasing the interest rate. Nor do Black Horse's records support or disprove its assertion that the Broker rejected the 5 April 2016 proposal because it was not at a level that the Broker was prepared to transact at. I shall consider the significance of this later in my decision.

Black Horse's further representations

32. Black Horse also made extensive further representations about the merits of the complaint and my provisional findings. I have read and considered those representations carefully. By way of summary, I note, among other things, it said:

General

- I incorrectly and unfairly considered matters in the Provisional Decision that did not form part of Mrs Y's complaint.
- My conclusions went beyond the FCA's findings in its Motor Finance Final Findings. The FCA did not find that discretionary commission models led to consumer harm in all cases. The question is whether the arrangement caused unfairness in Mrs Y's particular circumstances. It did not.
- In any event, the FCA's review took place after the events in this case and FCA's views did not reflect the rules or market practice in 2016. Nor do the FCA's views support my findings.
- Mrs Y settled the agreement early after a year. In total she paid £827.39 in interest charges with £447.20 attributable to the discretionary commission. The Broker received £1,146.67 in discretionary commission up front, so Black Horse ultimately lost money on the transaction.
- It would have been clear to Mrs Y from: the paperwork, her own history of

buying cars, and the nature of car sales, that the Broker would be acting in its own interests in trying to sell a car and make a profit from the transaction.

The dealer did not breach CONC 4.5.3R, CONC 3.7.4G(2), Principle 7 or 8.

- I attributed too broad a meaning to CONC 4.5.3R. That is concerned only with managing the conflict of interest created by commission payments. There was no requirement at the time to disclose the structure or "nature" of the commission arrangement.
- CONC 3.3.1R (and Principle 7) and CONC 3.3.1R(1A)(d) – which are about the presentation of information – cannot be used to expand the requirement to disclose the existence of commission to one requiring the disclosure of both the existence and nature of commission.
- The Broker's disclosure that lenders "may" pay it a fee for introductions was sufficient to alert Mrs Y to the possibility of a conflict of interest – the purpose and requirement, of CONC 4.5.3R.
- The FCA was not concerned about the use of the word "may". Its concern was that firms were not consistently elaborating on that (for example by stating the amount may vary by lender or product). To address that harm, FCA amended CONC 4.5.3R (and CONC 3.7.4G(2)) to require elaboration. That amendment would not have been necessary if it was a requirement to elaborate before.
- To comply with Principle 8, it was enough for the Broker to comply with CONC 4.5.3R as it did.

Mrs Y would not have acted differently

- Even if it was incumbent on the Broker to disclose the structure or nature of the commission, there is no reason to think Mrs Y would have acted differently, or that she would have successfully negotiated a lower interest rate with the Broker.
- It is unrealistic to think the Broker would have accepted no discretionary commission, particularly given the additional (VAT) costs it occurred by reshaping the deal.
- Mrs Y took out an agreement in 2022 with a 10.7% APR (a rate set by the lender that would have taken into account a commission payment) at a time when she would have been told about both the existence and nature of the commission arrangement.

Black Horse met its regulatory obligations

- My conclusion that it failed to act in accordance with CONC 4.5.2G and therefore acted contrary to Principle 6 is wrong and ignores the broader context of the guidance.
- The purpose of CONC 4.5.2G was to implement the box under paragraph 5.5

of the Irresponsible Lending Guidance[4]. That was concerned with disclosure of commissions in circumstances that might incentivise brokers to recommend unsuitable products. So CONC 4.5.2G is only engaged where differential commission rates have the potential to encourage brokers to inappropriately recommend one product over another.

- Discretionary commission models do not create that risk. And in this particular case, Mrs Y's options were limited, so there was, in practice, no risk that the Broker might inappropriately recommend the Black Horse product it did over another.
- It did not breach CONC 4.5.2G. But even if it did, that is only guidance and so does not mean it breached Principle 6.

Unfair relationships

- The commission arrangements did not create any unfairness. Mrs Y received a good outcome – she paid a fair and competitive interest rate and was able to purchase the vehicle of her choice in circumstances where it's unlikely she would have been able to borrow elsewhere on better terms.
- There was nothing inherently unfair about operating the discretionary commission arrangement just because it gave rise to a conflict of interest for the Broker. Under FCA rules, it was for the Broker to manage the conflict, which it did by meeting its regulatory obligations.
- In any commercial transaction there is a tension between the seller seeking the highest price and the buyer seeking the lowest price. That does not mean there is an unfairness. The fact Black Horse allowed the Broker to set the price for the agreement does not change that.
- The fact Black Horse did not disclose it was willing to accept a lower price cannot be a source of unfairness. And the Broker would not in any event have accepted the lower price and lower commission.
- I incorrectly drew on findings made by the Supreme Court in *Plevin*[5] about the inequality of knowledge caused by the failure to disclose PPI commission. The context in which PPI and motor finance is offered and the market dynamics are fundamentally different. In motor finance the relationship is far from one sided.
- The amount of commission and the impact it had on Mrs Y's interest rate was not sufficient to make the relationship unfair. The amount of commission paid should not be compared to the cost of credit, but to the cost of the motor vehicle.
- The Broker did not breach its obligations so there can be no unfairness because of the deemed agency under section 56 CCA.
- It complied with its regulatory obligations, so there was no unfairness for that reason.

Secret Commission – Wood & Pengelly

[4] The Office of Fair Trading's Irresponsible Lending Guidance published in March 2010 (updated February 2011).
[5] *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61; [2014] 1 WLR 4222.

- Whilst it agrees with my conclusion that a court would be unlikely to find that the principles of *Wood & Pengelly* apply to this complaint, it does not agree that the principles of *Wood & Pengelly* are capable of applying to half-secret motor finance commission payments.

Compensation

- Mrs Y received a fair and competitive interest rate of 10.5% APR, slightly higher than the Broker's advertised rate of 9.5% APR.
- This was reasonable and Mrs Y received a fair outcome given the advertised price for the car was £962 less than the CAP guide price and the additional VAT resulting from the reshaping of the deal.
- The commission paid was comparable to the Broker's average commission payment from Black Horse (£1,152). When the FCA banned discretionary commission arrangements in January 2021, the average payment to the Broker increased.
- The zero discretionary commission paying rate I proposed for the purposes of calculating compensation is wholly unfair, unrealistic and irrational as:
    - It would equate to an APR of 4.8%, far lower than average APR's.
    - The Broker would never and was not required then or now to have disclosed the commercially sensitive interest rate range, so Mrs Y could not in practice have negotiated it.
    - The Broker should reasonably receive some compensation for the work undertaken.
    - It would not have been sustainable or commercially realistic for the Broker to offer finance at a zero discretionary commission rate.
    - At zero discretionary commission, the Broker might well have altered another element of the deal to maintain its margin.
    - It is at odds with FCA's expectations as a result of banning discretionary commission models.
    - Had there not been a discretionary commission arrangement, there would have been a different commission paying arrangement producing a similar outcome.
- The rate should fairly be set at the advertised rate of 9.5% APR (£956.20 discretionary commission), or the Broker's post ban January 2021 headline rate of 8.9% APR (£887.63 discretionary commission).
- It would not be fair to award interest on the overpayments at 8% as courts would apply lower rates.

33. Black Horse also told us that:

- The Broker paid £3,750 for the car Mrs Y's bought. It advertised the car at £5,488 – the price Mrs Y ultimately paid for it – a mark-up of £1,738. That "sticker price" reflected the Broker's view of the value of the car.

— The car Mrs Y sold to the Broker had a part exchange value of £2,500. The Broker sold that car for £3,688 – a mark-up of £1,188.

Mrs Y's recollections

34. Mrs Y also provided her recollections about a number of matters which I have considered carefully. Among, other things, she told us:

— She didn't need to buy a new car and could have managed with the one she had, but wanted a change.

— About the negotiations that took place at the point of sale, including any relating to the advertised price of the car, the part exchange value of her existing car, and the interest rate:

"When I purchased the [car], I wasn't given any breakdown of costs, I was told what my part exchange was worth, the cost of the vehicle and what the monthly payments would be."

— She can not recall any discussion about negative equity and could not recall being advised about the reshaping of the deal or any mention of the VAT charge.

— If she had been told that the commission payment was tied to her interest rate for her agreement:

"I wouldn't have gone ahead with the car purchase and went to another dealer".

— If she had been told a second commission payment was tied to the amount she would be borrowing:

— *"I wouldn't have gone ahead with the car purchase and went to another dealer".*

— In response to a question posed by her representative – would you have tried to negotiate a better deal had you known about the commission model?

"Yes as I would have asked the question why about the commission".

My findings

35. 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

36. 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.

37. 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 Mrs Y entered the hire-purchase agreement in April 2016 (and had applied to similar arrangements since April 2014 when 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.*

Black Horse's further representations about the scope of Mrs Y's complaint and the relevant considerations

38. I note Black Horse's view that whilst Mrs Y made a number of points and referred to several legal concepts in her complaint, she did not, it says, specifically complain that it breached the requirements of CONC or the Principles, or that its failure to disclose the 'nature' of the commission payment made the relationship unfair under s140A CCA. So, it says, it cannot be fair and reasonable to uphold the complaint on that basis.

39. Black Horse says that my decision should have regard to how the complaint was articulated and should not add its own layer of additional legal complexities on issues that Mrs Y did not herself raise.

40. I do not find Black Horse's representations about this to be persuasive.

41. Firstly, it seems to me that Black Horse seeks to place an untenably narrow interpretation on the complaint points Mrs Y has made. For example, Black Horse seeks to draw a distinction between: (1) Mrs Y's argument that the failure to disclose the commission payment rendered the relationship between Black Horse and her unfair under s140A CCA; and (2) a complaint that the failure to disclose 'the nature' of the commission payment rendered the relationship unfair. It says that it cannot be fair and reasonable to uphold the complaint on the basis that the 'nature' of the commission arrangements was not disclosed when Mrs Y did not make that complaint.

42. But in any event – as Black Horse itself points out – the Ombudsman scheme is a scheme charged with determining complaints with minimum formality[6], in circumstances where it is not expected that consumers have professional representation[7]. It is not necessary for complainants (even those like Mrs Y who are represented) to raise every argument, or 'plead' every point, that might be relevant to

[6] S225(1) Financial Services and Markets Act 2000.
[7] DISP 3.7.10G.

the Ombudsman's decision about what is fair and reasonable in all the circumstances of the case. As Irwin J pointed out in *R (Williams) v Financial Ombudsman Service*[8]:

> *"The ombudsman is dealing with complaints, not causes of action. His jurisdiction is inquisitorial not adversarial. There is a wide latitude within which the ombudsman can operate".*

43. Ultimately, what matters is what at its heart the complaint is about. Having established that, I am *required* to take into account the matters set out at DISP 3.6.4R – to the extent they are relevant to the complaint made – when deciding what is in my opinion fair and reasonable in all the circumstances of the complaint. That is the case whether or not, for example, relevant law or regulatory rules are raised by the complainant in making the complaint, or indeed by the respondent business.

44. In this case, I am satisfied Mrs Y's complaint is ultimately about the fairness and consequences to her of the discretionary commission arrangements and the commission paid by Black Horse to the Broker. For example, I note in her original complaint letter, she said, among other things:

- She was concerned that the fairness of her *"agreement had been jeopardised by the existence of a discretionary commission model"* between Black Horse and the Broker.
- The Broker had not disclosed the commission payment in circumstances where it owed a duty to provide impartial and disinterested advice, information and recommendations – meaning that the payment amounted to a bribe (by Black Horse) at law.
- Black Horse was required by CONC 1.2.2R to ensure its employees and agents complied with CONC, meaning that Black Horse is responsible for the Broker's breaches. Those breaches, she complained, included the Broker's failure to ensure that the communication was fair and not misleading (CONC 3.3.1R) by failing to disclose important information *about "the commission amount and model used"*, and the failure to communicate in good time (or at all) the existence of any commission payment that could potentially impact the Broker's impartiality (a breach of CONC 4.5.3R).
- The failure to disclose the commission payment rendered the relationship between Black Horse and her unfair under s140A CCA.
- The use of the discretionary commission model would have led to the Broker increasing the interest rate causing her financial loss in the form of additional interest paid over the duration of the loan.

45. When Mrs Y referred her complaint to the Financial Ombudsman Service she made further arguments about why she felt Black Horse had acted unfairly. Among other things, she said:

- Both the Broker and Black Horse had refused to provide details of the commission model despite her complaint. So, her complaint was based on the assumption that Black Horse had operated a discretionary commission model.

[8] *R (Williams) v Financial Ombudsman Service* [2008] EWCH 2141.

— Black Horse had failed to comply with CONC 4.5.2G by entering into a commission arrangement that allows for differential commission rates, without it being linked to any extra work involved.

— Both Black Horse and the Broker had failed to comply with the Principles, including Principle 6, 7 and 8.

46. Overall, I am satisfied, that it is appropriate – indeed, I am required to – take into account the considerations I have set out at paragraph 37 when deciding what is, in my opinion, fair and reasonable in all the circumstances of this complaint. I will set out further information about each of these considerations at relevant points in my findings.

47. 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 Mrs Y's complaint.

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

48. 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'*[9] .

49. 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?"*[10]

50. 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."* [11]

51. 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, 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.*

[9] FCA Business Plan 2017-2018 page 74.
[10] FCA 'Our work on motor finance – final findings' para 1.2.
[11] FCA 'Our work on motor finance – final findings' para 1.5.

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

— *Across the firms in our analysis (around 60% of the market) we estimate that commission models which allow broker discretion over the interest rate could be costing customers £300m more annually when compared against a baseline of Flat Fee models.*[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.

52. Following a consultation[12] 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.

53. Whilst the FCA's review and the publications of its Motor Finance Final Findings took place after the events complained about here, the regulatory requirements against which FCA considered the behaviours of firms during the review were the same as applied in April 2016.

54. 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 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.

55. I do not, however, as Black Horse suggests, infer from the outcome and conclusions of the review (including the forward-looking ban on motor finance discretionary

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

commission models) that motor finance discretionary commission models in place prior to the ban necessarily produce an unfair or unreasonable outcome in every case.

56. 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 about the regulator's view of those arrangements, the interaction with its rules (the same rules that were in place in April 2016) and the potential for consumer harm.

57. I will now consider whether Black Horse acted fairly and reasonably in its dealings with Mrs Y and, if not, whether Mrs Y suffered any harm in her particular circumstances.

58. 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 Mrs Y to whom this decision may be relevant, and I am also mindful that this decision may be relevant to Black Horse's assessment of other complaints given the requirements of the complaint resolution rules set out at DISP 1.4.

(g) Mrs Y's complaint

59. As I have explained, Mrs Y's complaint is essentially about the fairness and consequences to her of the commission arrangements made between Black Horse and the Broker, which – among other things – she says were not disclosed to her by either firm at the time.

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

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

    (2) What, if anything, did the Broker disclose to Mrs Y 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 Mrs Y?

61. I will then go on to consider whether Black Horse acted fairly and reasonably in its dealings with Mrs Y, taking into account, in particular, the regulatory obligations that applied to Black Horse at the time, the law relating to unfair relationships and the law relating to the payment of secret commission.

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

62. It is not disputed – and I am satisfied that Black Horse paid the Broker £1,146.67 under a discretionary commission arrangement for introducing Mrs Y to it and bringing about her hire-purchase agreement. The Broker also received a £152.38 Support Payment.

The discretionary commission arrangement

63. Black Horse has told us – and has provided the agreement with the Broker in support – that:

- The terms of its commission arrangements set a standard flat interest rate of 5.50% (which translated to an APR of 10.5%) for hire-purchase agreements. At that interest rate, the Broker would earn a commission that was equivalent to a flat interest rate of 3.01% of the amount advanced for each year of the agreement.

- The Broker had the discretion to set the interest rate at a lower rate than the standard rate, but there would be a corresponding reduction to the commission payment it received. At a flat rate of 2.49% (equivalent Black Horse says to a 4.8% APR), the Broker would receive no commission.

- The Broker was unable to increase the interest rate above the standard flat interest rate of 5.5%.

64. The terms of the commission arrangements allow for the possibility that the Broker could reduce the interest rate below the 2.49% flat rate, zero discretionary commission paying, floor of the commission range. But if it did, the Broker would have to pay Black Horse a subsidy. Black Horse says this was partly because of competition law considerations:

> *"We set the minimum rate as the non-commission paying rate but we did not expect the dealer to write business at this rate. The minimum rate was set as the non-commission paying rate so that we would not prevent or restrict dealers from using their commission to provide lower finance rates to compete for individual customers. The minimum rate was intended to give dealers the ability to provide finance without taking commission if they wished, but not the ability to give away our income too (i.e there would have needed to be a subsidy paid back to Black Horse)."*

65. Having considered Black Horse's representations, I am satisfied the *effective* minimum flat interest rate that Black Horse was prepared to lend at in this case was 2.49%.

66. Although Black Horse 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 a 'Reducing Difference in Charges' ('Reducing DiC') model or an 'Interest Rate Downward Adjustment' model.

67. 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 FCA later banned) because of the potential conflict of interest created, among other reasons.

68. In any event, and whatever terminology is used to describe the model, what is in my view important here is that Black Horse's commission model linked the amount of commission the Broker received to the interest rate, and it allowed the Broker to decide the interest rate Mrs Y had to pay (albeit within the range set by Black Horse) and, in doing so, the Broker was able to determine the amount of commission it would receive.

69. In this case, in effect, Black Horse gave the Broker discretion to decide whether Mrs Y was charged a flat interest rate of 2.49%, a flat interest rate of 5.5%, or an interest rate in between these amounts. And the amount of commission Black Horse paid to the Broker (and the payments Mrs Y would have to make) was directly related to the interest rate the Broker selected and controlled. The lower the interest rate the Broker selected, in the range set by Black Horse, the lower the Broker's commission payment would be (and the lower Mrs Y's payment). In this case, the Broker chose the highest rate.

The Support Payment

70. Black Horse also paid the Broker a Support Payment, which it described as an 'Advance Support Budget'. It says:

> *"this was an additional payment made at portfolio level, rather than at a transactional level and was to support dealers with marketing costs and raising professional standards e.g training costs."*

71. Whilst the Support Payment was made at a portfolio level, I am satisfied the mechanics of the arrangement effectively created a direct link between the agreement Mrs Y took out and the money the Broker would receive from Black Horse, providing an incentive for the Broker to arrange Mrs Y's individual agreement.

72. Under the terms of the Support Payment arrangement Black Horse paid the Broker an initial sum of money in return for the Broker committing to arrange a set minimum amount (by value) of retail advances in 2016. The initial Support Payment was 2% of the minimum retail advances figure and it was paid in advance as a lump sum by Black Horse to the Broker.

73. If the Broker arranged less than the minimum retail advances figure, it would have to repay part of the Support Payment calculated on a pro-rata basis. If the Broker exceeded the minimum retail advances figure, Black Horse said it *'may'* make an additional payment calculated on a pro-rata basis of 2% of the additional amount advanced.

74. In effect – on the face of things and Black Horse has not disputed this – this meant the Broker stood to receive a payment equivalent to 2% of the amount financed for arranging Mrs Y's loan. If Mrs Y had not taken out the hire-purchase agreement, one way or another, the Broker would have been £152.38 worse off (as the final Support Payment it would be paid and allowed to keep was 2% of the total amount of retail advances it arranged). Mrs Y's finance agreement increased that total figure by £7,619.13.

75. For completeness, I accept that, unlike the discretionary commission payment, the Support Payment made to the Broker did not directly affect the interest rate Mrs Y paid, and the Broker could not alter the basis on which the Support Payment was calculated – it was a fixed percentage of the amount advanced.

76. Overall and based on the evidence currently presented, I'm satisfied that as a direct consequence of arranging Mrs Y's loan, the Broker received £1,146.67 under the

discretionary commission arrangement and £152.38 under the Support Payment arrangement.

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

77. Mrs Y says neither Black Horse nor the Broker disclosed the existence, or the amount, of commission the Broker would receive for arranging the hire-purchase agreement.

78. In contrast, Black Horse says:

- There was a requirement on the Broker to disclose the existence of commission to fairly manage the conflict of interest created by commission payments, and if asked, the amount. But there was no requirement to disclose the nature of the commission model nor the fact of a conflict of interest. It is not reasonable to expect the Broker, or it, to have done more than required by CONC.

- Even after the FCA's Motor Finance Review, the FCA only required brokers to disclose the nature of the commission, it did not require brokers to disclose the amount (unless asked).

- There was no requirement on lenders other than the requirement under CONC 1.2.2R to take reasonable steps to ensure dealers complied with CONC.[13]

- The Broker disclosed the existence of commission in this case in the pre-contractual documentation saying commission 'may' be paid as was standard industry practice (because commission would not be paid in every case). This was sufficient to alert Mrs Y to the possibility of a conflict of interest and if she wanted to know more, she could have asked questions.

- There was no requirement to say commission 'will' be paid – nor was that necessary as by telling Mrs Y that there may be commission, the secret was out[14].

- FCA did not highlight the use of 'may' as an issue in its review, or require further elaboration at the time, which is not surprising given the purpose of the rule. It is wrong to treat the use of the word "may" as akin to no commission disclosure at all.

- If the commission payment mattered to Mrs Y's decision making – for example, because she thought she could get a better rate on the finance elsewhere, or because she felt the rate was higher than she was willing to pay – it's reasonable to think she would have asked about this. She didn't, which suggests the commission payment would not have influenced her decision making.

79. I've considered the pre-contractual documentation that Black Horse has provided. This includes a customer declaration form signed by Mrs Y and an unsigned Initial Disclosure Document ("IDD") setting out the scope and nature of the services that the Broker offered to Mrs Y, which I understand Black Horse considers is indicative of the IDD Mrs Y is likely to have been given.

[13] CONC 1.2.2R requires a firm to: ensure that its employees and agents comply with CONC; and take reasonable steps to ensure that other persons acting on its behalf comply with CONC.
[14] See *Hurstanger Ltd v Wilson* [2007] 1 WLR 2351 paragraph 41.

What did the IDD say about commission?

80. The IDD is headed "About Our Services" and sets out the credit and insurance services the Broker offered. On the first page, at the end of section 2 headed '*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 may pay us a fee for these introductions."*

81. As the IDD is a document that was given to Mrs Y by the Broker, rather than by Black Horse, I have considered it against the Broker's obligations in April 2016, rather than those that apply to lenders. I will go on to consider the relevance of the Broker's actions to the question of whether Black Horse 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[15] applying to the Broker in April 2016?

82. 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'.

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

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

84. 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*

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

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.

85. Principle 6, says:

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

86. 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'.

87. Principle 8 says:

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

88. 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'.

89. 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'.

90. "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 Mrs Y. 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.

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

92. At the time Mrs Y entered into this agreement with Black Horse, 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*]

93. 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].*"

94. By way of summary only, the effect of paragraph 3.7i(box) and 3.7j of CBG[16] 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.

95. The box at paragraph 5.5 ILG made similar points about disclosure in the context of irresponsible lending practices.

96. 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:*
>
> - *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.*

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

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."

97. 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 Mrs Y was introduced to Black Horse by the Broker in April 2016.

98. 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]"

99. 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*]

100. 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"*
>
> …

101. 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."*

Application to Mrs Y's complaint

102. In this case, I have found the Broker received a total of £1,299.05 for arranging the hire-purchase agreement. It received £1,146.67 under the discretionary commission arrangement and £152.38 under the Support Payment arrangement.

103. I am satisfied that the existence or the amount of the commission in this case could actually or potentially affect the Brokers 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 Mrs Y's transactional decision (CONC 4.5.3R (2)) as:

- The discretionary commission arrangement was one which allowed the Broker discretion to adjust, or not adjust, 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 Mrs Y.

- The Broker had less incentive to select a lower rate for Mrs Y's credit agreement from the available range than the interest rate at the top of the range (5.50%). To select a lower rate would mean it would receive a lower amount of commission.

- Both the discretionary commission arrangement and the Support 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, and – in the case of the Support Payment – because the Broker would have to repay money it had already received if it did not meet the minimum retail advances figure.

- Both payments also created the possibility of a conflict of interest because it gave the Broker a possible incentive to encourage Mrs Y to borrow more money so that it would receive more commission – all be it, in the case of the Support 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 Mrs Y's transactional decision (whether or not they ultimately would have done in the circumstances of her application).

104. 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).

105. 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 hire-purchase agreement.

106. The potential impact of the financial arrangements on the Broker's impartiality in promoting the hire-purchase 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 Black Horse in its communications with Mrs Y (for example in the IDD).

107. 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 Mrs Y 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 Mrs Y's.

108. In this case, the commission arrangements created an inherent conflict between the interests of the Broker and the interests of Mrs Y. In particular, those arrangements gave the Broker an incentive to set a higher interest rate on the hire-purchase agreement; but they also incentivised the Broker to encourage Mrs Y to borrow more (to increase commission) and potentially also to select Black Horse's product (to receive more commission) to the detriment of Mrs Y (for example if the interest rate available from another lender was lower).

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

110. I note Black Horse'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 Mrs Y to the possibility that commission might be paid to the Broker by the lenders the Broker could make introductions to.

111. 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 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 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 Black Horse 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: given the particular features of the discretionary commission arrangement and in particular the Broker's ability to control the interest rate Mrs Y 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 Mrs Y that *'lenders may pay us a fee for these introductions'*, even if the specific rules and guidance provisions around commission disclosure in CONC did not.

112. I will first consider what the Broker should have told Mrs Y 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?

113. As I have already 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 may pay us a fee for these introductions.*

114. I accept the Broker disclosed that it *may* receive a fee from lenders for introducing Mrs Y. But I don't think this was enough for Mrs Y to know that the Broker 'would' receive payments from Black Horse for arranging the hire-purchase agreement she actually took out, or for the Broker to comply with its regulatory obligations.

115. I note Black Horse's view that the Broker was not required to say commission would be paid (or to elaborate further). I have considered Black Horse's comments about this carefully. But I am not persuaded by them.

116. 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 Black Horse relating to the hire-purchase agreement Mrs Y was entering. The requirement was not to disclose *the possibility* that the Broker might receive commission payments from lenders generally. The language of the provision suggests the Broker was required to make a more specific disclosure than it did in this case.

117. I also note the analogy Black Horse has drawn with the comments of Tuckey LJ in *Hurstanger.* It says that by disclosing commission may be paid, the secret was out and the secrecy was negated – Mrs Y was alerted to the possible conflict of interest and could have investigated further if she wanted to know more.

118. But I do not consider that telling Mrs Y that something might happen was enough for the Broker to meet the regulatory requirement to disclose the existence of commission paid in relation to the agreement Mrs Y was entering, particularly given the FCA's information requirements and the overarching requirement to fairly manage conflicts of interest. I am also mindful that the court in *Hurstanger* was not in any event considering the application of the FCA requirements that applied to the Broker in this case.

119. It also seems a somewhat contradictory position to argue that the Broker used 'may' because it didn't know if it would be paid commission and to argue that the same statement was sufficient for Mrs Y to have known that Black Horse 'would' be paying the Broker a commission for arranging her hire-purchase agreement as the rules required.

120. 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.

121. 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 Black Horse 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 Mrs Y's transactional decision), in mind.

122. In making that finding, I do not accept Black Horse's view that I am using CONC 3.3.1R (and Principle 7) and CONC 3.3.1R (1A)(d) to expand the requirement to disclose the existence of commission beyond what was required in April 2016. 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.

123. 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 Mrs Y'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 may pay us a fee for these introductions' as the IDD in this case said.

124. This alone was not in my view a meaningful disclosure of the "existence of any commission or fee or other remuneration" payable by Black Horse to the Broker in relation to the credit agreement Mrs Y 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.

125. Neither was it a meaningful disclosure of the existence of a financial arrangement that might impact on its impartiality in promoting the Black Horse credit product for the purposes of the guidance at CONC 3.7.4G (2), nor in the circumstances was it a sufficient step to fairly manage the conflict of interest between itself and Mrs Y as required by Principle 8.

126. 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 Mrs Y to understand the existence of the financial arrangement in place between Black Horse 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 Mrs Y in some way:

    (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 Black Horse, 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.

127. 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 under CONC 4.5.4R, it would have needed to tell Mrs Y the amount if she had requested, 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 Mrs Y about the existence of the structured financial arrangements it had in place with Black Horse.

128. Nor – as I will explain later in this decision at paragraph 138 – 145 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.

In the alternative – Principle 7 and Principle 8

129. 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 Mrs Y 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 simply alert Mrs Y to the possibility that lenders may pay it fees for introductions, in order to fairly manage the conflict of interest as Principle 8 required (even if – as Black Horse 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.

130. 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.

131. The conflict between the interests of the Broker and those of Mrs Y 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 Black Horse (for example in preference to another lender) in the hope of earning commission, potentially to Mrs Y's detriment – as might ordinarily be the case with commission payments.

132. The discretionary commission arrangement in this case created an additional conflict and risk to Mrs Y'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, Mrs Y would pay more interest and it would receive more commission.

133. 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 Black Horse suggests CONC 4.5.3R required. I do not consider the Broker did enough to manage fairly the conflict and alert Mrs Y 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 Mrs Y, and communicate information to her in a way which was clear, fair and not misleading, simply by saying: it sourced lenders from a selected panel *and "Lenders may pay us a fee for these introductions".* Knowing that commission might be paid would not alert Mrs Y sufficiently, or fairly, to the true impact of the underlying commission arrangement, where the interest rate that the Broker arranged was incentivised to be higher than was necessary for the finance arrangement to be arranged.

Summary

134. Overall, for the reasons I have explained, I consider the Broker should have provided the information I have set out above at paragraph 126 in relation to both elements of the commission as a consequence of CONC 4.5.3R.

135. 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 Mrs Y'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 Mrs Y the existence of an arrangement by which it would receive a commission payment tied to the interest rate on the hire-purchase agreement and under which it had the discretion to select from a pre-determined range set by Black Horse, with a selection of a higher interest rate paying more commission.

136. These steps would have allowed Mrs Y 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 Mrs Y could reasonably have been expected to understand whether (or not) the Broker would actually receive a commission payment for arranging the hire-purchase agreement it ultimately arranged in her case.

- Even if the disclosure statement in the IDD could be said to have been enough to have alerted Mrs Y to the fact that the Broker would receive a commission payment for arranging the finance agreement it did, I can't see how by virtue of that statement alone Mrs Y could reasonably have been expected to understand anything of the structure of the commission arrangements relating to the hire-purchase agreement (and in particular that some of the commission the Broker would receive was tied to the interest rate it would select, or in the case of the Support Payment, that the commission was tied to the amount of credit provided).

137. I've not been presented with anything else that indicates Mrs Y was, or that she ought reasonably to have been, aware of the existence or structure of commission the Broker would be paid for introducing Mrs Y to Black Horse and arranging the hire-purchase agreement.

The January 2021 rule changes

138. In reaching my final conclusions about the Broker's regulatory obligations, I have considered carefully Black Horse's representations that the FCA did not highlight the use of brokers saying commission 'may' be paid as an issue in its review; nor did FCA require further elaboration until after the rule changes in January 2021. But I do not agree with Black Horse's characterisation of FCA's Motor Finance Final Findings and subsequent actions.

139. I accept that FCA was concerned – from its 2018 mystery shopping exercises – that some firms were not saying anything about commission. But it seems to me, having considered all of what 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.

140. For example, in CP 19/28 in which it proposed changes to the commission disclosure rules:

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.

141. In the same paper, the 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"*[17] as an example of firms interpreting commission disclosure rules inconsistently (and that it was one of the harms it wanted to address).

142. 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.

143. 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 – *'Do you agree with our proposed commission disclosure clarification?', at paragraph 3.12*:

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

[17] 4.7 CP19.28 Motor finance discretionary commission models and consumer credit commission disclosure.

the relatively minor changes we consulted on will help firms across all consumer credit markets consider what is right for customers to know.

…'

144. But even if I am wrong about what CONC 4.5.3R required in 2016, 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.

145. 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.

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

146. I am satisfied that if the Broker had disclosed the existence of the commission arrangements in the way I have concluded it should have, it's more likely than not that it would have given Mrs Y 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 the hire-purchase agreement.

147. I think it is likely that in those circumstances Mrs Y would have asked for further information about the commission payments before deciding whether to proceed. I say this because I think it's more likely than not that Mrs Y 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.

148. As I set out earlier in this decision, CONC 4.5.4R required the Broker to disclose – at Mrs Y'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 Black Horse.

149. It follows that if Mrs Y 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 on her, it would have been incumbent on the Broker to disclose the exact amount of commission it expected to receive for arranging the hire-purchase agreement. Such disclosure would have enabled Mrs Y to assess the potential impact on the Broker and her and determine whether to proceed on the basis suggested.

150. If the Broker had told Mr Y that it stood to receive a payment of £1,146.67 under the discretionary commission arrangement at 10.5% APR, and a further £152.38 Support Payment, I think it's unlikely Mrs Y would simply have agreed to the finance agreement on the terms proposed.

151. Whilst it is possible that Mrs Y may have had concerns about the Support Payment arrangement, I think it's very unlikely that knowledge of the amount of the Support Payment would have affected her decision: it was only a small amount of money (£152.38) and did not directly affect the interest rate she was being asked to pay; and she had previously been turned down for four loans, so was unlikely to have had many other options, or to think the Broker's impartiality was in practice affected by the Support Payment arrangement.

152. In contrast, I consider it more likely than not Mrs Y would have been concerned by the discretionary element of the commission and the impact that had on the amount she was required to pay in interest. I think Mrs Y 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 £1,146.67 more in interest than she would have had to pay if the Broker had selected the zero-commission paying interest rate. The discretionary commission accounted for more than half of the total charge for credit shown on the hire-purchase agreement, which Mrs Y would have to pay.

153. Following my Provisional Decision, and at my request, Mrs Y provided her own representations about what she would have done. Those representations support the possibility that Mrs Y 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 she might have done.

154. Mrs Y's representations about what she would have done are, as Black Horse has pointed out, somewhat contradictory. In particular, she says, if she had known about the commission arrangements, both that she would have gone to another dealer, and that she would have negotiated with the Broker. In addition, her representation that she would have sought to negotiate was made in response to a leading question posed by her representative. That does not of course make it untrue, but it does limit its persuasiveness and the weight I attribute to it.

155. I am also mindful in considering the weight to place on Mrs Y's representations that:

- Mrs Y's recollections of the sale and the discussion around the hire-purchase 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.

156. Having considered the position carefully, whilst I have no doubt Mrs Y 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.

157. I have considered all the circumstances and what I consider it is more likely than not someone in Mrs Y's position would have done if the Broker had given Mrs Y the information I consider it should have done. Having done so, I accept it is a small possibility that Mrs Y would have gone to another dealer to seek a different car and finance arrangement if she had been told more about commission. But like Black Horse, I think it's unlikely. Mrs Y was content with the deal – at least as she understood it at the time, and, as Black Horse has pointed out: she had been turned down for finance elsewhere and the rate, even with commission, was reasonably competitive – so I think it's unlikely Mrs Y would have thought she could do better by going elsewhere.

158. I accept it is also a possibility that Mrs Y would have gone ahead on the terms suggested. But again, I think it's unlikely. I say this because I think it is unlikely that Mrs Y 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 Black Horse, set the interest rate) and at Mrs Y's request the amount of commission.

159. I think it's unlikely Mrs Y would have been prepared to pay the interest rate selected so that the Broker could receive the commission it did for arranging the hire-purchase agreement, when Black Horse did not require her to pay that rate.

160. Overall, I think it's more likely than not that Mrs Y 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.

161. I think that is particularly likely to have been the case if Mrs Y had known that the Broker would also receive £152.38 under the Support Payment arrangement because it arranged the hire-purchase agreement, even if it had selected the lowest interest rate (and therefore received no commission under the discretionary commission arrangement).

162. These findings are relevant to my consideration of whether a court would conclude that the relationship between Black Horse and Mrs Y arising out of the credit agreement was unfair to Mrs Y under S140A CCA 1974 – see below: section *(n) Did Black Horse's conduct mean that its relationship with Mrs Y was unfair under ss140A-C CCA?* And these findings are also relevant to section *(q) Fair Compensation.*

(l) Did Black Horse act fairly and reasonably towards Mrs Y?

163. I'll now consider whether Black Horse acted (or failed to act) fairly and reasonably towards Mrs Y in all the circumstances of this case. In doing so, I will have regard to each of the following in turn:

    (i) Black Horse's own regulatory obligations.

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

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

164. As a regulated firm Black Horse was subject to 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.

165. In my view, and as I will explain in more detail below, Black Horse breached Principle 6 (and acted contrary to the guidance at CONC 4.5.2G) in circumstances where it entered into a discretionary commission model with the Broker which created a conflict of interest for the Broker by incentivising it, in order to obtain more commission for

itself, to set the interest rate for Mrs Y's credit agreement at a higher rate than that at which Black Horse had indicated it was prepared to lend.

166. 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 Mrs Y's credit agreement than Black Horse was otherwise prepared to lend to her at, I think this also made her relationship with Black Horse unfair for the purposes of s140A CCA.

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

(m) Did Black Horse meet its regulatory obligations to Mrs Y?

168. Black Horse 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)

169. 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*"

170. 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)."*

171. 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."*

172. 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 Mrs Y's complaint?

173. In summary, Black Horse says:

- A finding that it breached CONC 4.5.2G would be wrong in law and irrational.
- CONC 4.5.2G is non-binding guidance rather than a rule, so a breach does not give the customer a legal right to claim compensation.
- CONC 4.5.2G should be interpreted purposively. 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.
- When approached in this way, CONC 4.5.2G is concerned with certain arrangements that have the potential to incentivise credit brokers to inappropriately recommend unsuitable credit products to a customer. There is no suggestion that the credit agreement was unsuitable for Mrs Y.
- CONC 4.5.2G covers 'differential commission rates' – that is where rates differ based on factors such as volume of sales or sales targets. For example: a lender offering 2% commission for the first 50 sales, 4% for the next 50, then 6% and so on. The different rates could inappropriately incentivise a broker to sell a particular product to achieve the higher commission tiers.
- CONC 4.5.2G should correctly be read as relating to 'differential commission rates based on the volume and profitability of business' and 'payments based on the volume and profitability of business'. This is supported by commentary in *Butterworths Financial Regulation Service* ("*Butterworths*").
- Discretionary commission arrangements are not 'differential commission rates based on the volume and profitability of business' and there is no additional incentive (over and above the fact of commission itself) to prefer a lender's product

or recommend products inappropriately. So CONC 4.5.2G does not apply in the circumstances of this complaint.

— If discretionary commission arrangements were 'differential commission rates', FCA would have made changes to CONC 4.5.2G following its review.

174. I've considered what Black Horse has said carefully.

175. I accept that CONC 4.5.2G is guidance and not a rule. However, 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.

176. 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 Black Horse met the overarching requirements of Principle 6 and whether Black Horse acted fairly and reasonably towards Mrs Y.

177. 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.

178. 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.

179. 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 Black Horse in this case.

180. I am not persuaded by Black Horse's view that the purpose of CONC 4.5.2G was solely to deter lenders from entering into commission agreements with brokers which could encourage brokers to recommend unsuitable products.

181. 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'.

182. 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."*

183. In my view, it is probable – although I note Black Horse's arguments to the contrary – that 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 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.

184. 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, and
  - paragraph 5 of the box to paragraph 5.5 through CONC 4.5.4R.

185. 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.

186. But even if I am wrong about that and Black Horse 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 Black Horse's position that the loan was suitable for Mrs Y, so it followed the guidance in CONC 4.5.2G.

187. If Black Horse 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 Mrs Y entered into was not ultimately suitable for her because the interest rate of the loan was set at a higher rate than Black Horse 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 repayments, can make a product unsuitable for the borrower. In this case, whilst Mrs Y's options were limited, she could still have taken out the same product at a lower cost than the Broker submitted her application at.

188. Black Horse 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."

189. 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).

190. 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.

191. 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 that the FCA adopted that explanation, in preference to the arguably less meaningful term 'volume-over-riders', when drafting CONC 4.5.2G.

192. 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]*

193. 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. So, 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.

194. I note Black Horse says if discretionary commission models were caught by CONC 4.5.2G, the FCA would have made changes to CONC 4.5.2G in 2021 when it banned discretionary commission models. But I'm not persuaded by that.

195. CONC 4.5.2G applies to all consumer credit lending and all differential commission rate arrangements, whilst CONC 4.5.6R (prohibiting the use of discretionary commission arrangements in the motor finance sector since January 2021) only applies to motor finance agreements.

196. So, a lender may still enter into a discretionary commission arrangement with a broker in circumstances where this is justified by the extra work of the broker (and does not otherwise offend Principle 6) *and* the credit is provided to fund the purchase of something other than a motor vehicle. And I don't agree that interpreting CONC 4.5.2G in the way I have suggests a conflict between the concepts of differential commission rates and discretionary commission arrangements, or CONC 4.5.2G and CONC 4.5.6R.

197. Overall, I am not persuaded by Black Horse's conclusions about the application of CONC 4.5.2G to discretionary commission arrangements like the arrangement in Mrs Y's complaint.

198. For the avoidance of doubt, it isn't my finding that differential commission rates and discretionary commission arrangements 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 Black Horse entered with the Broker in this case as well as other models and agreements such as the alternative ones Black Horse has referred to in its submissions.

199. Taking all these things into account, I'm satisfied that the terms of business between Black Horse and the Broker which set out the discretionary commission arrangement in this case, is a *"commission agreement providing for differential commission rates"* which falls within the broad umbrella of CONC 4.5.2G.

200. And it follows that I am satisfied that Black Horse 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. For the avoidance of doubt, I do not consider the Support Payment Arrangement 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?

201. Black Horse has provided additional information from the Broker about what happened at the point of sale, which I have taken into account when considering the relevance of CONC 4.5.2G to this complaint and whether the payments Black Horse made in Mrs Y's case were justified based on extra work carried out by the Broker.

202. It appears that the Broker did carry out, at least some, more work when arranging Mrs Y's motor finance than it would normally do when arranging the average credit agreement for a motor vehicle. The Broker restructured the arrangements to account for the negative equity Mrs Y had on her existing vehicle (although I do have some concerns about the impact inflating the purchase price on Mrs Y's Black Horse hire-purchase agreement could have had).

203. The Broker also submitted Mrs Y's original credit application to multiple lenders before restructuring the application in the way it did and submitted two proposals to Black Horse – although I'm not necessarily persuaded that submitting more than one application electronically (which at first glance appears to have been done at the same time) involved much extra work.

204. In any event, regardless of my concerns about just how much extra work the Broker actually carried out here, the fact remains that under the terms of the discretionary commission agreement between Black Horse and the Broker, the Broker was given the discretion to choose the interest rate irrespective of any extra work being carried out.

205. I note there isn't anything in the commission agreement Black Horse has provided to indicate that the interest rate selected under the discretionary commission arrangement reflected the amount of extra work undertaken by the Broker, or 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.

206. In those circumstances any extra work that the Broker carried out when bringing about Mrs Y's arrangement was incidental to the differential commission rate here rather than a justification for it.

207. In those circumstances, I'm not persuaded I can safely conclude that the differential commission rate agreement Black Horse entered into with the Broker was justified based on extra work that the Broker carried out. It follows I find Black Horse did not follow the guidance in CONC 4.5.2G.

208. And I'm satisfied that Black Horse's failure to follow the guidance in CONC 4.5.2G means that Black Horse failed to pay due regard to Mrs Y's interests and treat her fairly.

Principle 6 and CONC 4.5.2G – overall conclusions

209. As I have explained above, the discretionary commission arrangement Black Horse 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 Mrs Y paid, such that the Broker was incentivised to set the interest rate at a higher rate than Black Horse would have lent at. In this case, the Broker selected the highest rate.

210. This arrangement created an inherent conflict of interest for the Broker by incentivising it to set the interest rate at a higher rate, to obtain more commission for itself, than Black Horse had indicated it was prepared to lend at. It created the possibility that Mrs Y might end up paying a higher interest rate than Black Horse was prepared to lend to her at, for no other reason than the Broker deciding to take more commission.

211. Apart from the 'range' Black Horse set, 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).

212. In those circumstances I am satisfied that Black Horse's introduction of the discretionary commission arrangement and use of it in connection with Mrs Y's hire-purchase agreement meant that Black Horse failed to have due regard to Mrs Y's interests and treat her fairly.

213. 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 Black Horse'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.

214. 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 Black Horse is right about the application of CONC 4.5.2G to this complaint, that it must have paid due regard to Mrs Y's interests and treated her fairly.

215. Even if CONC 4.5.2G does not apply, I am satisfied that the discretionary commission arrangement allowed the Broker an unfettered discretion to set the interest rate at a higher level for the sole purpose of receiving more commission. This meant Mrs Y ended up paying a higher rate of interest than Black Horse 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 Black Horse failed to pay due regard to Mrs Y's interest and treat her fairly.

216. 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 Mrs Y's case have been made. 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 Mrs Y's case, I'm satisfied Black Horse 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 dealings with Mrs Y.

217. I note Black Horse's view that: a finding that 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. But I am not persuaded by these arguments.

218. I do not consider that the absence of a remediation exercise 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.

219. 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 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.

220. Overall, I am not persuaded Black Horse paid due regard to Mrs Y'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 Black Horse treated Mrs Y fairly and reasonably in all the circumstances.

221. I do not consider that unfairness extends to the Support Payment arrangement. Whilst it was incumbent on the Broker in the circumstances of this complaint to disclose the existence of the Support Payment arrangement, taking into account the features of that arrangement, I do not consider Black Horse's implementation and operation of that agreement meant it failed to have due regard to Mrs Y's interest and treat her fairly.

(n) Did Black Horse's conduct mean that its relationship with Mrs Y was unfair under ss140A-C CCA?

222. 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 Mrs Y's complaint.

223. 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) Black Horse may not have acted fairly and reasonably towards Mrs Y.

The law relating to unfair relationships

224. Ss140A-C CCA apply to a creditor and a debtor who have entered into a credit agreement. In this instance, Black Horse was Mrs Y's lender for this hire-purchase agreement. Therefore, it is a creditor for the purpose of s140A CCA and Mrs Y is a debtor, and the hire-purchase agreement is a credit agreement.

225. So, I'm satisfied that 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 Mrs Y'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.

226. I note Black Horse considers this to be an improper and impermissible approach, but its comments betray a fundamental misunderstanding of the basis on which I am required to determine complaints.

227. 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)."

228. In *Plevin*[18] 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."

229. It is my understanding that Mrs Y's agreement ended in June 2017. Nonetheless, I'm satisfied that s140A remains a relevant consideration as s140A(4) provides that *"A determination may be made under this section in relation to a relationship notwithstanding that the relationship may have ended."*

230. 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.

231. I think that, for a number of separate reasons, a court would likely find the relationship between Black Horse and Mrs Y unfair, and I take this into account separately in determining whether Black Horse acted fairly and reasonably towards Mrs Y as set out below.

Unfair relationships – conflict of interest

232. Firstly, having given careful thought to the matter, I'm satisfied that Black Horse'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 Mrs Y in the way it did) was something done by the creditor within s140A(1)(c) which meant the relationship between it and Mrs Y could potentially be unfair to Mrs Y, and in the circumstances of this case was ultimately unfair to Mrs Y.

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

233. Black Horse's operation of this discretionary model meant that, subject to respecting the flat interest range of 2.49% and 5.5%, it delegated the setting of the interest rate Mrs Y would pay to the Broker. As described above, Black Horse's commission model not only delegated the power to set the rate to the Broker, but it also created an inherent conflict between the interests of Mrs Y and the interests of the Broker by linking the amount of commission the Broker would receive to the interest Mrs Y would pay on her agreement, thereby incentivising the Broker not to reduce the interest rate. This meant that the higher Mrs Y's interest rate was set, up to a maximum of 5.5%, the more commission the Broker would receive.

234. So, the Broker was financially incentivised to choose a higher interest rate for Mrs Y. And the Broker's failure to manage the conflict between its interests and those of Mrs Y, and its decision to select the 5.5% flat interest rate in this case ensured that it received the highest amount of commission and Mrs Y ended up with an agreement with the highest rate of interest. Indeed, more than half of the total charge for credit Mrs Y was required to pay – some 55% of the total charge – was paid to the Broker as commission.

235. When I issued my Provisional Decision, my understanding was that Black Horse's view was that the effect of finding a court would consider the introduction and operation of the discretionary commission arrangement in Mrs Y's case created an unfair relationship, is to limit its ability to determine the price – i.e. the interest rate – it received for its product in a way that other goods and services providers aren't limited. I said that I did not find this argument to be persuasive because:

- Black Horse is making this argument in circumstances where the arrangement it entered into meant that it had already handed over the power to determine the interest rate Mrs Y was charged and therefore its ability to determine the price and what it would receive over to the Broker.

- And the commission agreement between Black Horse and the Broker indicates that Black Horse itself would receive the same price for its product whether the flat rate selected was 2.49% or 5.5%, as all of the extra interest was going to the Broker.

236. Black Horse has since clarified its submission. It says: in any commercial transaction the seller will usually want to achieve the highest price and the buyer the lowest. That does not mean there is unfairness. To find unfairness in those circumstances would be to treat financial service providers seeking the highest price (i.e. the interest rate) differently to other providers of goods and services.

237. I am not persuaded by this analogy, not least because this is not a case of a lender seeking to gain the highest price for its product for its own benefit. But in any case, the effect of the unfair relationship provisions of the CCA mean that consumer credit providers do not have a free hand to seek the highest price in all circumstances, even if other providers of goods and services do. If the terms of the agreement around price are unfair to the debtor – for example because, using the terminology of the legislation which preceded s140A CCA, it amounted to an extortionate credit bargain – then a court might well take steps to address that unfairness and in doing so limit the credit providers freedom to seek the highest price.

238. Equally while Black Horse also says that the FCA hasn't banned credit brokers from having discretion to reduce the interest on an agreement, I am not persuaded that is the key consideration here.

239. The unfairness here isn't so much that the Broker had the ability to reduce the interest rate as it is that Black Horse's commission model: (i) created an inherent conflict of interest between the Broker's interests and Mrs Y's interests; and (ii) incentivised the Broker not to reduce 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 Mrs Y's credit agreement.

240. Indeed, the particular discretionary commission arrangement in this case – a Reducing DiC model – arguably increases the incentive of the Broker to submit an application at the highest rate possible. This is because the structure of the model itself creates the perception that the commission already belongs to the Broker and it has to give up something that it already has and is entitled to, in order to reduce the rate.

241. In any event, what is clear here is the higher Mrs Y's interest rate was (up to a maximum flat rate of 5.5%) the more commission the Broker would receive. And in Mrs Y's case, the Broker ensured it received the highest amount of commission.

242. I note Black Horse's view that: my conclusions overstate the relevance and the impact of the potential conflict; that a feature of a transaction may be harsh to the debtor, but not necessarily make the transaction unfair as the features may be required to protect the legitimate interests of the creditor; that all commission arrangements create a conflict of interest, and it was for the Broker – under FCA rules – to manage that conflict under the regulator's rules. But I am not persuaded by them.

243. I accept that as a general proposition, all commission models are likely to have at least some potential to create a conflict between the interests of a broker and their customer. But what distinguishes the arrangement introduced and operated by Black Horse in this case and makes the relationship unfair to Mrs Y is the extent of that conflict and the incentives the arrangement gave to the Broker to set higher interest rates for its own benefit and at Mrs Y's cost, as the Broker did in this case.

244. I accept – as I explained earlier in this decision – that:

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

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

245. If the Broker *had* disclosed that information to Mrs Y, I accept a court might take the view that the unfairness to Mrs Y – created by Black Horse's introduction and operation of the discretionary commission arrangement – was negated by the disclosure. But I think a court would find the arrangements Black Horse 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.

246. In this case (as I considered earlier in this decision) Black Horse submits that: to comply with the regulatory requirement to fairly manage the conflict between the Broker's interests and those of Mrs Y, the Broker needed only to have told Mrs Y that *'lenders may pay us a fee for these introductions'*, as the Broker disclosed in this case. I do not agree with Black Horse's view about that.

247. But, *if* Black Horse 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 Mrs Y'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 Mrs Y in this case was sufficient to meet the Broker's regulatory obligations.

248. I am also not persuaded a court would find that an arrangement giving the Broker control of the setting of the interest payable on the loan (over and above the amount Black Horse required for its own purposes), for the purpose of allowing the Broker to determine the commission it would receive, was required to protect Black Horse's legitimate interests.

249. For completeness, I do not think it is likely a court would find that operating the Support Payment arrangement made the relationship unfair.

Unfair relationships – inequality of knowledge and understanding

250. I also find that Black Horse's failure to disclose to Mrs Y 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 Mrs Y's credit agreement was another thing done or not done by, or on behalf of, the creditor which made Black Horse's relationship with Mrs Y unfair to Mrs Y.

251. Both Black Horse 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 Mrs Y would have to pay. Mrs Y did not.

252. I think it's more likely than not that, if she had known about the Broker's role in selecting the interest rate and the link to commission, Mrs Y would, as a minimum, have questioned whether to enter into the hire-purchase agreement, at least on the terms offered, and she is likely to have challenged why she was having to pay a higher rate of interest than the lender was prepared to offer, simply because the Broker wanted to be paid a higher rate of commission.

253. In addition, in Mrs Y's case, I think a court would also likely conclude that the amount of the commission and the impact that had on Mrs Y's interest rate – equivalent to 55% of the total charge for credit – also meant the relationship between Black Horse and Mrs Y was unfair to Mrs Y in circumstances where the amount of commission was not disclosed to Mrs Y.

254. Again, if Black Horse had disclosed the amount of commission and the impact that had on Mrs Y's interest rate, I consider that would also have given Mrs Y pause for thought – as she is unlikely to have expected so much of the interest charges to be going to the Broker as opposed to the lender.

255. If Black Horse had disclosed the basis on which it would be paying commission to the Broker and, in this case, the amount payable and the impact it had on the interest rate, that would have removed the unfairness as it would have allowed Mrs Y to make a properly informed decision about the hire-purchase agreement.

256. 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 – the regulatory requirement to disclose the 'existence of commission' and, if asked, the amount, rested with the Broker.

257. But I think it is more likely than not a court would still find the relationship unfair to Mrs Y by virtue of:

- Black Horse'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); and separately:

- by Black Horse's failure to disclose the existence of the commission with its structure and the impact that it had on Mrs Y's interest rate in circumstance where the commission payment accounted for 55% of the interest Mrs Y was charged.

258. As before, if Black Horse is right that the regulatory requirement on the Broker to disclose the existence of commission meant that the Broker needed only to have told Mrs Y 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 Black Horse 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 Mrs Y's credit agreement. In my view, the disclosure made by the Broker in Mrs Y's case would have done little to alert her to the source of unfairness.

259. In reaching my findings about the unfairness to Mrs Y caused by the inequality of knowledge, I have carefully considered Black Horse's representations that the Supreme Court's comments about inequality of knowledge in *Plevin* were made in the context of a different transaction and financial product (Payment Protection Insurance) and the two products should not be treated comparatively. But they do not persuade me to alter my conclusions.

260. 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 Mrs Y would reasonably have expected, meant that it was incumbent on Black Horse to disclose information about the arrangements to her.

261. For completeness, it is not my finding that the unfair relationship arose solely because Black Horse did not disclose to Mrs Y that it was willing to accept a lower price (as Black Horse has sought to argue).

262. Finally, I note Black Horse's view that I was wrong to use the cost of credit as the comparator when making the finding that the undisclosed amount and impact on the interest rate (55% of the cost of credit) made the relationship unfair. It says the amount of commission should be compared to the total amount payable for the vehicle – a much lower percentage.

263. Again, I am not persuaded by Black Horse's representations. The issue here is the impact the discretionary commission arrangement had on the cost of credit (the price of the credit agreement, which the Broker was permitted to set – and did set – at a rate more than twice what Black Horse would have accepted) and the fact Mrs Y entered

the hire-purchase agreement in ignorance of those arrangements and the impact it would have on the cost of credit.

264. Again, my findings in this respect are limited to the discretionary commission arrangement and do not apply to the Support Payment arrangement.

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

265. In addition to the above, I also consider it is likely that Black Horse's failure to comply with Principle 6 taking into account CONC 4.5.2G (which I have already considered above) would also lead a court to find that the relationship between it and Mrs Y was unfair to Mrs Y.

266. 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.

267. As I have found, the discretionary commission agreement between Black Horse and the Broker did not require the Broker to conduct extra work in order to obtain a higher rate of commission and overall Black Horse failed to have due regard to Mrs Y's interest and to treat her fairly as required by Principle 6. I consider Black Horse's failure to comply with CONC 4.5.2G and Principle 6 is yet another thing done by Black Horse 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 Black Horse's relationship with Mrs Y was unfair under s140A CCA.

268. Again my findings of unfairness relate only to the discretional commission arrangement and do not extend to the Support Payment arrangement.

269. The sources of unfairness I've set out (in paragraphs 232 to 267) are things done or not done by Black Horse that I think would likely lead a court to find that Black Horse's relationship with Mrs Y was unfair to Mrs Y 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 Black Horse and why this reinforces my view that a court is likely to find that Black Horse's relationship with Mrs Y was unfair under s140A CCA.

Unfair relationships – anything done or not done on behalf of Black Horse - the Broker's acts/omissions when bringing about Mrs Y's hire-purchase agreement

270. I also 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)[19] CCA – another thing to be regarded as done or not done by, or on behalf of, Black Horse which made the relationship between Black Horse and Mrs Y unfair to Mrs Y.

[19] 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'.*

271. I've already explained when considering the preliminary questions earlier in this decision, why I consider that the wording of the Broker's IDD was 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 Mrs Y 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 Mrs Y as it should have done as a step to comply with Principle 8 in any event.

272. 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)"*. 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"*.

273. 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)".*

274. 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"*.

275. *Forthright Finance Ltd v Ingate*[20] 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.

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

277. In my view, the term "antecedent negotiations" is broad enough to cover failures by the Broker in this case to comply with its own regulatory obligations in arranging the credit that Mrs Y 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).

278. As a result, in my view, the pre-contractual negotiations that took place between the Broker and Mrs Y 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"*.

279. In other words, when conducting the pre-contractual negotiations with Mrs Y, the negotiations conducted by the Broker in relation to the sale of the vehicle and the

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

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 Black Horse.

280. 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.

281. Support for this can be found in the Court of Appeal's decision in *Scotland & Reast*[21], which has recently been followed in *Smith v Royal Bank of Scotland Plc*[22].

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

283. 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).

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

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

286. It follows that the Broker's own regulatory breaches/failures when arranging the credit for Mrs Y (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 Black Horse. In turn, this is to be treated as constituting a thing done (or not done) by or on behalf of Black Horse 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), which mean that a court is likely to regard the relationship between Black Horse and Mrs Y to have been unfair under s140A(1)(c).

Unfair relationships – overall conclusions

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

287. Overall, therefore, for the various reasons I have identified above, I consider that a court would likely find that Black Horse's relationship with Mrs Y was unfair under s140A CCA and that each of the unfair relationship grounds I have identified are reasons why Black Horse failed to act fairly and reasonably towards Mrs Y.

288. 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 Black Horse 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 Mrs Y 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 Black Horse and Mrs Y unfair under s140A CCA.

289. 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?

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

291. Black Horse agreed with my ultimate conclusion not to uphold the complaint for this reason, but not with my conclusion that the principles of *Wood & Pengelly* are capable of applying to 'half-secret' commission. It invited me to exclude the secret commission findings from my final decision. Mrs Y told us that she has no objection to this and, so far as is necessary, is happy to withdraw this element of her complaint.

292. Whilst I note, the parties' comments about the findings in my Provisional Decision, I am satisfied that it remains appropriate for me to 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.

293. 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 recommendation 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.

294. 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.

295. Black Horse says *Wood & Pengelly* isn't relevant to Mrs Y's complaint because, among other reasons, her complaint involves "half-secret" rather than a "fully secret" commission. Instead, the Court of Appeal's decision in *Hurstanger Ltd v Wilson*[23] ("*Hurstanger*") remains applicable, which requires the existence of a fiduciary

[23] *Hurstanger Ltd v Wilson* [2007] EWCA Civ 299.

relationship between the Broker and Mrs Y. On the facts, it says, there was no such fiduciary relationship.

296. I note Black Horse'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. 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 recommendation to Mrs Y 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 Mrs Y for the reasons I shall explain.

297. The IDD which Black Horse says set out the services the Broker could provide Mrs Y with, said at the third bullet in the section "Whose products do we offer?":

> *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 may 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.*

298. Having considered how the Broker explained its role in arranging this agreement with Black Horse, 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 recommendation to Mrs Y on an impartial or disinterested basis.

299. 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 recommendation in relation to the credit broking it provides. 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.

300. So from my review of the IDD, it does not appear that the Broker was under a duty to be impartial and to give Mrs Y disinterested advice, information or recommendations. The IDD made clear that the Broker would not provide advice or recommendation to Mrs Y. And once the Broker had provided Mrs Y 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), Mrs Y had to make her own choice on how to fund the purchase of her vehicle.

301. For these reasons, I don't think that a court would be likely to find that Black Horse, in paying commission to the Broker in the circumstances of this case, did so in breach of

the principles in *Wood & Pengelly.* However, for the reasons I've already explained in the two preceding sections of this decision, I, in any event, remain satisfied that Black Horse did not act fairly and reasonably towards Mrs Y.

(p) Conclusions

302. As set out above, I'm satisfied that Black Horse failed to act fairly and reasonably in its dealings with Mrs Y 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, Black Horse acted contrary to the guidance at CONC 4.5.2G and failed to have due regard to Mrs Y's interests and treat her fairly as required by Principle 6.

- It is likely a court would conclude that the relationship between Black Horse and Mrs Y was unfair to Mrs Y under s140A of the CCA for each of any of the following separate reasons:

  (1) Black Horse'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 Mrs Y by linking the amount of commission the Broker would receive to the interest Mrs Y paid. This created an unfair relationship both generally and because it meant Black Horse failed to comply with Principle 6 and CONC 4.5.2G.

  (2) The inequality of knowledge and understanding created by Black Horse'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 Mrs Y 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 Black Horse.

303. My findings that Black Horse acted unfairly and unreasonably are limited to the discretionary commission arrangement in this case. I am not persuaded Black Horse acted unfairly and unreasonably by operating and applying the Support Payment arrangements.

304. I will now go on to consider what impact Black Horse's failure to act fairly and reasonably on Mrs Y had and what would be fair compensation in all the circumstances of the complaint.

(q) Fair compensation

305. It seems to me that the appropriate starting point in determining fair compensation is to consider whether – had Black Horse acted fairly and reasonably in its dealings with

Mrs Y – Mrs Y would have ended up in a better position overall, including in relation to the credit agreement.

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

What was the impact of Black Horse's failure to pay due regard to Mrs Y's interests and treat her fairly?

307. I am satisfied in this case, the discretionary commission arrangements Black Horse 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 the highest level within the permitted range and so received the highest commission possible under the discretionary commission arrangement (£1,146.67). 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 Mrs Y presented.

- It is therefore possible that the interest rate Mrs Y paid on the hire-purchase agreement was higher than she would have paid had Black Horse 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 Black Horse would have lent to Mrs Y at the flat interest rate of 2.49% (4.8% APR), which would have satisfied Black Horse's own income requirements see paragraph 65 above.

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

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

309. This discretionary commission arrangement created an inherent conflict of interest and incentivised the Broker not to reduce the interest rate. So the impact of the unfairness created by the introduction and operation of the model is likely to be the possibility Mrs Y paid a higher interest rate than she would have done.

310. 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 Black Horse, and, separately, Black Horse's own failure to disclose the basis on which it would pay commission and the amount as a matter of fairness given the inequality of information and understanding, made the relationship unfair to Mrs Y.

311. 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 Mrs Y?*), 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 Mrs Y 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.

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

313. 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.

314. 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 also mindful in that context that the credit agreement in this case was settled in June 2017.

Mrs Y's comments about redress

315. In her initial representations, Mrs Y said she should receive a refund of all of the payments she made under the hire-purchase agreement plus interest at the rate of 8% from the date each payment was made.

316. As I explained in my Provisional Decision, I am not persuaded by Mrs Y's original view that she should receive a refund of all the payments she made, plus interest. I'm mindful Mrs Y was in a position where she required, or at least considered it appropriate to take out a finance agreement (whether with Black Horse or someone else) in order to proceed with her purchase of her chosen vehicle, rather than (for example) proceeding as a cash purchase.

317. So Mrs Y had the benefit of the loan and it's unlikely that her decision to take out a finance agreement would have been different if the interest rate had been lower than the amount she actually paid under the hire-purchase agreement.

318. Mrs Y also had the benefit of the vehicle financed by the agreement and it would appear she was also able to repay the shortfall on her existing finance agreement by taking out the hire-purchase agreement. And whilst I note and accept that Mrs Y says she didn't ultimately *need* to purchase a new car, I think it's unlikely she would have chosen not to buy just because she had more information, or if it cost her less.

319. As this was the case, I think that a refund of all the payments Mrs Y made under the hire-purchase agreement, which would in effect also amount to a refund of the capital advanced as well as the interest paid, in circumstances where she clearly received a benefit from the arrangement, would over-compensate her and would not be fair in all the circumstances.

320. So to start with I'm satisfied it would be fair to approach the question of fair compensation on the basis that Mrs Y would always have had to repay the capital amount she was lent.

321. Further, as I consider it very unlikely that Mrs Y would have obtained finance without paying *some* interest, and it was the particular, higher, interest rate she was charged as a result of the discretionary commission arrangement in place between Black Horse

and the Broker, rather than the act of charging her interest at all, which is the product of the unfairness in his case, I think it would be fair to assume that Mrs Y would have paid some interest when considering what she should fairly receive by way of compensation.

322. In those circumstances, I'm satisfied a refund of all the interest Mrs Y paid under the hire-purchase agreement, would overcompensate Mrs Y and would be disproportionate to the unfairness I seek to address.

323. I'm satisfied that Mrs Y would always have paid some interest. The question that remains for me to determine is what would it be fair for Mrs Y to receive by way of compensation – to fairly remedy the unfairness I have identified as a result of the operation and non-disclosure of the discretionary commission model and the likelihood she paid more interest than she would otherwise have done if Black Horse had acted fairly and reasonably.

324. For completeness, I note Mrs Y's view about compensation has in any event evolved since her initial complaint. In response to my Provisional Decision Mrs Y said she considered my redress proposals set out in the Provisional Decision to be fair in all the circumstances.

Black Horse's comments about redress

325. Black Horse says Mrs Y received a fair interest rate (which she would have received in any event) and therefore didn't suffer any loss, so no compensation is due even if I were to find, as I have done, that it didn't act fairly and reasonably towards her.

326. Black Horse has also told us that: the rate Mrs Y paid (10.5% APR) was only slightly higher than the Broker's headline advertised rate at the time (9.5% APR) and meant it received a comparable commission payment to the Broker's average (and less commission than Black Horse typically paid the Broker in 2021 following the FCA ban on discretionary commission arrangements, when the Broker's advertised rate was 8.9% APR).

327. Whilst I do not rule out the relevance of the perceived competitiveness of the interest rate Mrs Y paid entirely or the evidence about the interest rates charged by the Broker after the FCA's ban in 2021, I think these things are of limited relevance where the evidence suggests the consumer could – as a matter of fact – have obtained a lower rate, as is the case here. In this case, the Broker could have submitted a finance application for Mrs Y at a flat interest rate of 2.49% (4.8% APR) and Black Horse would have accepted that rate.

328. I also note Black Horse's submissions that: the market wouldn't have sustainably operated if brokers were to routinely have submitted applications at the zero discretionary commission paying rate; and that the zero-discretionary commission 4.8% APR was far lower than average APR's.

329. 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. But it seems to me that is ultimately a hypothetical proposition.

330. I am required to determine complaints based on the individual circumstances of the complaint. In this case, Mrs Y could – as a matter of fact – have borrowed at a flat interest rate of 2.49% (4.8% APR) under the discretionary commission arrangement. Black Horse was willing to lend to her at that rate (notwithstanding that was lower than average APRs) 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.

331. So I think it's appropriate to approach the question of fair compensation, from the starting point that in Mrs Y's case, Black Horse would have been prepared to lend to her at the flat interest rate of 2.49% and if it had done so the Broker would have received £152.38 under the Support Payment arrangement, but nothing under the discretionary arrangement.

What interest rate would Mrs Y have paid if Black Horse had acted fairly and reasonably?

332. Whilst Mrs Y could in principle have taken out the finance agreement at a flat interest of 2.49% (APR 4.8%) I am mindful, when considering the position Mrs Y would have been in if Black Horse had acted fairly and reasonably, that it does not necessarily follow that Mrs Y would have received the lowest interest rate offered within the discretionary arrangement if the model had operated in a different way.

333. If Black Horse 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 example, 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.

334. 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 Black Horse was prepared to offer Mrs Y in April 2016, beyond Black Horse's general and high-level representations, for example about the APRs offered at the time by other brokers, average APRs including the fact that, immediately following the ban on motor finance discretionary commission arrangements, the Broker's advertised rate was 8.9% APR.

335. I am also mindful that in this case, the Broker stood to receive £152.38 for arranging Mrs Y's loan under the Support Payment arrangement, so it is also possible that Black Horse may have had limited or no further commission costs for it to pass on to Mrs Y under a different model. I note, however, Black Horse's representation about the commission levels it typically paid the Broker in 2016 when the discretionary commission arrangement was in place and following the ban in 2021 under different arrangements, which involved higher payments.

336. Ultimately, I am mindful that in this case the only certainty is that Black Horse would have lent to Mrs Y at a flat interest rate of 2.49% (APR 4.8%) notwithstanding the difficulties Mrs Y had obtaining finance at the time.

337. Whilst I accept its possible Mrs Y might have paid a higher interest rate than that under a different commission arrangement, ultimately, I think it is reasonable to place more weight, when considering what interest rate Mrs Y might have paid, on the rate the evidence shows Black Horse would have lent to her at, than the other more hypothetical possibilities.

338. Overall, based on the evidence presented to date, 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 currently persuade me to depart from the starting proposition that Black Horse would have lent to Mrs Y at a flat rate of 2.49%.

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

340. 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 Black Horse is deemed responsible), or if Black Horse itself had disclosed the position, Mrs Y 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.

341. I think it's unlikely that Mrs Y 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 Support Payment – albeit the amount of Support Payment the Broker would receive for arranging Mrs Y's credit agreement was a relatively modest amount.

342. In this case the events occurred in 2016 and the service the Broker provided was limited to introducing Mrs Y to a lender (the Broker did not give her advice). I consider it more likely than not that Mrs Y would have taken the view that the £152.38 payment the Broker stood to receive under the Support Payment arrangement was sufficient for introducing her to Black Horse. I do not consider the Support Payment to be the be all and end all here - particularly as the Broker also stood to make a profit from the sale of Mrs Y's vehicle regardless of any commission Black Horse paid to it. In any event, I think what is important here is that it's fairest to assume Mrs Y would not have been prepared to pay more from her own funds (which was the effect of the discretionary commission arrangement) for the service.

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

344. I note in reaching this conclusion, Black Horse's view that neither the Broker nor it would have disclosed the interest range (given the commercial sensitivities) even if the Broker had made the disclosure I suggest it should have done. So it would not have been open to Mrs Y to negotiate a loan at the lowest interest rate.

345. I am not persuaded by Black Horse's representations about this.

346. 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 Mrs Y would have questioned the arrangement, particularly given the direct link between the commission payable and the interest she would have to pay.

347. I found that at Mrs Y's request, the Broker would ultimately have disclosed the amount of commission it would receive and Mrs Y would have sought to renegotiate the terms of the finance agreement to pay less commission.

348. In my view, Mrs Y would not have needed to know the interest rate floor to achieve that result – 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.

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

350. 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. It may 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 suggest that either element of the commission payments led to a reduction in the car price (so that the price was lower than it would have been if Mrs Y had bought the car outright with her own funds), and so I do not consider that possibility alone provides a persuasive basis to reach a different conclusion about the likely interest rate Mrs Y would have paid."

351. Since my Provisional Decision Black Horse has confirmed that Mrs Y paid the full advertised sticker price for the car. I am therefore satisfied that the commission payment did not, as a matter of fact, have any impact on the price Mrs Y paid for the car in this case. The Broker did not discount the car price it charged Mrs Y because it received commission for arranging finance for her and I am satisfied Mrs Y would not have paid more than she did (the full price) even if she had taken the car out without finance (and there had been no commission).

352. Similarly, whilst I note Black Horse's representations that the advertised price of the vehicle was £962 less than the CAP guide price, there is no evidence to suggest the difference was a direct consequence of the payment of commission. Rather, the price set seems simply to reflect the Broker's informed assessment of the appropriate marketing price for the particular second-hand car it was selling.

353. I note Black Horse's representations that the Broker would not have proceeded with the sale of the car at the zero discretionary commission paying interest rate. Whilst Black Horse is unable to provide any contemporaneous evidence to support its assertion, I accept it is a possibility that the Broker would not have agreed to the lower rate and zero discretionary commission – it would have meant that the Broker would have made less money from the overall transaction.

354. But I am mindful that even if the Broker had received only the Support Payment of £152.38 by way of commission, it would still have had considerable incentive to proceed with the sale. Irrespective of the Support Payment, I'm also mindful of the specifics of Mrs Y's particular transaction.

355. In addition to £152.38 Support Payment, the Broker stood to achieve a mark-up of £1,738 for selling the car Mrs Y bought and potentially further money from selling the part exchange vehicle which it bought from Mrs Y for £2,500 but – Black Horse says – had a CAP retail guide price value of £3,895 (and was ultimately sold a week later for £3,688).

356. So, allowing for VAT, the Broker stood to receive around £2,500 in commission and gross profit from vehicle sales if it accepted zero commission under the discretionary commission arrangement. Whilst I accept this would not all be profit – there would have been other costs associated with cleaning and marketing the vehicles for example, this would still appear to be a strong incentive for the Broker to sell the car even without the discretionary commission payment.

357. Overall, I am satisfied it is more likely than not and fairest to assume that Mrs Y could have negotiated a zero discretionary commission interest rate in the circumstances of this complaint.

The shortfall on Mrs Y's existing loan and VAT

358. This case is slightly unusual because Black Horse says the Broker's decision to set the interest rate at the highest level was in part driven by the additional VAT costs it incurred by restructuring the agreement to allow Mrs Y to buy and benefit from the car and repay an existing finance agreement for a car which was in negative equity.

359. As I explained earlier in this decision (see paragraphs 26-31), Black Horse has not been able to provide any specific contemporaneous (or indeed more recent) evidence from the Broker to support its own conclusion that the Broker increased the interest rate for that reason.

360. The evidence shows only that the Broker submitted an application to Black Horse on 5 April 2016, another at a higher interest rate with a more specific outstanding loan balance on the 7 April 2016 and Mrs Y completed the car order on the 8 April 2016. The evidence does not show why the interest rate changed, not does it prove or disprove that the application made on 5 April 2016 was not at a level the Broker was prepared to transact at as Black Horse suggests.

361. There may have been many reasons for the change to the interest rate proposed between the application of 5 April and 7 April. For example, given Mrs Y had been turned down for four loans on 3 April, the Broker may simply have been testing the waters to see whether Black Horse would lend when it submitted its proposal on 5 April in an attempt to resurrect the car sale and the 7 April proposal may have been a more considered application and simply reflected the Broker's desire to achieve the highest commission payment possible.

362. It is also possible that if Mrs Y had sought to negotiate the terms of the finance agreement the Broker would have been prepared to forgo a discretionary commission payment to cover the additional VAT to ensure that the sale went ahead. As I have explained, the Broker stood to make a considerable profit on the part exchanged vehicle, sufficient to cover the additional VAT from reshaping the deal.

363. Overall, whilst I accept it is possible that Mrs Y would have agreed an interest rate which gave the Broker sufficient commission under the discretionary commission arrangement to cover the increased VAT charges it would incur as a consequence of structuring the arrangement in a way that allowed her to purchase the car, I am not persuaded I can safely conclude it is more likely than not.

364. And, having considered all the evidence and arguments about redress, my final decision is that Black Horse should compensate Mrs Y by paying her:

— the difference between (i) the payments she made from time to time under the finance agreement (at the flat interest rate of 5.5%) and (ii) the payments she would have made (including when she settled the loan early) had the finance agreement been set up at the lowest (zero discretionary commission paying) flat interest rate permitted (that is 2.49%); together with

— interest on each overpayment payment 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.

365. 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 Black Horse and Mrs Y to be unfair under s140A CCA, taking into account the court's wide discretion to remedy the unfairness of the relationship between Black Horse and Mrs Y – as set out in s140B CCA which I referred to earlier in this decision.

366. I note Black Horse's representations that the interest rate of 8% simple is too high, unfair and higher than a court would award if it found there to be an unfair relationship. But I am not persuaded to alter my view about what constitutes a fair interest rate to compensate Mrs Y for being deprived of money in this case.

367. I am mindful – as Black Horse has pointed out during the course of the complaint that consumer borrowing rates are typically higher than the 8% simple I am awarding here – for example Black Horse says personal loan rates ranged from 3.49% to 29% at the time, and in my experience credit card and overdraft rates are also typically higher. Overall, I am satisfied 8% simple is a fair rate to use in this case.

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

— Requiring Black Horse to pay Mrs Y 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 Black Horse will incur a (greater) loss from the transaction, Black Horse having already paid those interest payments and more (as Mrs Y repaid the loan early) to the Broker as commission.

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

369. 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 Black Horse is the respondent) and, having considered all the evidence and arguments, I am satisfied that Black Horse should fairly compensate Mrs Y 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 Mrs Y may also have had grounds to complain about the Broker.

370. By establishing and operating the discretionary commission model, Black Horse created the environment which permitted the Broker to select a higher interest and to receive more commission without reference to the work involved, with the effect that Mrs Y paid more than she needed to for the loan. And, as the finance provider, Black

Horse could itself have explained to Mrs Y the basis on which her interest rate was set, the Broker's role in setting that rate, and the commission resulting from that.

371. In those circumstances, whilst I recognise Black Horse 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 Black Horse was the ultimate beneficiary of the commission arrangements, I do not think it would be fair and reasonable to reduce the compensation Black Horse should pay Mrs Y for those reasons.

My final decision

372. For the reasons I've explained, I uphold Mrs Y's complaint and direct Black Horse Limited to put things right in the way I've set out at paragraph 364 above.

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

374. Black Horse should calculate and pay the compensation within 28 days of the date which Mrs Y accepts my final decision.

Jeshen Narayanan
Ombudsman