Neutral Citation Number: [2024] EWHC 3237 (Admin)

Case No: AC-2024-LON-001124

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/12/2024

Before :

MR JUSTICE KERR

- -

Between :

THE KING (on the application of CLYDESDALE FINANCIAL SERVICES LIMITED)	**Claimant**
- and -	
FINANCIAL OMBUDSMAN SERVICE LIMITED	**Defendant**
(1) ARNOLD CLARK AUTOMOBILES LIMITED **(2) JENNA LEWIS** **(3) FINANCIAL CONDUCT AUTHORITY**	**Interested Parties**

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Ben Jaffey KC, Ruth Bala and Marlena Valles (instructed by **TLT LLP**) for the **Claimant**
James Strachan KC and David Hopkins (instructed by **Financial Ombudsman Service Limited**) for the **Defendant**
Jonthan Kirk KC and Richard Roberts (instructed by **Addleshaw Goddard LLP)** for the **First Interested Party**
The **Second Interested Party** did not appear and was not represented
Jemima Stratford KC and Aarushi Sahore (instructed by **Financial Conduct Authority**) for the **Third Interested Party**

Hearing dates: 15, 16 and 17 October 2024

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Approved Judgment

This judgment was handed down remotely at 10.00am on 17 December 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE KERR

Mr Justice Kerr :

Introduction and Summary

1. Foster J ordered the rolled up hearing that took place before me from 15 to 17 October 2024. The purpose was to determine whether a certain decision issued in January 2024 by an ombudsman from the Financial Ombudsman Service, Mr Jeshen Narayanan, was lawful or not. The decision of that ombudsman and now of this court are of concern to the motor dealing and motor finance industry, to the Financial Conduct Authority and to consumers who buy motor vehicles.

2. The issues determined by Mr Narayanan have arisen in other complaints. His decision and that of this court could affect thousands of other cases. I will refer to the claimant finance company as **Clydesdale** (though it trades as Barclays Partner Finance). I will refer to the defendant as **the FOS**; to Mr Narayanan as **the Ombudsman**; to the first interested party as **Arnold Clark**; to the second interested party as **Ms Lewis**; and to the third interested party as **the FCA**.

3. The dispute arose because Ms Lewis complained in December 2021 to the FOS about her treatment in November 2018 when she bought a second hand Audi car from Arnold Clark's showroom in Liverpool. She made no contract with Arnold Clark; she entered into a contract (**the conditional sale agreement**) with Clydesdale, which bought the car from Arnold Clark. Title would be transferred to her after she had made 60 equal monthly payments over five years.

4. Her complaint to the FOS was upheld in January 2024. The particular focus of the Ombudsman's decision was on the commission arrangements between Arnold Clark and Clydesdale, which affected the interest rate payable by Ms Lewis under the conditional sale agreement. At issue were both the commission arrangements themselves and what was disclosed and not disclosed to Ms Lewis about them. The Ombudsman made a monetary award in Ms Lewis' favour against Clydesdale, deeming Arnold Clark to be Clydesdale's agent under provisions in the Consumer Credit Act 1974 (**the CCA**).

5. That compensation has been paid and recoupment is not and will not be sought. Ms Lewis has therefore not needed to take part in the proceedings. The challenge is to the upholding of her complaint and the monetary award. The parties are agreed that the court should determine the challenge and not treat it as academic. I agree that it is not academic because of the many other related complaints that are, I am told, outstanding.

6. Commission terms such as those agreed between Arnold Clark and Clydesdale in this case were banned by the FCA in 2021; but, I understand, many vehicle purchases have been made in circumstances where such terms or similar terms were or may have been present. The FCA is looking into this. It has referred me to certain of its policy

documents and made submissions on the interpretation of its rules and guidance and on relevant statutory provisions.

7. In the motor finance context, commission arrangements as between consumer, car dealer and lender have been examined in a number of cases for the purpose of applying principles of common law and equity; most recently in three appeals heard together, *Johnson v. Firstrand Bank Ltd (t/a Motonovo Finance) (and other appeals)* [2024] EWCA Civ 1282. The claims were for repayment of commission paid by the consumers to the lenders. There was also an "unfair relationship" claim under section 140A of the CCA in one of the appeals.

8. The judgment of the court was given on 25 October 2024, after the hearing before me. The parties helpfully drew it to my attention. The present judicial review context is the regulatory environment surrounding motor finance deals of the kind considered in *Johnson v. Firstrand Bank Ltd*. There was one cross-reference to the regulatory regime in the judgment of the court; see at [94] mention of the FCA's rule "CONC 4.5.3R", of which more below.

9. As this is a rolled up hearing, each ground of challenge must be assessed as arguable or not; and if it is arguable I must determine whether it succeeds. There are also some procedural points to decide. The issues are:

(1) whether the Ombudsman misinterpreted the relevant provisions of the FCA Handbook governing the conduct of regulated persons and bodies in the financial services industry;

(2) whether the Ombudsman was right to conclude that the commission arrangements between Clydesdale and Arnold Clark should have been disclosed or more fully disclosed to Ms Lewis;

(3) whether Arnold Clark should be permitted to rely on additional grounds of challenge separately from and independently of Clydesdale's grounds;

(4) whether Arnold Clark was treated by the Ombudsman in a manner that was procedurally unfair;

(5) whether Arnold Clark should be permitted to rely on expert opinion evidence not before the Ombudsman, namely, a report dated 27 August 2024 on interest rates and finance deals available in the motor finance market;

(6) whether the Ombudsman erred in law, disregarded relevant considerations or reached an irrational conclusion when deciding to make a monetary award in favour of Ms Lewis;

(7) whether the Ombudsman erred in law in deciding that under provisions in the CCA, Arnold Clark was the deemed agent of Clydesdale when Arnold Clark dealt with Ms Lewis in November 2018;

(8) whether pursuant to section 31(2A) of the Senior Courts Act 1981 (**the SCA**) I must refuse relief on the ground that had the conduct complained of not occurred it is

highly likely that the outcome for Clydesdale would not have been substantially different; and

(9) depending on the court's decision on those issues, what if any relief should be granted.

The Facts

The parties

10. The FCA exercises statutory functions in regulating the financial services industry under the Financial Services and Markets Act 2000 (**the FSMA**). This includes the making of rules for supervision of consumer credit activities such as the broking and provision of motor finance. Its rules and guidance, as amended from time to time, are set out in the FCA Handbook.

11. The FOS was established by Part XVI of the FSMA. It provides an independent, informal complaint resolution system for the financial services industry. Provision about the FOS and its functions and activities is made in sections 225 and following of, and Schedule 17 to, the FSMA. Section 225(1) states that Part XVI provides for "a scheme under which certain disputes may be resolved quickly and with minimum formality by an independent person."

12. By paragraph 13 of Schedule 17 to the FSMA, the FCA is required to make rules for pre-complaint correspondence, giving the person complained against an opportunity to respond to the complaint before it reaches the FOS; and for the setting of time limits for bringing complaints. Paragraph 14 requires the "scheme operator", i.e. the FOS, to make "scheme rules", with the consent of the FCA, governing the procedure for resolving complaints.

13. Arnold Clark is one of the largest car dealers in the UK, with numerous showrooms including the one in Liverpool where Ms Lewis bought her Audi. Arnold Clark maintains a panel of finance companies which offer finance arrangements to its customers to enable them to pay for their vehicle in instalments. Arnold Clark acts as broker in those transactions and typically receives remuneration from the finance company.

14. In 2018, Clydesdale was one of the panel member finance companies used by Arnold Clark. Typically, the finance company will acquire the car from the car dealer, will bear legal responsibility for the condition of the vehicle and any representations or warranties given to the customer; and will have an indemnity from the broker, i.e. the car dealer, in respect of the condition of the car and the correctness of information provided to the customer about it.

15. Since the FSMA was enacted (and indeed earlier, under restrictive trades practices legislation going back to the 1970s), regulatory bodies have borne responsibility for regulation in the financial services industry. The Office of Fair Trading (**the OFT**), the Financial Services Authority (**the FSA**) and now the FCA have, over the years, carried out those functions. It is not necessary for present purposes to trace the evolution of those bodies and their functions over time; but I will need to mention the OFT and the FSA as well as the FCA.

The OFT consultation in 2009

16. I take the narrative in chronological order, starting in July 2009 because of subsequent cross-references back to older documents on which the parties relied. In July 2009, the OFT carried out a consultation exercise about irresponsible lending of various kinds. In a consultation paper, the OFT expressed provisional views, including that:

> "Differential commission rates or 'volume over-riders' should be offered only where these are justified in terms of the relative work involved and the amounts should be disclosed to the borrower."

17. In a footnote against the phrase "differential commission rates", it was said that "[t]he amount of any such commission should be disclosed on request". A further footnote defined "volume over-riders" as "additional payments made on the basis of business volume and profitability".

The irresponsible lending guidance

18. The first version or draft of the OFT's "Irresponsible lending – OFT guidance for creditors" (**the ILG**) was dated March 2010, although it was not until August 2010 that the consultation responses were summarised. There was then an updated version of the ILG – the version before the court – dated February 2011.

19. The summary of consultation responses referred (at paragraph 6.5) to the issue of "suitability of credit products". Suitability was considered relevant to whether lending was irresponsible or not. The OFT did not consider "that creditors should be required to operate in 'advised sales territory' as such", i.e. they should not be expected to advise on the most suitable product, as a financial adviser would. But creditors should not supply "credit products … which are clearly unsuitable for particular types of use".

20. Paragraphs 6.8 and 6.9 of the summary of consultation responses referred to the draft guidance about disclosure of commission. Some business respondents thought the draft guidance went too far in implying that creditor or their intermediaries had a "fiduciary duty" to borrowers. The issue was discussed in the following paragraphs, leading to the OFT's conclusion, which was summarised at paragraph 6.15.

21. The OFT position was, in summary, that creditors and their intermediaries did not owe a fiduciary duty to borrowers; they were not required to advise on the most suitable product; but they must avoid the sale of products that were clearly unsuitable; and that borrowers, on request, should be provided with sufficient information to enable to take an informed view; and that (paragraph 6.15, with the bold in the original):

> "… brokers should disclose to borrowers the **existence** of any commission or other payment payable by the creditor, and of any other reward available from the creditor, before the credit agreement is made with the borrower. The **amount or nature** of any such commission should be disclosed **upon receipt of a request from the borrower** to do so."

22. Footnote 16, against the emboldened words "amount or nature" referred to a case in the Manchester County Court in which a lack of transparency in a sale of payment protection insurance had been deprecated. The fact of a commission had been disclosed but not the amount.

23. Footnote 17 referred to disclosure of the amount or nature of a commission needing to be disclosed "upon receipt of a request". It was lengthy and each of the opposed parties said it supported their case. I will not set it out save to say it included near the start (with bold in the original):

> "The OFT would **encourage** brokers to **proactively** disclose the amount or likely amount or percentage figure of the commission … ."

24. In the February 2011 version of the ILG which is before me, the guidance took the following form (omitting a footnote, with bold in original; the example below paragraph 5.5 was set out in a separate box):

> "5.5 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).
>
> [*And in the separate box:*]
>
> 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 supporting 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 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', 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 [*footnote 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."

25. Footnote 26 was quite lengthy; with the bold in the original, it stated:

> "In the OFT's view, the **existence** of any 'commission' payable to a broker or intermediary by a creditor in respect of the relevant credit agreement should be made known to a potential borrower by the broker or intermediary under circumstances in which the existence/amount of the commission **could** actually or potentially act as an undue incentive for the broker or intermediary to recommend a particular credit product (as opposed to an

appropriate alternative, from the borrower's perspective, from the product range available the broker/intermediary) to a potential borrower and/or where knowledge of the existence/amount of the commission **could** actually or potentially have a material impact on the potential borrower's borrowing decision. In effect, potential borrowers should be made aware of the **existence** of a financial arrangement between a broker or intermediary with a creditor which might potentially impact upon the **impartiality** of the broker or intermediary in terms of the credit product(s) that it promotes to a potential borrower."

The guidance for credit brokers and intermediaries

26. In November 2011, the OFT issued further guidance for "Credit brokers and intermediaries", sub-headed "OFT guidance for brokers, intermediaries and the consumer credit and hire businesses which employ or use their services". This was known as "**the CBG**". Again, it became the subject of cross-references back in the later rules or guidance at issue in this case.

27. Paragraph 3.7 of the CBG contained "a non-exhaustive list of unfair or improper business practices relating to advertising and promotion", to which the OFT would have regard when considering fitness to hold a statutory trading licence. An example of such a practice (at letter i, beneath paragraph 3.7) was (with bold in the original and omitting a footnote):

> "i. (in the case of credit intermediaries) failing to make sufficiently clear in advertising or other documentation for consumers any limitations on the intermediary's independence including any links with creditors or other third parties that may give rise to a conflict of interest.
>
> [*And in the box beneath that extract:*]
>
> For example, failing to make sufficiently clear that a fee or commission is, or may be, payable by a creditor or third party to the intermediary. In the OFT's view, the **existence** of any 'commission' payable to a broker or intermediary by a creditor in respect of the relevant credit agreement should be made known to a potential borrower by the broker or intermediary **under circumstances in which the existence/amount of the commission could actually or potentially act as an undue incentive for the broker or intermediary to recommend a particular credit product (as opposed to an appropriate alternative, from the borrower's perspective, from the product range available to the broker/intermediary) to a potential borrower and/or where knowledge of the existence/amount of the commission could actually or potentially have a material impact on the potential borrower's borrowing decision.**
>
> In effect, potential borrowers should be made aware of the **existence** of a financial arrangement between a broker or intermediary and a creditor that might potentially impact upon the impartiality of the broker or intermediary in terms of the credit products(s) that it promotes to a potential borrower.
>
> 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."

28. The FCA also drew my attention to paragraph 3.7 at letter j:

> "failing to make to the borrower sufficiently full and early disclosure of the existence of any commission fee (or other form of remuneration) [*footnote 39: For these purposes, fee/commission includes any financial consideration such as an introducer's fee, arrangement fee, volume over-rider or non-cash benefit (in other words any benefit that might impact on the impartiality of the advice given or service provided by the broker/intermediary or might otherwise give rise to a conflict of interest)*] payable by the creditor to the broker or intermediary when appropriate to do so [*footnote 40: See text box adjacent to paragraph 3.7i*]."

The brokerage agreement

29. Such was the regulatory environment, to the extent the parties drew it to my attention, when on 4 July 2012 Arnold Clark and Clydesdale entered into the agreement for provision by the latter of finance to Arnold Clark's customers, which I will call **the brokerage agreement**. Its terms, which I will mention later, had been updated by the time Ms Lewis bought her car in November 2018.

The consultation on principles and standards

30. In March 2013, the outgoing FSA published a detailed consultation paper on "High level proposals for an FCA regime for consumer credit". Chapter 7, "Conduct standards", proposed a "tiered framework of high-level standards and more detailed conduct standards". The FCA's rules would comprise "Principles for businesses"; "High level standards"; and "Conduct standards".

31. The paper explained (in Table 7.2) the difference between "rules" and "guidance". Breach of a rule could lead to enforcement action and could be actionable as a breach of statutory duty. Failure to follow guidance need not mean a rule had been breached. Guidance "indicates possible ways for a firm to comply with a rule, recommends a particular course of action or gives information about how we will interpret a rule in certain circumstances".

32. The Principles for Business were to be applied by the FCA from 1 April 2014. Breach of them would not itself be actionable as a breach of statutory duty. The consultation paper stated (omitting footnotes):

> "What are the Principles for Businesses?
>
> 7.7 The Principles for Businesses (the Principles) are a general statement of the fundamental obligations that firms must comply with under the regulatory system. In our Handbook, they are referred to as 'PRIN' for short. The Principles are rules and firms must comply with them at all times. We can take enforcement action if they are breached by a firm.
>
> 7.8 We propose to apply the Principles to all authorised consumer credit firms and those with limited permission. As well as setting out our overarching expectations of firms, they form the basis for other more detailed rules and guidance. They will also apply to ancillary activities of consumer credit activities, for example, where a credit broker provides generic advice, which is not a regulated activity."

33. Later in the paper (at paragraph 7.42 and following) it was explained that relevant OFT guidance would be, "where appropriate, turned into either FCA rules or FCA guidance". That would include, among other things, the ILG and the CBG. Paragraph 7.4 stated:

> "We intend to approach replicating the substance of the guidance so that firms that already comply with it are unlikely to need to change their behaviour."

The February 2014 policy statement

34. After the consultation exercise that followed, the FCA published a policy statement in February 2014 (PS14/3) confirming the same regulatory structure and approach. The FCA was to take over regulation of consumer credit firms from the OFT from 1 April 2014. Paragraph 1.2 of that policy statement read:

> "We will have stronger powers and more resources than the OFT to regulate the consumer credit industry. Firms will have to comply with our Principles for Businesses, such as treating customers fairly, from 1 April and they should feel the difference under our regime from day one."

Clydesdale's motor loan application process

35. Moving forward to July 2018, Clydesdale provided Arnold Clark with a document for the use of the latter's sales staff, entitled "Motor loan application process". The importance of following the steps set out in the document were stressed, because the car dealer is treated as the lender's agent under the relevant legislation. The importance of treating the customer fairly and complying with the Equality Act 2010 was also emphasised.

36. The fifth section of the 45 page document referred to changing the interest rate payable by the customer, in the following terms:

> "During the application process, there is the option to vary the interest rate (between the limits set within the system, currently including a maximum APR of 29.9%).
>
> If you vary the interest rate, this must be in line with the training your employer has given you about Treating Customers Fairly and the Equality Act 2010. You must explain to the customer that you are changing the interest rate and the reasons why.
>
> You must not change the interest rate based on an assumption that the customer is willing to or able to pay more, or for a reason which is not in line with the Equality Act (for example, based on the customer's age, sex or mental capacity, or to earn extra money from the sale).
>
> An example of an acceptable reason for changing the interest rate would be to reduce the customer's monthly repayments to meet their budget. However, it would not be acceptable, for example, to increase the interest rate because the monthly repayments are below the customer's original monthly budget, or because the customer has told you that they have a very high income compared with the repayment amounts."

Ms Lewis' car purchase from Arnold Clark

37. Arnold Clark's practice at the time was to advertise prominently on its website the APR of 8.9 per cent, using the words: "Low-rate finance at 8.9% APR representative"; and "We're offering the same low APR on all our used cars, with no hidden terms and no unexpected costs"; and "We're so confident in our low-rate finance used car packages, that if you find a better deal elsewhere, we'll give you back **Double the Difference**" [bold in original].

38. In November 2018, Ms Lewis wanted to buy a second hand car. She first visited Arnold Clark's showroom in Liverpool on 13 November and was shown the Audi she was interested in buying. The price was £19,133. That price (as stated in a later letter of 6 January 2023 from Clydesdale to the Ombudsman, at paragraph 1.6) reflected a "basic vehicle price" of £18,998, 5 per cent lower than the "CAP Retail price".

39. The CAP organisation is described in the letter as "the industry accepted guide for retail value for vehicles". It provides open source pricing information to the automotive industry. The CAP retail price for an Audi of the model, age and condition of the one bought by Ms Lewis was £20,132, about 5 per cent more than the price Ms Lewis paid.

The conditional sale agreement

40. Ms Lewis paid Arnold Clark £300 in cash and part exchanged her old car for £5,500, leaving a balance of £13,333. She borrowed that sum from Clydesdale on the terms in the conditional sale agreement. The cost of that borrowing was £3,113 made up entirely of interest. The loan of £13,333 plus the cost of the borrowing, £3,113, totalled £16,446.

41. That amount would be paid by Ms Lewis to Clydesdale in 60 equal monthly instalments of £274.10 each, over five years. All these figures were included in the conditional sale agreement signed by Ms Lewis and by or on behalf of Clydesdale on 15 November 2018. Also recorded in it was the flat rate of interest, 4.67 per cent, and the annual percentage rate (**the APR**), 8.9 per cent.

42. For the uninitiated, the meaning of flat interest rates and the APR was later explained by the Ombudsman in his decision, at [16] and [17]:

> "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."

43. I should also mention that among the detailed written terms and conditions of the conditional sale agreement, under the heading "Other important information", the third of several bullet points stated: "You agree to us paying commission to any broker or supplier acting as your agent in relation to the agreement."

The initial disclosure document

44. The process for Ms Lewis signing up to the conditional sale agreement at Arnold Clark's premises comprised five steps, only the first of which I need mention: provision by the sales executive of the "Initial Disclosure Document", in fact headed "Initial disclosure document – about our services" (**the IDD**). Ms Lewis signed a declaration on 15 November 2018 that the five steps were followed.

45. The IDD was printed in small print across about half a page of A4 paper, in three columns. It included, under the sub-heading "Whose product do We offer?", the following:

> "We act as a credit broker sourcing credit to assist with Your purchase from a carefully selected panel of lenders (listed on our website [address given]). Lenders typically pay Us a fee for these introductions."

46. Under the next sub-heading, "Which service will We provide you with?", the following appeared:

> "You will not receive advice or a recommendation from Us for Credit Broking …. 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."

Terms of the brokerage agreement

47. I return next to the brokerage agreement. I was shown documents setting out its updated terms. Some of the documents are not easy to follow but that does not matter because there was no dispute about them and no suggestion that the Ombudsman later misunderstood them. I gratefully borrow from the summary in Clydesdale's skeleton argument. At the time when Ms Lewis acquired her car in November 2018, the brokerage agreement provided as follows.

48. Arnold Clark could set a flat interest rate payable by the customer to Clydesdale, from 2.68 per cent to 15.25 per cent. The amount by which that rate exceeded 2.68 per cent was payable as commission by Clydesdale to Arnold Clark. That commission was described as "discretionary", but Arnold Clark were entitled to be paid it by Clydesdale as of right. The word "discretionary" refers to Arnold Clark's right to set the flat interest rate, within the agreed parameters. The "discretionary" commission payable by Clydesdale to Arnold Clark was subject to a cap: the lower of either £2,500 or 50 per cent of the total interest charges.

49. In Ms Lewis' case, Clydesdale paid Arnold Clark £1,326.60 of "discretionary" commission, calculated by reference to the difference between the minimum 2.68 per cent flat rate and the 4.67 per cent Arnold Clark required Ms Lewis to pay; a difference of 1.99 per cent. Clydesdale also had to pay Arnold Clark's head office 2 per cent of the amount borrowed; in this case, £13,333; 2 per cent of which is £266.66. Arnold Clark therefore received, in total, £1,593.26 (£1,326.60 plus £266.66) from Clydesdale for arranging Ms Lewis' loan.

50. There were other relevant "standard terms" in the brokerage agreement. Arnold Clark undertook (at clause 6.1.1) to comply with Clydesdale's "Sales and Procedure Guide", which included the Motor Loan Application Process document, already mentioned. Arnold Clark must not act so as to make Clydesdale's relationship with the customer "unfair" under the CCA or treat the customer unfairly under FSA (now FCA) rules (clause 6.1.4). It must not cause Clydesdale to incur liability under section 56 of the CCA (clause 6.1.5).

51. By clause 9 and its subclauses, Arnold Clark provided a wide ranging indemnity for liabilities incurred by Clydesdale to the customer as a result of things done or not done by Arnold Clark or representations made by it to the customer in respect of which it would be deemed Clydesdale's agent under section 56 of the CCA. Clydesdale's liability to Arnold Clark was limited to payment of commission at the agreed rates (clause 9.3).

52. In his later decision, the Ombudsman, correctly, characterised the brokerage agreement thus:

> "62. …. commission model linked the amount of commission the Broker received to the interest rate, and it allowed the Broker to decide the interest rate Miss L had to pay (albeit within the range set by Barclays PF) and, in doing so, the Broker was able to determine the amount of commission the Broker would receive.
>
> 63. In this case, in effect, Barclays PF gave the Broker discretion to decide whether Miss L was charged a flat interest rate of 2.68%, a flat interest rate of 15.25%, or an interest rate in between these amounts. And the amount of commission Barclays PF paid to the Broker (and the amount of the payments Miss L would have to make) was directly related to the flat interest rate the Broker selected and controlled, subject to the application of the cap provisions. The higher the flat interest rate set, in the range set by Barclays PF, the higher the Broker's commission payment would be – subject to the cap. In this case, the Broker chose a rate 1.99% higher than the lowest available flat interest rate."

The FCA's motor finance review and report

53. The FCA had since April 2017 been reviewing the motor finance sector and issued, in March 2019, a report called "Our work on motor finance - final findings". The report addressed, among other things, a concern that consumers may not be getting the right kind of information at the right time, in particular about commission arrangements for credit broking in the sector. The FCA also addressed "whether commission structures have led to higher finance costs for customers because of the incentives they create for brokers" (paragraph 1.5).

54. At paragraph 2.25 in the report, the FCA said it was considering banning "differential interest charges" and similar commission models, or "limiting broker discretion". At paragraph 2.26 the report referred to the "CONC" (consumer credit) provisions, to which I am coming shortly, and continued:

> "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."

55. The same month, March 2019, the FCA sent out to lenders in the sector a "cost survey document" requesting information about the cost implications for lenders of possible regulatory changes relating to commission structures, including "the degree of discretion brokers have in setting consumers' interest rates" and regulatory requirements for "commission structure disclosure".

56. In the fourth section on possible "increased disclosure requirements", the FCA sought information by 19 May 2019 on the impact on lenders of regulatory change that:

> "would seek to prevent conflicts of interest arising from brokers' remuneration models, by ensuring that consumers receive adequate and prominent information, in a timely manner, about the existence and nature of any commission arrangement, and/or any implications for the customer, when brokers are recommending a credit product. This could include, for example, including the nature of the broker's remuneration arrangement (currently only the existence of a remuneration has to be disclosed), and/or the amount of any such remuneration".

The consultation on proposed banning of discretionary commission arrangements

57. Later that year in October 2019, the FCA published a consultation paper (under the reference CP19/28) on plans to "address consumer harm" by "banning commission models that can incentivise a broker (including motor dealers) to increase a customer's interest rate"; and on a proposal to "make minor changes to clarify aspects of our commission disclosure rules and guidance to give consumers more relevant information in all consumer credit markets" (paragraph 1.1 of the consultation document).

58. The FCA had found "high levels of non-compliance with some of our existing commission disclosure requirements in … CONC… ." (paragraph 1.9). The "minor changes" or "minor adjustments" (paragraphs 1.13 and 1.14) to CONC rules and guidance would "give greater clarity on their intention" and "greater certainty on how to comply" (paragraph 1.14). Disclosure to the customer that the broker would receive commission from the lender was often either not disclosed at all or the disclosure was "not prominent" (paragraph 1.13).

59. The proposal for disclosure was (paragraph 4.11) that firms should prominently disclose the "nature" as well as the "existence" of the arrangements; so that the obligation would be to disclose the "existence and nature" of the arrangements, rather than the "existence" thereof. A sophisticated economic and risk analysis was included in the consultation paper, as well as consideration of competition issues that could arise from the change.

The decision to ban discretionary commission arrangements

60. At the end of 2019, Clydesdale withdrew from the motor finance market. The following summer, in July 2020, the FCA published its policy statement numbered PS20/8, containing the "feedback on CP19/28 and final rules". The policy statement was lengthy and I need not refer to much of it. At paragraph 1.38, it proclaimed that the rules and guidance set out in Appendix 1 would come into effect on 28 January 2021.

61. The first of those changes was an outright ban on "discretionary commission arrangements" by an amendment to CONC 4.5.6R which now provided that in respect of motor finance a lender or credit broker "must not" enter into a discretionary commission arrangement, a term defined in the Glossary as any arrangement where a lender permits a broker to decide the amount of interest charged for credit and the amount of commission payable to the broker is affected in whole or in part by the interest charged.

62. Secondly, amendments were (materially for present purposes) made to CONC 4.5.3R and 3.7.4G as follows, with deletions struck out (in red) and new added words underlined (in green):

> "**CONC 4.5.3R (28 January 2021)**
>
> A *credit broker* must prominently disclose to a *customer* in good time before a *credit agreement* or a *consumer hire agreement* is entered into, the existence and nature 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, fee or other remuneration could actually or potentially:
>
> (1) affect the impartiality of the credit broker in recommending ~~a particular product~~ the *credit agreement* or the *consumer hire agreement*; or
>
> (2) if made known to the customer, have a material impact on the customer's transactional decision to enter into the credit agreement or the consumer hire agreement. …
>
> **CONC 3.7.4G (28 January 2021)**
>
> 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 and nature of any financial arrangements with a *lender* that might impact upon the *firm's* impartiality in promoting or recommending a *credit* product to ~~a~~ the *customer* or which might, if disclosed by the *firm* to the *customer*, affect the *customer's* transactional decision in relation to the *credit* product;"

Ms Lewis' complaint to the FOS

63. Ms Lewis complained to Clydesdale, which politely rejected her complaint in a letter of 1 December 2021. In its response, Clydesdale explained that it was forwarding the complaint to Arnold Clark, as the party that had provided her with its services on the occasion when she bought her car. Arnold Clark accepts that it was made aware of the complaint by Clydesdale.

64. Ms Lewis complained to the FOS the next day that her car finance had been mis-sold and that the car dealer had received undisclosed commission. She said she had been caused financial hardship and stress and sought "compensation for the mis selling". The FOS investigated the complaint from late 2021 and into 2022. The investigator (called an "adjudicator") was Ms Sally Turner.

Procedural history of Ms Lewis' complaint to the FOS

65. Ms Turner emailed Arnold Clark on 28 October 2022 asking for a copy of the IDD. Arnold Clark obliged on 8 November 2022. She formed the view that the complaint should be upheld. She wrote to Clydesdale on 7 December 2022, explaining why. Clydesdale responded in detail on 6 January 2023, explaining why it took the different view that the complaint should not be upheld. I need not rehearse this debate as it was overtaken by the Ombudsman's later decision.

66. Clydesdale notified Arnold Clark in December 2022 that there was a FOS adjudicator's view which had found against Clydesdale and that Clydesdale was planning to challenge that view. Clydesdale requested information from Arnold Clark, which provided Clydesdale with a copy of the IDD and what was described by Arnold Clark's chief financial officer, Mr David Cooper, as "[s]ome basic information".

67. Ms Turner emailed Arnold Clark again on 18 May 2023, asking for the terms of business document embodying its commission arrangements with Clydesdale as at November 2018. Mr Gavin Forbes of Arnold Clark responded by a letter dated the same day (which appears to have taken some weeks to reach the FOS), suggesting that Ms Turner's email may have been intended for Clydesdale, as Arnold Clark had not received any correspondence previously from the FOS relating to a complaint in the name of Ms Lewis.

68. The Ombudsman produced a 50 page provisional decision dated 26 June 2023 expressing the provisional view that the complaint should be upheld and compensation awarded for reasons summarised in bullet points in [6] of the provisional decision. In [7], further evidence and arguments from the parties were required to be sent to him by 26 July 2023; after that, he would issue his final decision. However, that deadline was extended.

69. In August 2023, Clydesdale sent a copy of the provisional decision to Arnold Clark and asked it to respond to Clydesdale's "further queries", as Mr Cooper explained in his witness statement. The FOS did not contact Arnold Clark directly again. Arnold Clark decided that it was unwilling to provide a witness statement to the FOS because, as Mr Cooper explains, its interests potentially conflicted with those of Clydesdale.

70. Clydesdale's solicitors instructed a credit broker specialising in motor finance called Evolution Funding Limited (**Evolution Funding**) to provide a report on the motor finance market from the start of 2016 up to the end of June 2022 and to provide comment on the complaint from Ms Lewis and other complaints. Its report on Ms Lewis' case was set out in a letter of 24 August 2023 signed by its chief executive officer, Mr Lee Streets.

71. Ms Lewis was described as a "[p]rime customer", with a high "Delphi score" of 929. Evolution Funding criticised the provisional decision; it was "at odds with the regulatory landscape at the time of this deal". Ms Lewis had received "a highly competitive and fair deal". Evolution Funding had itself brokered about 2,300 prime deals during November 2018. The average APR was 10.4 per cent. Therefore, they argued, Ms Lewis was not treated unfairly or charged too high an interest rate. It was unlikely she could have found a better deal elsewhere.

72. Evolution Funding went on to note that the use of discretionary commission models had been widespread until the FCA banned them; as long as the dealer advertised its APR, which they generally did, consumers could search across the market for the best deal. Commission was important to dealers because it enabled them to price vehicles competitively. Without it "the credit broker market could not function properly".

73. On 30 August 2023, Clydesdale's Mr Nigel Merryweather wrote to the Ombudsman making detailed submissions opposing the views in the provisional decision. The complaint should be dismissed and there should be no redress, he argued. The letter

went on to set out a detailed critique of the reasoning in the provisional decision, relating to the interpretation of the relevant rules and guidance; and the facts and the reasoning on causation in the context of proposed redress. A request was made for an oral hearing of the complaint.

74. Clydesdale did not accept responsibility for Arnold Clark's role in the transaction with Ms Lewis but did not criticise Arnold Clark; it had disclosed in the IDD that lenders "typically pay Us a fee for these introductions". Clydesdale relied on the evidence from Evolution Funding, submitting that the APR of 8.9 per cent was well below the market average for a prime customer and that Ms Lewis got as good a deal as was available in the market at the time.

75. In September 2023, Clydesdale and Arnold Clark were in email contact about the matter. On 19 September, Mr Forbes of Arnold Clark emailed Mr John Waters of Clydesdale, answering a request for evidence to support the proposition that "if dealers earned no commission, then customers would likely face higher prices for vehicles". Mr Forbes' answer was:

> "In terms of the overall UK Motor Industry commission paid by Finance Companies is an income / revenue stream for Motor Dealers who are being remunerated for the work they have done in arranging the finance with the Finance Company. If Motor Dealers earned no commission then that income / revenue stream would obviously no longer be there and it follows that Motor Dealers would have to replace that loss income / revenue stream.
>
> Different publications & firms undertake regular analysis of the UK Motor industry from a Franchised Dealer Group perspective (e.g. analysis relating to the Top 200 / Top 150 Dealer Groups) and in terms of Return of Sales (i.e. Profit Before Tax as a % of Turnover) the net margin within the retail motor industry is very low. This reality I would say ties in with the point as above that in overall terms UK Motor Dealers would have to replace that loss income / revenue stream and this would result in the prices of motor vehicles increasing."

76. The Ombudsman had raised three evidential queries with Clydesdale, which the latter answered in a further letter of 27 September 2023. One was whether there was evidence to support the assertion that without the commission the sale price of the car would have had to be increased. In its response, Clydesdale quoted from and appended Mr Forbes' email.

77. Another was about whether the car price would be set before or after the panel lender for the finance transaction was selected. Clydesdale's response referred back to "a conversation that we had with Mr Forbes … on 19 July 2022" and quoted from a subsequent written communication from Arnold Clark, to the effect that if Clydesdale had declined the proposal, Arnold Clark would still have stuck with the advertised APR of 8.9 per cent and searched for a different panel lender willing to accept it.

78. Clydesdale also reiterated and expanded on its request for an oral hearing. Among the reasons put forward was that a hearing "may also enable the Ombudsman to ask questions of the Dealer if they are invited to participate". It was pointed out that Arnold Clark's conduct could be strongly criticised and Clydesdale could be held to account for that conduct. A hearing was therefore appropriate "so that appropriate evidence can be obtained from the Dealer".

79. Clydesdale were then given an opportunity to comment on certain written comments the Ombudsman had obtained from Ms Lewis. I need not set out the details of that exercise. Ms Lewis was saying she might have been able to get a bank loan to buy the car, at a lower rate of interest. Clydesdale begged to differ; it responded by email on 6 October 2023.

80. Ms Lewis having also made allegations about the behaviour of Arnold Clark's sales staff towards her, Clydesdale also suggested that, while that did not strictly fall within the scope of the complaint, "we have invited the Dealer to respond to these comments". Clydesdale's Mr Merryweather relayed those comments back to the Ombudsman in a letter of 13 October 2023: "[w]e have now received the Dealer's response and we would like to share this with you".

81. Mr Merryweather attached a note from Arnold Clark detailing the sale on 15 November 2018 and set out the chronology of events from Ms Lewis' initial enquiry about the Audi on 13 November, through to signing the conditional sale agreement. Clydesdale also relayed to the Ombudsman Arnold Clark's account of selecting the lender, which was said to have happened after the price of the car and the APR of 8.9 per cent had been agreed with Ms Lewis.

82. On 25 October 2023, the Ombudsman gave detailed reasons for refusing an oral hearing. There is no challenge to that decision. He accepted that there were disputes of fact, which are commonplace in FOS complaints. He noted the criticisms of Arnold Clark but pointed out that Clydesdale had passed them to Arnold Clark which had answered them and its account had been passed to the Ombudsman by Clydesdale. The Ombudsman then stated in his reasons:

> "I understand the written submissions that have been made and I do not think that holding an oral hearing would adduce anything new, or anything that the parties have not been able to provide already. And I'm also satisfied that, given the complaint before me, I do not require Arnold Clark to further clarify its comments in relation to its actions as a motor dealer (when selling Miss Lewis her vehicle), rather than its actions as a Credit Broker, or make any further oral submissions on a complaint where it is not the respondent firm. I'm satisfied that I already have what I need to fairly and reasonably determine matters."

The Ombudsman's decision

83. The Ombudsman's decision was then issued, on 10 January 2024. It is the decision challenged in these proceedings. It is long and detailed and I will need to come back to some of the detail later. For now it is sufficient to quote from the summary in [6]:

> - "The discretionary commission model Barclays PF used in Miss L's case, created an inherent conflict between the interests of the Broker and the interests of Miss L, as it gave the Broker an incentive to set a higher interest rate than Barclays PF would have accepted so that the Broker could receive more commission.
>
> - In introducing and operating the discretionary commission arrangement with the Broker on the terms it did, Barclays PF acted contrary to the guidance at CONC 4.5.2G and failed to have due regard to Miss L's interests and treat her fairly as required by Principle 6 of the Financial Conduct Authority's ("FCA") Principles for Businesses (the "Principles").

- It is likely a court would conclude that the relationship between Barclays PF and Miss L was unfair to Miss L under s140A of the Consumer Credit Act 1974 ("CCA") for any or all of three reasons:

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

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

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

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

…..

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

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

  - paying her interest on each overpayment at the rate of 8% simple per year calculated from the date of the payment to the date of settlement in accordance with my final decision.; and

  - if the finance agreement has not concluded at the date of settlement: reducing, or paying Miss L an amount equivalent to have the same effect, the monthly payments left on the agreement to what they would have been had Miss L's agreement been written at a flat interest rate of 2.68%, rather than 4.67%."

The judicial review challenge

84. The present challenge was then brought, on 8 April 2024. The FCA filed summary grounds of resistance in support of an expedited rolled up hearing. Arnold Clark, as one of the interested parties, filed an acknowledgement of service which, I am told, did not contain any detail beyond broad support for Clydesdale's challenge. On 23 July 2024, Foster J ordered the present rolled up hearing. She ordered that CPR rule 2.11 should not apply, meaning the parties were not free to extend deadlines set by the court.

85. Arnold Clark's (and other interested parties') detailed grounds of resistance and any additional grounds for supporting the challenge, and any written evidence, were due,

under that order, by 6 August 2024. However, the court subsequently endorsed the parties' agreement to extend that time limit until 27 August 2024, in light of the holiday period. That deadline was met.

86. That day, Arnold Clark filed detailed grounds of resistance, including a new complaint of procedural unfairness and assertions of illegality (i.e. error of law and disregard of relevant considerations) in awarding compensation to Ms Lewis; an application notice seeking to rely on an expert report by Mr Paul Cullum of Frontier Economics Limited (**Frontier Economics**); and a witness statement from Mr Cooper, its chief financial officer.

87. On 5 September 2024, the FOS filed and served written grounds of opposition to Arnold Clark being permitted to advance the points taken in its detailed grounds and opposing the application to rely on the report of Frontier Economics. The FCA wrote a letter to the court to similar effect. Thus, the battle lines were drawn for the issues to be determined at the rolled up hearing.

FCA Handbook Provisions and Their Interpretation

88. The FCA Handbook is frequently updated. Section 5 of the April 2024 "Reader's Guide: An introduction to the Handbook" describes the different kinds of provisions. I need not set out all types of provisions here. They vary in their normative potency from "Principles" or "Statements of Principle" at one end of the spectrum, to "Notes" providing "informative, but non-legislative, material" at the other.

89. In between, most of the "rules" create "binding obligations", breach of which can lead to enforcement action and an action for damages; while "guidance" made under section 139A of the FSMA is there mainly to:

> "explain the implications of other provisions … indicate possible means of compliance, or ... recommend a particular course of action or arrangement".

90. I confine myself to the provisions relevant to this case, omitting the italics denoting defined terms. They begin with the Principles, denoted by "PRIN". A Principle is also a rule (with the suffix "R"; guidance has the suffix "G"). PRIN 2.1.1R states 12 Principles (the twelfth is recent and postdates the material times in this case). I quote Principles 6, 7 and 8:

> "6 Customers' interests - A firm must pay due regard to the interests of its customers and treat them fairly.
>
> 7 Communications with clients - 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.
>
> 8 Conflicts of interest - A firm must manage conflicts of interest fairly, both interest between itself and its customers and between a customer and another client."

91. The Handbook also includes "General Provisions", denoted "GEN", which are a mix of rules and guidance. Under the heading "Purposive interpretation", GEN 2.2.1R states that every provision "must be interpreted in the light of its purpose". In line with

general principles of interpretation in our law, GEN 2.2.2G then provides the following further guidance:

> "The purpose of any provision in the Handbook is to be gathered first and foremost from the text of the provision in question and its context among other relevant provisions. The guidance given on the purpose of a provision is intended as an explanation to assist readers of the Handbook. As such, guidance may assist the reader in assessing the purpose of the provision, but it should not be taken as a complete or definitive explanation of a provision's purpose."

92. Another part of the FCA Handbook deals specifically with consumer credit. It is called the Consumer Credit sourcebook or "CONC" for short. Chapter 3 is entitled "Financial promotions and communications with customers". The provisions were amended in 2021, but in November 2018 when Ms Lewis bought her car provided, so far as material, as follows.

93. CONC 3.3 stated "The clear fair and not misleading rule and general requirements". CONC 3.3.1R provided similarly at (1) that a firm "must ensure that a communication or a financial promotion is clear, fair, and not misleading"; and at (2) that a firm must ensure that each communication or financial promotion:

> "(d) 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 …; and (e) does not disguise, omit, diminish or obscure important information, statements or warnings".

94. CONC 3.7 specifically deals with (as it did in 2018) credit brokers and applies (by CONC 3.7.1R) to "a financial promotion or a communication with a customer in relation to credit broking in relation to a regulated credit broking agreement". CONC 3.7.4G stated at the relevant time that a firm should in a financial promotion or in a communication with a customer:

> (1) Make clear, to the extent an average customer of the firm would understand, the nature of the service that the firm provides [**Note**: paragraphs 3.7e and 4.8b of CBG]
>
> (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 or recommending a credit product to a customer; [**Note**: paragraph 4.5 of CBG]
>
> (3) ….
>
> (4) ensure that any disclosure about the extent of its independence is prominent and in accordance with the clear, fair not misleading rule in CONC 3.3.1R, clear and easily comprehensible [**Note**: paragraph 4.6 of CBG]."

95. Chapter 4 of CONC dealt with (as it still does) "Pre-contractual requirements". Within it, CONC 4.5 covers "Commissions" and applies to a firm "with respect to consumer credit lending" (CONC 4.5.1R). By CONC 4.5.2G:

> "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]"

96. CONC 4.5.3R, headed "Commissions: credit brokers", provided at the material time:

> "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]"

97. And by CONC 4.5.4R, at the material time:

> "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, 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]"

98. I will not set out in full the 2021 versions of those provisions of CONC but I note here that among other things, Clydesdale relies on amendments appearing in the 2021 versions which expanded the references to the "existence" of commission, etc, to the "existence and nature" of commission, etc. I do not set out here certain provisions of the "DISP" part of the FCA Handbook, as it makes provision for the resolution of disputes under the auspices of the FOS. I will need to mention them later in the context of dispute resolution procedures.

99. The principles applicable when interpreting the rules of a body such as the FCA were not controversial. I was referred to Ouseley J's decision in *R (British Bankers Association) v Financial Services Authority* [2011] EWHC 999 (Admin), [2011] Bus LR 1531, at [77], [101], [160]-[169] and [173]-[184]. The case arose from concerns about the mis-selling of payment protection insurance.

100. Ouseley J held that a breach of the "Principles" could properly be the subject of enforcement action and to compensation for customers under the complaints handling regime, even though it did not (by section 150(2) of the FSMA) amount to a cause of action for breach of statutory duty. The FSA's "rules" did not exhaust the application of the Principles; the latter could augment specific rules and an ombudsman had to take account of a breach of a Principle in deciding what was fair and reasonable, even without a breach of a specific rule.

101. Ouseley J's approach to interpreting the rules of the then FSA has been endorsed by the Court of Appeal in *R (Options UK Personal Pensions LLP) v. Financial Ombudsman Service Ltd* [2024] EWCA Civ 541, [2024] Bus LR 1307, per Asplin LJ at [76]. The Principles are an "overarching framework" which though not actionable *per se* can form the basis of a duty which can lead to a complaint to the FOS and that complaint may succeed whether or not any other specific rule is found to have been breached.

102. I also bear in mind the observations of Singh LJ in *Shop Direct Finance Co. Ltd v. Official Receiver* [2023] EWCA Civ 367, [2023] Bus LR 1425, including his summary distilling the propositions at [46] (endorsed by Nugee LJ at [113]):

> "(1) Ultimately it is the actual wording of a provision that must govern any decision as to its effect.
>
> (2) The Handbook should be read as a whole, taking an holistic and iterative approach, so that a preliminary view on one provision can be tested by reference to the rest of the relevant provisions.
>
> (3) The provision should be construed in the light of its overall purpose.
>
> (4) It should be construed on the basis that it is intended to produce a practical and commercially sensible result. The rules should be taken to be grounded in reality."

Judicial Review of FOS Decisions

103. I have briefly touched upon the statutory scheme above when introducing the parties. I now add that section 226 of the FSMA enacts the "compulsory jurisdiction" of the "ombudsman scheme" under "[c]ompulsory jurisdiction rules" made by the FCA under section 226(3), specifying the activities to which they apply. The rules so far mentioned are compulsory jurisdiction rules.

104. By section 228(2) of the FSMA, in relation to the compulsory jurisdiction, a complaint to the ombudsman "is to be determined by reference to what is, in the opinion of the ombudsman, fair and reasonable in all the circumstances of the case". The decision must be given in writing and must include the giving of reasons for the decision (section 228(3) and (4)).

105. If the complainant accepts the decision, it becomes binding on both parties and final (section 228(5)). A decision may include a "money award", i.e. compensation, including interest payable on the award (section 229(2)(a), (3) and (8)). A money award may be registered under scheme rules and recovered as a debt in the county court, or its Scottish or Northern Ireland equivalents (Schedule 17, paragraph 16 to the FSMA).

106. There is no right of appeal against a decision of an ombudsman as to "what is, in the opinion of the ombudsman, fair and reasonable in all the circumstances of the case" (section 228(2) of the FSMA). The only remedy in respect of such a decision is judicial review. It follows that relief can only be granted in the Administrative Court on the usual public law grounds. This court cannot substitute its view for that of the ombudsman. A challenger must show that the decision is unlawful by reason of some flaw such as error of law or irrationality, in the usual way when the court is exercising its supervisory jurisdiction.

107. I return to the procedural rules in the FCA Handbook, denoted by the prefix "DISP" which stands for dispute resolution. Chapter 3 in the section dealing with dispute resolution and complaints is entitled "Complaint handling procedures of the Financial Ombudsman Service". DISP 3.5.4R requires that if an investigation is necessary, "both parties have been given an opportunity of making representations" and provides for a "provisional assessment" setting out reasons and a time limit "within which either party must respond".

108. DISP 3.5.5R requires the complaint to be determined without a hearing if the ombudsman "considers that the complaint can be fairly determined without convening a hearing". DISP 3.5.6R allows a party to request a hearing, giving reasons. The ombudsman then decides whether to convene a hearing and if so whether it should take place in public or in private. Provisions for written evidence and procedural deadlines of the usual kind then follow.

109. By DISP 3.6.1, headed "Fair and reasonable", an ombudsman "will determine a complaint by reference to what is, in his opinion, fair and reasonable in all the circumstances of the case". This replicates the language of section 228(2) of the FSMA. Expanding on that language slightly, DISP 3.6.4R then states:

> "In considering what is fair and reasonable in all the circumstances of the case, the Ombudsman will take into account:
>
> (1) relevant:
>
> (a) law and regulations;
>
> (b) regulators' rules, guidance and standards;
>
> (c) codes of practice; and
>
> (2) (where appropriate) what he considers to have been good industry practice at the relevant time."

110. I now set out DISP 3.7.1R and DISP 3.7.2R, forming part of DISP 3.7 headed "Awards by the Ombudsman":

> "3.7.1R
>
> Where a complaint is determined in favour of the complainant, the Ombudsman's determination may include one or more of the following:
>
> (1) a money award against the respondent; or
>
> (2) an interest award against the respondent; or
>
> (3) a costs award against the respondent; or
>
> (4) a direction to the respondent.
>
> **Money awards**
>
> 3.7.2R
>
> … [*Subject to an immaterial exception*] a money award may be such amount as the Ombudsman considers to be fair compensation for one or more of the following:
>
> (1) financial loss (including consequential or prospective loss); or
>
> (2) pain and suffering; or
>
> (3) damage to reputation; or

(4) distress or inconvenience;

whether or not a court would award compensation."

111. For completeness, I should mention that earlier in the DISP provisions, DISP 3.4.2R provides (and, I understand, also provided in November 2018) for "Test cases". The operative provision is DISP 3.4.2R which permits an ombudsman, with the consent of the complainant, to "cease to consider the merits of a complaint so that it may be referred to a court to consider as a test case" if certain further conditions are met.

112. Those conditions are also set out in DISP 3.4.2R. The ombudsman must have received a written detailed statement from the respondent, stating how and why the complaint raises "an important or novel point of law with significant consequences" and an undertaking to indemnify the complainant in respect of legal costs in certain circumstances.

113. The ombudsman must then decide whether the complaint would be more suitably dealt with by the court, taking into account various factors set out at DISP 3.4.3G, including whether the point of law is central to the outcome, how important or novel it is, the significance of the consequences of the dispute for the respondent's business, the amount of stake, and so forth. There has never been such a test case.

114. In two cases heard together, published as *R (Shawbrook Bank Ltd) v. Financial Ombudsman Service Ltd* [2023] EWHC 1069 (Admin), Shawbrook Bank and Clydesdale unsuccessfully challenged decisions of two FOS appointed ombudsmen in lead cases concerning complaints about "fractional ownership" selling of holiday timeshares. Collins Rice J at [9]-[16] set out the legal framework and principles in judicial reviews of financial ombudsman decisions.

115. At [12]-[13] in her detailed judgment, Collins Rice J said this:

> "12. Ombudsmen are dealing with complaints, not legal causes of action. They are not (conclusively) determining legal rights and duties. They are not bound to apply the common law. As an efficient, cost-effective and relatively informal type of alternative dispute resolution, ombudsmen 'should not be stifled by the imposition of legal doctrine'. A determination reached by an ombudsman may properly differ from the conclusion that a court would reach. They have a statutorily protected discretion in the 'fair and reasonable' jurisdiction and are not susceptible to legal appeal.
>
> 13. On the other hand, they are creatures of statute with jurisdiction circumscribed by law. They have a legal obligation to take relevant law into account. They must direct themselves correctly as to what the relevant law is. They are 'free to depart from the relevant law' but if they do they should say so in their decisions and explain why. And they are susceptible to judicial review on grounds of error of law in relation to their identification of what the relevant law is, as well as perversity and irrationality in relation to their substantive decisions."

116. In *R (Options UK Personal Pensions LLP) v. Financial Ombudsman Service Ltd* [2024] EWCA Civ 541, [2024] Bus LR 1307, the Court of Appeal (per Asplin LJ at [60]) similarly endorsed the proposition of Stanley Burnton LJ in *R (Heather Moor & Edgecomb) v Financial Ombudsman Service Ltd* [2008] Bus LR 1486, at [54], that an ombudsman was, under the FOS statutory scheme, "free to depart from the common

law". The ombudsman's broad judgment as to what is fair and reasonable is different from common law actionability.

117. The ombudsman is not "operating by the length of his foot"; he or she must adequately explain the reasoning (see the discussion in Asplin LJ's judgment at [73]-[84]); but that does not mean that, if the ombudsman departs from the common law, the decision must include a detailed analysis of what causes of action at common law were not available or were departed from and why. The same approach was recently reaffirmed by Popplewell LJ in *FCA v. Bluecrest Capital Management (UK) LLP* [2024] EWCA Civ 1125, at [61(1)].

Arnold Clark's Additional Grounds

118. As explained above, the FOS, supported by the FCA, disputes Arnold Clark's right to rely on its additional grounds and opposes the application to introduce the expert report of Mr Cullum. There are four strands to this aspect of the case: relevant procedural rules and case management; the allegation of procedural unfairness; the assertions of illegality in relation to redress; and the application to adduce expert evidence.

Procedural rules and Foster J's case management order

119. In its detailed grounds, Arnold Clark raised a new complaint of procedural unfairness: the FOS should have invited it to take part in the proceedings; it refused Clydesdale's request for a hearing to be convened to that end; the DISP rules do not include a power to add an interested party; and the Ombudsman did not invite Arnold Clark to make representations or supply evidence. He should not, Mr Jonathan Kirk KC submits, have relied on Clydesdale to forward material from Arnold Clark because the interests of the two could conflict.

120. The FOS did not use the test case procedure, Mr Kirk argued. It never has. It did not ask Ms Lewis to consent to use of that procedure. The FOS does not have to canvass an interested third party in every case, but this was a lead case with major effects on Arnold Clark's business interests. Its evidence about an acceptable interest rate was pivotal; without it, the compensation issue could not be fairly determined. Loss can only be compensated if it is suffered; none was.

121. The FOS took the preliminary point that Arnold Clark could not invoke procedural unfairness. Clydesdale had not done so. Arnold Clark was an interested party, not a claimant. Mr David Hopkins submitted that Foster J's case management order read together with the applicable procedural rules meant that Arnold Clark was confined to supporting Clydesdale's existing grounds of challenge and was not free to introduce new ones. In the alternative, he said, the new grounds should not be allowed because they are unarguable.

122. Mr Hopkins pointed out that Foster J's order was made under Part 54 of the CPR and that at paragraph 2 she directed filing of "Detailed Grounds for contesting the claim or supporting it on additional grounds". He submitted that read in the context of the CPR Part 54 regime, "supporting it on additional grounds" meant giving additional reasons for supporting the claimant's existing grounds of challenge. It could not be read as permitting the raising of new grounds of challenge unconnected to the existing ones, he said.

123. To make good the point, Mr Hopkins took me on a tour through the provisions of Part 54 and practice direction 54A using the word "grounds", submitting that more often than not the word means "reasons" rather than grounds of challenge such as those relied on by a claimant at the start of the proceedings. Foster J's order had clearly referred to and should be read in the same sense as rule 54.14(1), where the words are "support it [i.e. the claim] on additional grounds".

124. The other provisions were rule 54.5(1)(b) (the claim form must be filed "not later than 3 months after the grounds to make the claim first arose"); 54.6(1)(d) ("grounds" for contending that the claim is an Aarhus Convention claim); 54.8(4)(a)(i) (acknowledgment of service must set out "summary … grounds" for contesting the claim); 54.15 (court's permission needed for claimant to rely on "grounds" other than those for which permission already granted); and PD 54A, paragraph 4.2(1)(b) (claim form must include "a clear and concise statement of the grounds for bringing the claim").

125. This survey, said Mr Hopkins, showed that the word "grounds" was used in two different senses, the wide sense of a pleaded ground of challenge (as in CPR rule 54.5(1)(b) and PD 54A, paragraph 4.2(1)(b)); and the narrow sense of "reasons" for contesting a claim or supporting a defendant's resistance to it (as in CPR 54.8(4)(a)(i) and 54.14(1)). Unless those two distinct senses of "grounds" are recognised, unfairness and absurdity ensue, Mr Hopkins argued.

126. An interested party could bypass the permission requirement. A claimant with a supportive interested party would be in a privileged position. The interested party's supporting grounds could be completely new ones raised long out of time. The defendant would have no opportunity to respond unless there were a further round of pleadings and evidence, for which the rules do not provide. Arnold Clark should have raised the procedural fairness point as a claimant, promptly and not more than three months after the decision.

127. Mr Kirk responded that the provisions mean what they say and that interested parties often raise new points more than three months after the challenged decision; rule 54.14 allows for that. There is no violation of the certainty principle underlying the short time limit of three months at the most: that public bodies' decisions should not remain under the shadow of a possible challenge for long periods.

128. That is because, Mr Kirk noted, the proceedings are already by definition underway and heading for trial. While it is true that the interested party does not require permission to raise a new ground of challenge such as those raised by Arnold Clark here, permission will already have been given to the claimant for the proceedings to proceed at all. Any need for a claimant to respond as a matter of fairness can be dealt with by ordinary case management orders.

129. On this issue, I agree with Mr Hopkins' submissions up to a point. I accept that there are two senses of the word "grounds" and that Foster J's direction, and rule 54.14(1) on which the direction is based, use the term in its narrow sense of "reasons". However, I think the court could, exercising its ordinary case management powers, allow an entirely new ground of challenge (such as procedural fairness here) to be raised by an interested party if the court considered that was fair to the other parties, even though it might be out of time.

130. If the interested party would have succeeded as a claimant in persuading the court to grant permission for the ground to be advanced (taking account of the time limit and any need for an extension), there seems no reason why it should not be allowed to do so in the capacity of interested party, provided that is not unfair to the defendant. To require the interested party to bring a fresh claim would be arid, cumbersome, unnecessary and against the overriding objective.

131. Thus, the interested party does require the court's permission to raise a completely new ground, but that permission may be given outside CPR Part 54, under case management powers in Part 3, which applies to judicial review claims. Any unfairness to the defendant can, in principle, be dealt with by permitting further pleadings and evidence, an adjournment, or by not allowing the interested party to rely on the new ground.

132. In this case, the FOS and the FCA have complained that Arnold Clark's new grounds came very late and have grumbled about that in submissions and correspondence; but they have not sought an adjournment and have been able to respond effectively without needing further evidence, in skeleton arguments and oral submissions, to Arnold Clark's procedural fairness ground (and the assertions of illegality with regard to redress, to which I am coming shortly).

133. I conclude that Arnold Clark's procedural unfairness ground is outside the terms of Foster J's case management order, paragraph 2; but I can still decide to allow it under the case management power at CPR rule 3.1(2)(m), rather than require Arnold Clark to bring a late fresh claim to the same effect. Whether I should do so is another matter. If the point is not arguable on its merits, it should not be allowed. If it is arguable, I must take account of lateness and any other relevant procedural factors in deciding whether to allow it.

The merits of Arnold Clark's allegation of procedural unfairness

134. Developing his submissions in oral argument, Mr Kirk complained that the Ombudsman had made no attempt to invoke the "Test Cases" procedure in DISP 3.4.2R. This was clearly a lead case and treated as one, the decision being more than usually detailed. The FOS publishes no guidance on how it operates. It did so in a manner unfair to an interested party which in this case alone could give pivotal evidence in a case with a substantial impact on its business.

135. For the FOS, Mr James Strachan KC rehearsed the rules and the procedural history, which I have set out above. He submitted that the Ombudsman had no power to compel use of the test case procedure and that while the case was of wider importance than just to Ms Lewis, she had not complained against Arnold Clark; the decision was fact specific; procedural fairness was amply satisfied by the reception of evidence and argument from Arnold Clark transmitted through Clydesdale; and the Ombudsman was entitled for the reasons he gave, after careful consideration, not to hold or invite Arnold Clark to attend a hearing.

136. I have concluded that there is no arguable merit in Arnold Clark's contention that the Ombudsman treated it in a manner that was procedurally unfair. DISP 3.5.12G provides that an ombudsman may take into account evidence from third parties. That happened here. The Ombudsman had before him the relevant sale documents. Arnold Clark could have provided further unsolicited witness evidence. The Ombudsman had

evidence about the market and discretionary commission arrangements from Clydesdale and Evolution Funding.

137. The evidence before the Ombudsman included the email of 19 September 2023 from Mr Forbes to Clydesdale, which the latter appended to its letter of 27 September to the Ombudsman. Clydesdale also passed to the Ombudsman on 6 October 2023 Arnold Clark's response to the comments from Ms Lewis about its conduct on the occasion of the sale. The Ombudsman considered whether to hold an oral hearing, was not obliged to hold one and gave full and considered reasons on 25 October 2023 for not holding one.

138. He was plainly entitled to the view that an oral hearing would not, in his words, "adduce anything new, or anything that the parties have not been able to provide already". It seems to me beyond argument that he was entitled to be:

> "satisfied that, given the complaint before me, I do not require Arnold Clark to further clarify its comments in relation to its actions as a motor dealer (when selling Miss Lewis her vehicle), rather than its actions as a Credit Broker, or make any further oral submissions on a complaint where it is not the respondent firm".

139. I do not think it is arguable that the Ombudsman, or the FOS, was bound to take the unprecedented step of invoking the Test Case procedure or, rather, seeking Ms Lewis' consent to that course. Arnold Clark would have to persuade the court that no reasonable ombudsman or ombudsman service could do otherwise. It did not ask the Ombudsman or the FOS to invoke DISP 3.4.2R and to "cease to consider the merits of a complaint so that it may be referred to a court to consider as a test case". The point has no merit.

140. For those reasons, I do not allow Arnold Clark to rely on its procedural unfairness ground of challenge. If I had thought it was arguable, I might well have not allowed it because of its lateness and because Arnold Clark had not sought to raise it timeously in the capacity of a claimant. If I had allowed it despite that, I would have dismissed it on its merits.

Arnold Clark's assertion of illegality in relation to redress

141. In its detailed grounds and skeleton argument, Arnold Clark submitted that the decision to award monetary compensation to Ms Lewis was marred by illegality, because the Ombudsman can only make a monetary award for financial loss where such loss has been suffered (see FSMA section 229(3)(a)); to overlook this was an error of law; and in concluding that Ms Lewis had suffered financial loss the Ombudsman:

> "failed to take into account important evidential matters, set out in the evidence now provided by Arnold Clark, which he ought to have considered when determining a test case" (detailed grounds, paragraph 1(b)(ii)).

142. Mr Hopkins submitted that this line of attack is inseparable from the procedural unfairness allegation. Mr Kirk did indeed, in his skeleton argument at paragraph 22, make the same link, submitting (my italics) that:

> "[a] *consequence of adopting a procedurally unfair process* was that the Ombudsman did not consider relevant matters, which he ought to have considered, in determining whether there had actually been a 'financial loss'."

143. If the Ombudsman had had the benefit of the additional evidence now relied upon, i.e. Mr Cooper's statements and Mr Cullum's report, it is said by Arnold Clark that he must inevitably have concluded that Ms Lewis suffered no financial loss. I have already ruled that the Ombudsman was not arguably bound to invite Arnold Clark to provide more evidence than it did, via Clydesdale, provide.

144. Aside from the additional evidence, there is little to distinguish Arnold Clark's denial of financial loss from Clydesdale's second ground of challenge, namely that it was irrational to make a monetary award. The argument is in essence the same, whether called irrationality, disregard of relevant considerations or misdirection of law: the "hypothetical negotiation" scenario was flawed because Ms Lewis would not have been offered a deal involving zero commission. The Ombudsman could not find financial loss and had to refuse a monetary award.

145. Clydesdale made that argument to the Ombudsman at the time, relying on Evolution Funding's report. Arnold Clark restates it now, wishing to rely on further evidence from Messrs Cullum and Cooper. Arnold Clark is thus, in substance, supporting Clydesdale's second ground of challenge rather than pressing the court to accept an entirely novel ground of challenge. The assertion of "illegality" is therefore within the compass of Foster J's case management order, unlike the allegation of procedural unfairness.

146. I would not prevent Arnold Clark from advancing its arguments which, effectively, support Clydesdale's irrationality challenge in relation to compensation (numbered ground 2). I will consider Arnold Clark's arguments on illegality when I address that ground. It does not necessarily follow that Mr Cooper's evidence, not before the Ombudsman, assists Arnold Clark's argument; nor that the expert report of Mr Cullum must necessarily be allowed.

The application for permission to adduce expert evidence

147. Arnold Clark's position is that "[t]he evidence provided by Arnold Clark makes it clear that the Ombudsman's conclusions … are wrong" (detailed grounds, paragraph 32). The report of Mr Cullum "is provided only to assist the court with the conclusions that can fairly be reached from analysing that data" (skeleton, paragraph 39). That report, if allowed, would be deployed in support of the second ground of challenge: that the decision on compensation and quantum cannot stand. I will therefore consider the application at that stage.

Ground 1(i): Error of Law; Disclosure of Commission Model

148. Clydesdale's first ground of challenge is that the Ombudsman erred in law in determining that Arnold Clark should have disclosed to Ms Lewis what its commission arrangements with Clydesdale were. The Ombudsman's decision and reasoning on this issue is in his decision at [114]-[167]. In summary, he reasoned as follows.

149. First, the existence and amount of commission could affect the broker's impartiality in recommending the finance agreement because Arnold Clark could set the interest rate and had an incentive to set a high one; this created a conflict of interest. The more money Ms Lewis borrowed, the more commission Arnold Clark would receive. Knowledge of the existence or amount of the latter's commission could impact on Ms Lewis' transactional decision.

150. Both limbs of CONC 4.5.3R were engaged. To comply with it, Arnold Clark should have disclosed the existence of both its commission payments and indicated in a prominent way, such as in the IDD, their existence. In addition, Principle 8 (requirement to manage conflicts of interest fairly) and Principle 6 (requirement to pay due regard to the interests of Ms Lewis and treat her fairly) required Arnold Clark to disclose the source of the conflict.

151. The Ombudsman then rejected various submissions of Clydesdale to the contrary and gave reasons for doing so. I need not set these out in detail as I will address those or similar submissions myself shortly. The minimal disclosure made in the IDD and in the terms and conditions document in the conditional sale agreement were not adequate to meet Clydesdale's obligations. The language of CONC 4.5.3R "suggests the Broker was required to make a more specific disclosure than it did …" ([130]). This was supported by CONC 3.3.1R (communications must be clear, fair and not misleading) and Principle 7 (requirement to pay due regard to client's information needs).

152. Arnold Clark should have disclosed, the Ombudsman said, "in some way and prominently", that it would receive payments in two ways; commission "tied to the interest rate which it would select from a pre-determined range set by [Clydesdale], with higher interest rates paying more commission"; and "a fixed percentage of the loan amount" ([138]). Under CONC 4.5.3R and CONC 3.7.4G(2), it did not have to disclose the amount of commission payable under those arrangements ([139]).

153. In the alternative, the Ombudsman said, if he were wrong about the effect of CONC 4.5.3R and CONC 3.7.4G(2), compliance with those provisions "does not mean the Broker will necessarily have complied with Principles 7 and 8 in all circumstances … it is well established that specific rules do not necessarily exhaust the application of the Principles" ([145]).

154. Here, there were two conflicts of interest: the ordinary financial incentive to introduce the lender; but also the ability to choose the interest rate, so that the more Ms Lewis borrowed, the more commission Arnold Clark would receive. It had not done enough "to manage fairly the conflict and alert Miss L to the source of the conflict … nor did it pay due regard to the information needs of Miss L and communicate information to her in a way which was clear, fair and not misleading …" ([149]).

155. For Clydesdale, Mr Ben Jaffey KC, supported by Mr Kirk for Arnold Clark, submitted the Ombudsman had misinterpreted the provisions. Interpretation of the relevant rules and guidance is a question of law (per Ouseley J in a case about the Banking Code Standards Board, *R (Norwich and Peterborough Building Society) v. Financial Ombudsman Service Ltd* [2002] EWHC 2379 (Admin), at [71]): "[i]f he misinterprets it, he will have failed to take it into account". The Ombudsman is not the arbiter of the meaning of the provisions.

156. Mr Jaffey submitted that the actual wording of CONC 4.5.3R must govern any decision as to its effect. In 2018, what CONC 4.5.3R required and what CONC 3.7.4G recommended was disclosure of the existence of commission, not the structure of the commission arrangements or the amount, except on request by the customer. The rule was complied with by disclosing both the existence of commission in the IDD and the terms and the terms and conditions of the conditional sale agreement.

157. The Ombudsman's error, said Mr Jaffey, was to treat word "existence" of commission as if it read "existence and nature" of commission, the phrase introduced by amendment in 2021. The FCA was wrong to say that the amendments to CONC merely clarified what the rules already required. If external materials referred to in the FCA's detailed grounds were permissible aids to construction, they could not override the clear text of the provision.

158. There were indeed references in the March 2018 motor finance review report to non-compliance with then existing obligations; and references in that report and the October 2019 consultation paper to the need to clarify and "strengthen" existing provisions. That did not assist, said Mr Jaffey. The FCA is not the guardian of the meaning of the rules. The non-compliance doubtless referred to cases where commission remained wholly concealed, not cases such as this where there was disclosure which the Ombudsman considered insufficient.

159. The presumption that the legislature (here, the FCA) does nothing in vain should inform the correct construction of CONC 4.5.3R. Applying that presumption, the 2021 amendments must have expanded the disclosure obligation in respect of commission arrangements from an obligation to disclose the "existence" thereof to the "existence and nature" thereof.

160. This contention was supported, Mr Jaffey submitted, by a survey done by the FCA for research purposes in 2019 where the text sent to firms included a proposal that increased disclosure requirements:

> "could include, for example, including the nature of the broker's remuneration arrangement (currently only the existence of a remuneration has to be disclosed) and/or the amount of any such remuneration."

161. Having adopted too onerous a construction of the rules, the Ombudsman then erred in finding insufficient compliance with them, Mr Jaffey argued. The words "Lenders typically pay Us a fee for these introductions" were sufficient in 2018. The note to the then version of CONC 4.5.3R (and, I interject, also the 2021 version), cross-referred to the box beneath paragraph 3.7i of the CBG, which gave as an example of an unfair business practice failing to make sufficiently clear that commission "is or may be payable".

162. It makes sense, said Mr Jaffey, for CONC 4.5.3R to be construed to allow generic and not bespoke IDD documentation, since commission would not be payable in every case, only in some. In the October 2019 consultation paper the FCA had reported its finding that from January 2017 to July 2018 "only a small number of brokers in our sample disclosed to the customer that a commission may be received". The Ombudsman had accepted that if Ms Lewis had read the IDD she would have thought commission would, more likely than not, be paid.

163. As for Principles 7 (clear, fair and not misleading information) and 8 (conflicts of interest), Mr Jaffey made three points which, he said, rendered untenable the Ombudsman's finding that those Principles were breached whether or not he was right to find that CONC 4.5.3R was breached. There was no lawful basis for the finding that Principles 7 and 8 were breached, he said. The Principles had their limits and the Ombudsman overstepped them. Normally, they would be complied with if the concomitant rules on disclosure were complied with.

164. The first point was that the Principles had to be applied on the footing that the broker was not a financial adviser and assumed no duty to provide impartial advice, information or a disinterested recommendation. It was clearly for the customer to shop around. The IDD made this clear. The broker has its costs to cover and cannot do so unless it is able to introduce customers to lenders prepared to remunerate the broker adequately.

165. Secondly, the IDD and other documents were clear, fair and not misleading. Arnold Clark openly advertised its APR and Ms Lewis chose to enter into the conditional sale agreement based on that same APR. Ms Lewis was offered, Mr Jaffey submitted, the best rates available in the market, which she had a strong financial incentive to accept, in her own interest.

166. Third, the variable rate and the right to choose it operated in a fair way. It was limited by the cap set at the lower of either £2,500 or 50 per cent of total interest charges. The broker was required by the lender to operate the arrangements fairly in a manner that did not discriminate on Equality Act grounds or on the basis of wealth. The rate here was only 1.99 per cent above the minimum rate. The amount of commission had to be disclosed on request, by CONC 4.5.4R.

167. For the FOS, Mr Strachan submitted that in its attempt to impugn the decision, Clydesdale sought illegitimately to characterise the Ombudsman's reasoning as proceeding from an interpretation of the rules and Principles, when in truth he was making an evaluation of the facts and the application of the rules and Principles to them; an evaluation that was not arguably irrational.

168. As to interpretation, Mr Strachan denied the logic of first ascertaining the meaning of the provisions as amended in 2021 and then reasoning backwards that because the legislature does nothing in vain, they must have meant something different before the 2021 amendments. The problem being addressed was one of non-compliance with the (pre-2021 amendments) rules.

169. That the post amendment rules required the disclosures listed by the Ombudsman does not entail the proposition that the pre-amendment rules did not, Mr Strachan submitted. The approach to interpretation in *Shop Direct* required the rules to be construed as part of the FCA Handbook as a whole, including and not, as Clydesdale did, ignoring the Principles.

170. The Ombudsman was right, said Mr Strachan, to approach CONC 4.5.3R in the light of the communications obligations in CONC 3.3.1R and in the light of Principles 7 (client information needs) and 8 (managing conflicts fairly). The Ombudsman's construction of CONC 4.5.3R was correct for the reasons he gave and produces a practical and commercially sensible result.

171. The rest of Clydesdale's challenge under this ground was a disguised attack on the Ombudsman's application of the rules, which was a matter for him and is not one for the court, said Mr Strachan. He was entitled to decide what degree of disclosure on the facts would meet the obligation under CONC 4.5.3R to disclose "the existence of any commission or fee or other remuneration …". Both limbs of that provision were engaged, as he found; knowledge of the "existence or amount of the commission" could affect the broker's impartiality in recommending a product or materially impact on the customer's decision.

172. As for Principles 7 and 8, Mr Strachan submitted that the Ombudsman was entitled, irrespective of whether he correctly interpreted and applied CONC 4.5.3R, to find that "in the circumstances of this case and given the particular features of the discretionary commission arrangement … it was incumbent on the Broker to do more than say as it did that 'Lenders typically pay Us a fee for these introductions" (see the decision at [144]).

173. Mr Strachan argued that Clydesdale had asserted no error of law in respect of the Ombudsman's treatment of those two Principles. No allegation of misinterpreting them was made. Clydesdale did not like the Ombudsman's assessment of what amount of disclosure was required to adhere to the two Principles; but that did not make his decision on that issue, and his assessment of what fairness required on the facts, arguably unlawful.

174. Ms Jemima Stratford KC, for the FCA, supported the submissions on behalf of the FOS on the construction of the provisions in the FCA Handbook. The task of the court was the orthodox one of construing the rules and Principles. The provisions should be interpreted in the light of their purpose and context, but the actual wording of any provision would ultimately govern the court's decision as to its meaning, in line with the *Shop Direct* approach.

175. The effect of the 2021 amendments must be considered in their broad context, not by taking out of context individual passages and phrases from FCA publications preceding the amendments. The FCA had from 2017 to 2021 examined and investigated the practices of lenders and brokers in the motor industry and had considered them against a range of rules then in force. That work was ongoing. The FCA would make submissions on construction and law, but not on fact specific issues (such as those raised in the second ground).

176. Ms Stratford made five points about CONC 4.5.3R. First, its purpose is to arm the consumer with adequate knowledge to enable her to make an informed decision before entering into a lending arrangement. She must not be rushed: the disclosure must be made "in good time" before the lending agreement is entered into. The disclosure obligation is activated by any impartiality issue or possible "material impact" on the consumer's choice. Transparency is the object, as in Principle 7 referring to a client's "information needs" and in CONC 3.3.1R requiring communications that are clear, fair and not misleading.

177. Second, CONC 4.5.3R refers to the identity of the person paying the commission or fee or other remuneration: a "lender or owner or a third party …". That shows the disclosure must be of more than the bare fact that commission is payable. Therefore, said Ms Stratford, the content of the required disclosure must vary depending on the

factual circumstances and nature of the commission arrangement; but merely to disclose that commission is or may be payable, without more, would fall well short of compliance; it would not equip the consumer to make an informed decision.

178. Third, the importance of promoting consumer choice was emphasised in FCA publications (and before that, in the ILG and the CBG) including the March 2019 report, where CONC 4.5.3R (then unamended) was summarised (at paragraph 3.29) with the observation that commission arrangements "which allow the broker discretion to adjust the interest rate, to earn more commission", would be caught by the rule and "[i]f the customer is aware of the existence of such arrangements, they can probe further if they want or request an indication of the amount or likely amount … ."

179. Fourth, the FCA's concern was to make explicit the extent of disclosure required, not to allow brokers and lenders to interpret the provisions and decide that issue for themselves. The ban on discretionary commission arrangements was specific to motor finance; it did not apply to other forms of credit broking. Once the ban was in place, there was no longer any need for such specific provision in motor finance but the 2021 amendments were made to promote adequate disclosure in other sectors.

180. Fifth, Clydesdale relied on a 2010 OFT publication summarising responses to the consultation that led to the ILG, to support its proposition that the relevant distinction is between the "existence" and the "amount" of commission (with mandatory disclosure of the former only and of the latter only on request); and that the "nature" of a commission was equated with its "amount" rather than its "existence". However, the final version of the box beneath paragraph 5.5 of the ILG did not replicate this reasoning or refer to the "nature" of a commission.

181. As for CONC 3.7.G, Ms Stratford submitted that it formed part of the suite of provisions about financial promotions and communications by credit brokers to borrowers, all concerned with ensuring the broker's independence and requiring, consistently with CONC 3.3.1R and Principle 7, that the communication should be "prominent". The FCA supported the Ombudsman's determination that Arnold Clark should have disclosed the discretionary commission arrangement because it could impact on its impartiality.

182. Principle 7 (on client information needs) and CONC 3.3.1R (on financial promotions and communications) are self-evidently concerned with fair, clear and transparent communications, Ms Stratford submitted. They inform the interpretation of CONC 4.5.3R but also separately impose free standing obligations to communicate fairly and not in a misleading manner. The FCA supports the Ombudsman's decision to that effect and the corollary that Arnold Clark's communications to Ms Lewis fell short of compliance.

183. As for Principle 8, the FCA agreed with the Ombudsman that the commission arrangements created the two specific conflicts of interest he described in his decision. The issue had been identified in the March 2019 report following the motor finance review. The FCA supports the Ombudsman's decision that the disclosure was inadequate by reason of Principle 8 because the conflicts were not properly managed. It does not assist Clydesdale that the commission was not fully secret and therefore not a bribe at common law.

184. I come to my reasoning and conclusions on this first ground of challenge. First, I accept the submission of Clydesdale that the correct interpretation of the FCA Handbook provisions is a matter for the court and not the Ombudsman and that if the latter misinterprets them, he will (as Ouseley J pointed out in the *Norwich and Peterborough Building Society* case in the context of the Banking Code), have failed to take them into account.

185. Next, I accept the uncontroversial proposition, well established in the authorities, that the correct interpretation of a provision is ultimately governed by the language used, read in the context of the Handbook as a whole, taking a holistic approach, construed in the light of the overall purpose of the provision and on the basis that it is intended to produce a practical and commercially sensible result (per Singh LJ in *Shop Direct*, at [46]).

186. I also agree with Mr Strachan that it is for the Ombudsman and not the court (subject only to the court's supervisory jurisdiction) to decide on the facts whether a rule or Principle has been breached. Unless the Ombudsman proceeds upon a misinterpretation of the rule or Principle, his decision as to its application to the facts is for him to decide. That flows from section 228 of the FSMA and DISP 3.6.4R; and from the analysis of Collins Rice J in *Shawbrook Bank Ltd* at [15]-[16] and of Asplin LJ in the *Options UK* case, at [73]-[84].

187. I do not accept Clydesdale's submission that where a rule and a Principle occupy essentially the same territory, the Principle would normally be complied with if the rule is complied with. That may be so in some, even many cases, but as a proposition it overstates the status of the rule and understates that of the Principle. It is not consistent with the nature of the Principles, which "create an overarching framework and are not constrained or diminished by a specific rule" (per Asplin LJ in *Options UK*, at [74]; endorsing at [76] the approach of Ouseley J in the *British Bankers Association* case).

188. As Ouseley J noted in *British Bankers Association* at [184], in deciding what is fair and reasonable, an ombudsman is not prevented from awarding compensation where no breach of a specific rule is found but breach of a Principle is found. There can be a lawful finding of breach of a Principle without breach of a rule, as well as vice versa. Where there is an overlap between the content of a rule and a Principle, the rule does not exhaust the application of the Principle (*ibid.* at [166]). In the present case, the Ombudsman was considering provisions which overlap in their subject matter.

189. Those provisions should be read together, adopting a holistic approach. Principle 7 (clients' information needs and non-misleading communications to clients) overlaps with CONC 3.3.1R (communications and financial promotions) and with CONC 3.7.4G(4) (prominent disclosure in accordance with the clear, fair and not misleading rule). Principle 8 (managing conflicts of interest fairly) overlaps with CONC 4.5.3R (disclosure of existence of commission, etc in specified cases) and with CONC 3.7.4G(2) (indication of financial arrangements with a lender that may impact on firm's impartiality).

190. I accept the submission of Mr Strachan that there is no clearly pleaded challenge to the Ombudsman's interpretation of the Principles. Rather, Mr Jaffey's submission for Clydesdale was that his three points taken together (that Arnold Clark did not act as a financial adviser; that its documents were clear, fair and not misleading; and that the

commission arrangement operated in a way that was fair to Ms Lewis) meant that the Ombudsman's analysis of Principles 7 and 8 was "wrong in law" and he submitted that "[i]n all the circumstances, there was no lawful basis for a finding of breach of Principles 7 and 8".

191. However, there is no plea of perversity or irrationality. The first ground of challenge is summarised in Clydesdale's skeleton: the "Ombudsman erred in law in his determination of liability". Irrationality is not suggested until we get to the second ground of challenge (that the Ombudsman "reached an irrational result on quantum"). I agree with the FOS that even if Mr Jaffey's three points were established on the facts to the satisfaction of the court, that would not, absent an irrationality challenge, suffice to impugn the Ombudsman's decision that Principles 7 and 8 were breached.

192. I consider next the scope of CONC 4.5.3R. I agree with Ms Stratford that what she called the "regulatory archaeology" should be treated with caution. I did not find the cross-references to the ILG and CBG and the references to the consultation papers and other publications conclusive in either direction. In *Shop Direct*, Singh LJ at [82] disapproved of reliance on consultation papers to resolve an ambiguity. Here, the older publications predated the advent of the system of overarching Principles combined with specific rules. Within the publications relied on, there are *indicia* in both directions.

193. On the one hand, the requirement to disclose the "existence" of commission arrangements undeniably became a requirement to disclose the "existence and nature" of commission arrangements. Other things being equal, Mr Jaffey is right to say it is unlikely that amendment wrought no change in the disclosure requirements. On the other hand, the argument that absent an express requirement to disclose their "nature", CONC 4.5.3R could not require disclosure of more than the bare fact that a commission was payable, is unattractive because it treats CONC 4.5.3R in isolation, not in harmony with its neighbours (Principles 7 and 8, CONC 3.3.1R and CONC 3.7.4G(2)).

194. I have reached the conclusion that in the 2018 version of CONC 4.5.3R, using the word "existence" *simpliciter*, the wording of the rule was then already wide enough to require, in some cases, disclosure of more than the bare fact that commission, a fee or other remuneration would be, or could be, payable. It was open to the Ombudsman, in my judgment, to decide that this was a case in which the disclosures made fell short of what CONC 4.5.3R then required.

195. The Ombudsman reasoned that the conflict of interest was particularly acute because two separate commission payments were payable to Arnold Clark; the head office commission at 2 per cent of borrowing and the "discretionary" rate determined by the payee. The former, had it stood alone, would have been inadequately disclosed by means of the threadbare statements in the IDD and conditional sale agreement (albeit that would not of itself have led to a finding of unfair treatment of Ms Lewis because it was standard and did not affect the interest rate she had to pay). The inadequacy was more serious in the case of the latter because it was unusual and did affect the rate she had to pay.

196. The Ombudsman considered that what was disclosed was inadequate in respect of both the existence of the head office commission, which was standard, and in respect of the existence of the discretionary commission, which was unusual and indicative of an acute conflict of interest not adequately flagged up in the IDD or the conditional sale

agreement. The requirement was to disclose "the existence of *any* [my italics] commission or fee or other remuneration payable to the credit broker by the lender".

197. It was for the Ombudsman to decide what level of disclosure would meet the requirement to disclose the "existence" of "any" commission payable. The IDD did not refer to commission at all, unless the reference to a "fee" is understood to include commission. The two were treated as separate kinds of remuneration in the then wording of CONC 4.5.3R; the phrase was "any commission or fee or other remuneration payable". The conditional sale agreement referred to "commission", in the singular and without further particularity. The extent of disclosure was in inverse proportion to the acuity of the conflict of interest.

198. I reject the contention that the finding of breach of CONC 4.5.3R proceeded from a misinterpretation of that rule. Where there are two separate kinds of commission, CONC 4.5.3R applies separately to disclosure of the existence of both kinds. The broker must adequately disclose the existence of both kinds. If the second kind is the discretionary kind as in this case, any distinction between its "existence" and its "nature" may be too fine to affect, in practice, the extent of disclosure required under CONC 4.5.3R.

199. *A fortiori*, the finding that there was a breach of Principles 7 and 8 is not impeachable and indeed is not clearly impeached in the first ground of challenge. Those Principles were closely related to the obligations in their more specific counterpart rules, CONC 4.5.3R and CONC 3.3.1R. There is no flaw in the finding that Principles 7 and 8 were breached. On the first ground (ground 1(i)), I grant permission but I dismiss the challenge.

Ground 1(ii): Error of Law; Discretionary Commission Arrangements

200. Clydesdale's next ground of challenge (called ground 1(ii)) is that the Ombudsman erred in law in his determination on liability in that he wrongly found the discretionary commission arrangement between Clydesdale and Arnold Clark was caught by CONC 4.5.2G.

201. To recap, the guidance at CONC 4.5.2G states:

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

202. And Principle 6 states:

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

203. The Ombudsman addressed this issue at [194]-[262]. At [196], he stated his conclusion that for reasons that would follow he found that Clydesdale had breached Principle 6 and acted contrary to the guidance at CONC 4.5.2G because the discretionary commission arrangement with Arnold Clark, created a conflict between the interests of Arnold Clark and those of Ms Lewis and provided an incentive for Arnold Clark to set

an interest rate higher than the rate at which Clydesdale would be prepared to lend to Ms Lewis.

204. He set out Clydesdale's main contentions. In summary, Clydesdale submitted that CONC 4.5.2G was not relevant: "differential commission rates" referred to "volume over-riders", the phrase in the box under ILG paragraph 5.5. They were defined in a footnote as "additional payments made on the basis of business volume and profitability". The purpose of CONC 4.5.2G was to deter unsuitable lending; the discretionary commission arrangement here was not volume related or profitability related. It did not make the lending unsuitable and did not come within "differential commission rates".

205. The Ombudsman thought "differential commission rates" should be given its plain and ordinary meaning: "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" ([209]). CONC 4.5.2G was relevant. The box under ILG paragraph 5.5 did refer to unsuitable lending, but also to the need for differential commission rates or volume over-riders to be justified "in terms of the relative work involved" ([211]).

206. He was not persuaded that CONC 4.5.2G was concerned only with brokers proposing unsuitable loan products; it also stated that differential commission rates should not form part of arrangements between brokers and lenders unless justified by the work involved ([215]). If that was wrong, he thought the lending was unsuitable for Ms Lewis in this case "because the interest rate of the loan was set at a higher rate than [Clydesdale] would have lent to her at" ([216]-[217]). He continued at [217]:

> "I consider the interest rate is a key component of a loan product, and an interest rate that has been increased by the Broker to a level higher than it needed to have been at (without the justification of extra work) resulting in increased payments, can make a product unsuitable for the borrower. In this case, even though the APR was the Broker's advertised typical rate, Miss L could still have taken out the same product at a lower cost than the Broker submitted her application at."

207. The Ombudsman disagreed ([218]) with the view of the authors of Butterworths Financial Regulation Service at paragraph [231] of that work 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. … 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."

208. That was at odds with "what the provision actually says" ([219]) and with what the FCA said in its March 2019 report "Our work on motor finance - final findings", at paragraph 2.26 (I have quoted it above). He offered the different interpretation that cases within CONC 4.5.2G "could include where the commission rate as a percentage of the amount of credit varies according to the interest rate charged to the customer" ([222] in the Ombudsman's decision).

209. The Ombudsman then considered whether the commission arrangements here were justified "based on the extra work of the Broker" ([233]). The broker here was given discretion to choose the interest rate irrespective of whether it carried out any extra work; there was no reference to extra work in the documents passing between Arnold Clark and Clydesdale, such as the "Motor loan application process" ([240]-[241]). Any extra work was "incidental to the differential commission rate, rather than a justification for it" ([243]).

210. He concluded at [245] that the failure to follow the guidance in CONC 4.5.2G meant that Clydesdale "failed to pay due regard to Miss L's interests and treat her fairly". At [250] and [251] he explained that if his interpretation of CONC 4.5.2G were wrong, it was more likely than not that the treatment of Ms Lewis was a breach of Principle 6 in any event. If Clydesdale had followed the guidance in CONC 4.5.2G, that did not mean it had complied with Principle 6.

211. He did not accept Clydesdale's contention that Ms Lewis had been treated fairly because she had been offered Arnold Clark's normal APR of 8.9 per cent which was a favourable rate within the market. At [256], he rejected the submission that:

> "the fact that [Clydesdale]'s intention was to allow the Broker to cover its costs and expenses, allow the Broker flexibility to make deals more competitive and to encourage the Broker to refer consumers to Barclays PF means Barclays PF paid due regard to Mrs L's interests and treated her fairly."

212. The unfairness, he explained at [262], lay in the discretionary commission arrangement, not the "head office" commission fixed at 2 per cent of the amount borrowed. The provision in the brokerage agreement for the head office commission was not part of the unfair treatment of Ms Lewis.

213. For Clydesdale, Mr Jaffey submitted that the prohibition against differential commission rates in CONC 4.5.2G is "intended to prevent brokers promoting an unsuitable product to a customer instead of another, more suitable, product"; and that discretionary commission arrangements of the kind used here are different from differential commission rates. The arrangements here "did not contravene CONC 4.5.2G; and the product was suitable because the cost of credit was as low or lower than any other product available on the market".

214. Mr Jaffey submitted that the Ombudsman erred in law by treating differential rates of commission as including discretionary commission arrangements. The purpose of CONC 4.5.2G was to discourage the promotion of unsuitable lending products such as, for example, advising the borrower to take out a secured loan, where that is against the borrower's interest; or to take out a payday loan to promote longer term borrowing.

215. Mr Jaffey relied on the July 2009 consultation paper on irresponsible lending, preceding the ILG. In the chapter on "pre-contractual issues", among the various types of unsatisfactory behaviour listed was that of "[d]eceptive and/or unfair practices", the second example of which was, at paragraph 5.15:

> "Failing to act in the best interests of a borrower by promoting the sale of a particular product, for business and/or personal gain, under circumstances in which the product is clearly inappropriate given the borrower's needs and personal circumstances."

216. Beneath that text in a box there appeared the words:

> "Differential commission rates [*footnote 37*] or 'volume over-riders' [*footnote 38*] should be offered only where these are justified in terms of the relative work involved and the amounts should be disclosed to the borrower."

I interject that footnote 37 read: "[t]he amount of any such commission should be disclosed on request". Footnote 38 read: "[v]olume over-riders are additional payments made on the basis of business volume and profitability."

217. Mr Jaffey also submitted that the CBG (dating from November 2011) supported his construction of CONC 4.5.2G. In chapter 4, headed "Service Provision", under the sub-heading "Transparency", paragraph 4.4 stated:

> "An intermediary's independence could be affected by his business arrangements with a creditor (or a credit broker or other intermediary) and/or by the method of remuneration. For example, a person would be unlikely to be considered independent if he:
>
> • works exclusively with one or more creditors
>
> • is otherwise tied [*footnote 60*] in any way to a creditor or
>
> • gives preference to particular products (for example, because of differential commission rates, volume over-riders or other benefits)."

218. Footnote 60 stated:

> "By 'tied' we mean any contractual or non-contractual links between the parties which are liable to impact on the service provided by the broker/intermediary, or any advice given, over and above normal commission arrangements - for example a 'right of first refusal' agreement or an agreement that the broker/intermediary will give preference to the creditor's products."

219. Those passages undermine the Ombudsman's sweeping conception of the guidance at CONC 4.5.2G. The guidance was narrower and more focussed than he realised, Clydesdale submitted. He was also wrong to find that the product proposed to Ms Lewis by Arnold Clark was unsuitable for her needs, because she received a leading market APR and one which, under Arnold Clark's arrangements with Clydesdale, could be reduced but not increased.

220. As for Principle 6, Mr Jaffey contended that the Ombudsman's analysis was flawed. His reasoning was that Ms Lewis paid a higher rate of interest than Clydesdale was prepared to lend at and that this was "solely because of the commission arrangement and the Broker's appetite for earning more commission" ([252]). That was untenable because the broker would not and could not, in the real commercial world, introduce a customer to a lender unless the broker received adequate commission.

221. While Clydesdale was willing, in accordance with the brokerage agreement, to lend at a lower rate than Ms Lewis paid, Arnold Clark would not have introduced her to Clydesdale at that lower rate because, as it was put in Clydesdale's skeleton argument:

> "arranging finance has costs, commission is a proper source of income, and the Claimant was able to lend at low rates because of the work done by the Broker in fully managing the relationship with the Complainant."

The correct approach to Principle 6 is to consider whether Ms Lewis was treated fairly by reference to the alternative options open to her in the market, i.e. whether there were other more favourable APRs at the time.

222. There were not, said Mr Jaffey. Arnold Clark's arrangements with Clydesdale required the former not to increase the APR above 8.9 per cent for impermissible reasons; it could go down but not up in a case such as that of Ms Lewis. Her position was protected by Arnold Clark's obligations under the brokerage agreement to treat her fairly. The Ombudsman was wrong to construct a "counterfactual" that overlooked these points. There was no proper basis for the finding that Ms Lewis was treated unfairly because the counterfactual (addressed in the next ground of challenge) is flawed and wrong.

223. Mr Strachan, for the FOS, pointed out that the Ombudsman had been careful to differentiate between discretionary commission arrangements and differential commission rates. At [231], he had disavowed any finding that the two were "the same thing". His decision was that the words "differential commission rates", not further defined, "when considered in terms of its plain and ordinary meaning and the related provisions in the FCA Handbook", were wide enough to encompass the discretionary commission arrangements in this case.

224. Mr Strachan submitted that Clydesdale had not offered any linguistic reasons why the commission arrangements here should be treated as outside the ordinary meaning of the words "differential commission rates". An arrangement where the interest rate varies according to the choice of the broker is "differential" as a matter of language. The construction is not strained and fits the context; the phrase appears within a set of provisions concerned with the risks to consumers arising out of commissions payable to brokers in credit arrangements.

225. The Ombudsman's construction of CONC 4.5.2G accords with the overall objective of the guidance, namely to discourage or prohibit the use of extra commission for brokers without justification due to the work involved; and produces a commercially sensible result in that it is difficult to understand how a discretionary arrangement of the present kind could, ordinarily, be justified. The broker sets the interest rate even though the lender did not require it and even though the uplift does not reflect extra work by the broker.

226. As for Principle 6, the FOS argued that, again, the challenge was not to the interpretation of the Principle but its application to the facts, which was a matter for the Ombudsman not the court, short of irrationality or some other public law flaw, which is not asserted. Clydesdale's argument that the Ombudsman should have measured the fairness of Ms Lewis' treatment by considering alternative market options open to her, was not an argument involving any challenge to the meaning of the words used in Principle 6; it was an unpleaded attack on the way the Ombudsman had applied those words to the facts.

227. The Ombudsman's statutory duty was to decide whether the treatment of Ms Lewis was in his opinion fair and reasonable; essentially the same task as fell to him when

considering whether Clydesdale had breached Principle 6. It is not axiomatic that the lowest market price available necessarily entails fairness of treatment. There was no irrationality challenge to the finding that Principle 6 was breached. The argument about the meaning of CONC 4.5.2G was academic because the Ombudsman's finding of breach of Principle 6 did not turn on it.

228. Ms Stratford, for the FCA, supported the FOS's position and added some further points. In the wording of CONC 4.5.2G, the words "providing for" appear not once but twice in the phrase "providing for differential commission rates or providing for payments based on the volume and profitability of business"; indicating that, if it was not already apparent, differential commission rates and payments based on the volume and profitability of business are two different things, not synonymous. The latter does not qualify the former.

229. The vice of differential commission rates, Ms Stratford submitted, is that higher commission is charged to the customer without any justification owing to extra work. There is no good reason to adopt the strained and narrow construction advocated by Clydesdale. The box beneath the ILG paragraph 5.5 contains a list of illustrative examples which the OFT regarded as unfair lending practices.

230. The third paragraph in the box, which led to the introduction of CONC 4.5.2G ("[w]e also consider that differential commission rates or 'volume over-riders', 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"), is identifying a particular problem where the commission arrangements – differential commission rates or volume over-riders – are not justified by extra work for the broker.

231. The interpretation suggested in Butterworths is not persuasive, Ms Stratford submitted, because the authors do not say why "volume and profitability" must qualify the words "differential commission rates" and do not have regard to the purposive and contextual approach required when interpreting provisions in the FCA Handbook. Nor do they address the FCA's own commentary on the provisions, which points the other way.

232. Ms Stratford reminded me that in PS14/3, published in April 2014 after the consultation on principles and standards, the incoming FCA rehearsed the feedback from those consulted on draft provisions including what became CONC 4.5.2G (then draft 4.6.2G). The feedback included observations to the effect that the references to volume and profitability were "unclear" and more discussion was needed. The FCA's response was that it did not agree:

> "ILG 5.5 makes clear that differential commission rates or volume over-riders should be offered only where they are justified in terms of the relative work involved. The current drafting is sufficiently clear in our view."

233. That, Ms Stratford submitted, supports the argument that differential commission rates require their own justification based on additional work. And later, in the specific context of the motor finance review, the FCA stated in its final report at paragraphs 2.25 to 2.27 that lenders were not doing enough to limit risk from their commission models. Policy work was underway which could lead to "banning DiC [*difference in charges*] and similar commission models or limiting broker discretion."

234. At paragraph 2.26, the FCA referred to CONC 4.5.2G and observed that in its then current form its application "could include where the commission rate as a percentage of the amount of credit varies according to the interest rate charged to the customer." The onus was therefore on the lender, the FCA added at paragraph 2.27, to "show that any differences in commission rates are justified, based on the work involved for the broker."

235. The Ombudsman's interpretation was, the FCA contended, correct and he was entitled to conclude that there was no justification for the additional commission. By the same reasoning, the Ombudsman was entitled to find a breach of Principle 6. The objection to discretionary commission arrangements is that, as the FCA put it in its skeleton:

> "the broker is incentivised to choose a higher rate of interest which then results in increased costs for the consumer; in the absence of proper disclosure, this is treating the customer unfairly. The availability or otherwise on the market of different rates, as a matter of fact, does not impact this point of principle."

236. I have carefully considered these rival contentions. I start by reminding myself that CONC 4.5.2G is not a rule; it contains guidance. It warns lenders and brokers that they risk adverse findings if they do not heed it; perhaps under Principle 6 if they are found to have treated a customer unfairly; perhaps in relation to non-disclosure or inadequate disclosure, under CONC 4.5.3R, CONC 3.3.1R and Principles 7 and 8, which have already been discussed.

237. The correct interpretation of CONC 4.5.2G is, as all parties agree, a matter for the court; while its application, correctly interpreted, to the facts is a matter for the Ombudsman. In considering the meaning of CONC 4.5.2G, I start with some linguistic points, since the language of the provision is paramount.

238. First, to state the obvious, the language of the provision mentions two kinds, not just one kind, of "commission agreement". Both are to be avoided unless they meet the requirement for justification "based on the extra work of the firm involved in that business". The sense of the language is that the justification requirement applies to both kinds of commission agreement, not just the latter.

239. The first species of the genus "commission agreement" is one "providing for differential commission rates". The second is a commission agreement "providing for payments based on the volume and profitability of business." As Ms Stratford pointed out, the words "providing for" appear twice. This is not mere verbiage, in my judgment. It points to the conclusion that the two kinds of commission agreement are distinct from each other and not synonymous.

240. I accept that it is linguistically possible to have a provision which places synonyms next to each other, separated by the word "or". For example, you could have a provision that mentions "flora, or plants", meaning "flora, also known as plants". Clydesdale's submissions invite me to treat "differential commission rates" as including arrangements that are synonymous with "volume over-riders" (i.e. the word "or" being used in the sense "also known as") or are otherwise unsuitable, such as a payday or secured loan.

241. That is not a natural reading of the words; it is strained and artificially narrow. It does not fit with "providing for" used twice. It does not meet the point that not all "differential" commission rates are linked to volume and profitability of the business. I think the word "differential" means what it says. It means "not fixed". Here, the head office commission was fixed, at 2 per cent of borrowing. The discretionary element was not fixed. It differed according to the broker's choice. To my mind, that makes it "differential" in ordinary English.

242. The requirement for justification applies, as I have said, to both kinds of commission agreement. An example of increased commission based on volume and profitability without justification would be, as Clydesdale suggested, where the commission is 2 per cent on the first hundred car sales, 3 per cent on the next hundred, and so on. The buyer of car number 256 should not have to pay more commission just because they are unlucky enough to buy from that batch.

243. An example of extra work not based on volume and profitability might be where the cars to be sold have to be sourced from outside the UK and the broker has to do the extra work of arranging customs clearance; or where the cars sold comprise a fleet sold to a car rental company and the broker has to attend meetings with various layers of management within the buyer company.

244. Commission agreements of the first kind, providing for "differential commission rates", must also be justified. An arrangement such as in the brokerage agreement in this case, where the broker selects an interest rate within agreed parameters, seems difficult to justify because it does not involve extra work for the broker, apart from the minimal intellectual effort of selecting the rate. CONC 4.5.2G was therefore a red flag for arrangements of that kind.

245. It is true that the FCA had not yet banned such arrangements outright, at the time. If full and complete disclosure of the arrangements is made by the broker (as to which see the discussion of ground 1(i) above), the lender might well avoid a finding of unfair treatment under Principle 6, despite a strongly arguable breach of CONC 4.5.2G which frowns upon such arrangements unless they are justified by extra work; CONC 4.5.1G being only guidance and not a rule.

246. Such is my assessment of the language used in CONC 4.5.2G, viewed in the light of the surrounding provisions in the FCA Handbook. That assessment is not altered by examining the *travaux préparatoires* relied on by the parties. Caution must be exercised when looking at such materials, for they cannot contradict the language of the provision and in some cases long predate it.

247. The fact that the examples of "[d]eceptive or unfair practices" in the July 2009 consultation paper, preceding the ILG, include recommending inappropriate lending products does not mean that recommending inappropriate lending products that are not discretionary commission arrangements is the entire territory of what became CONC 4.5.2G, to the exclusion of discretionary commission arrangements.

248. The same is true of paragraph 4.4 of the CBG, which again lists examples of non-transparent arrangements with a credit broker or other intermediary that could affect the intermediary's independence. The list does, in fact, include giving preference to

particular products "because of differential commission rates, volume over-riders or other benefits".

249. The box beneath ILG paragraph 5.5 is a legitimate aid to the construction of CONC 4.5.2G because it is expressly cross-referred to in the square bracketed words that follow the text of CONC 4.5.2G. Paragraph 5.5 refers to the promotion of clearly unsuitable lending products and in the box are found examples of the same. They include not just unsuitable lending such as a payday loan or unsustainable secured loan; but also "differential commission rates or 'volume over-riders'", unless they are justified by the extra work involved.

250. I do not find that the box beneath ILG paragraph 5.5 adds anything to the analysis beyond what is found in the language of CONC 4.5.2G itself. At the highest, the words in the box are not conclusive in favour of Clydesdale's narrow interpretation. The consumer protection context would tend to point in the other direction. For what it is worth, so does the passage relied on by the FCA in its April 2014 policy statement, commenting on the then draft CONC 4.6.2G, which became CONC 4.5.2G.

251. For those reasons, I prefer the construction of CONC 4.5.2G advocated by the FOS and the FCA and I agree with the Ombudsman's decision at [209] that "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".

252. It follows that, like the Ombudsman and the FCA, I disagree with Butterworths' interpretation of the provision and accept the point made by Ms Stratford that the authors do not say why "volume and profitability" must qualify the words "differential commission rates" and do not adopt the required purposive and contextual approach when interpreting the FCA Handbook.

253. I come next to Principle 6. This is straightforward. There is no challenge to the Ombudsman's interpretation of that Principle, nor any irrationality challenge. The only basis advanced by Clydesdale for impugning the Ombudsman's conclusion that it breached Principle 6 is the submission that it did not treat Ms Lewis unfairly because she got a good deal with a market leading APR and because Arnold Clark deserved reasonable remuneration for its work.

254. I accept Mr Strachan's submission that this amounts to no more than a disagreement with the Ombudsman's view. It was for him to determine whether what happened infringed Principle 6. It is not enough to disagree with the outcome of his deliberations to persuade the court to overturn his finding, whether or not the court agrees with his conclusion. I also accept the submission of the FOS that the Ombudsman's finding on Principle 6 was not dependent on his interpretation of CONC 4.5.2G and can stand, independently of it.

255. Furthermore, I agree with the FCA that the accusation of unfair treatment is not satisfactorily answered by invocation of market forces and a claim to have served the customer handsomely in the market place while ensuring no more than reasonable remuneration for the broker. The customer's borrowing costs are increased by the broker's choice of an elevated interest rate. That is so whether or not, in the self-serving view of the lender and the broker, she is more than compensated for that by other features of the transaction.

256. It is, as Ms Stratford called it in her skeleton, a "point of principle". The Ombudsman was entitled to treat it as such when considering Principle 6. Fairness arises in numerous different contexts and has, famously, been called a protean concept. The statutory and regulatory scheme gives the Ombudsman the task of deciding upon it. I cannot find fault with his decision on the issue. On ground 1(ii), I grant permission but dismiss the claim.

Ground 2: Irrational Result on Quantum

257. Clydesdale's next ground of challenge (numbered as ground 2) is that the Ombudsman reached an irrational result on quantum, i.e. on the amount of compensation Ms Lewis should receive. Clydesdale's case, supported by Arnold Clark, is that rationality required and permitted only a decision that no compensation should be awarded because no loss was suffered by Ms Lewis.

258. The Ombudsman's decision on this issue starts at [168]-[193]. He was satisfied that if the commission arrangements had been disclosed in a "prominent way", as they should have been, and Arnold Clark had "disclosed the source of the conflict to Miss L as a step to fairly manage the conflict" that would, more likely than not, have given her "pause for thought and she would have questioned the arrangement" and "asked for further information" about the arrangement and "the impact it would have on the cost of the finance agreement" ([168]-[169]).

259. Pursuant to CONC 4.5.4R, she would have had the right to be told on request the likely amount, albeit not the precise amount, payable to Arnold Clark by Clydesdale. She would not have expected to be told, the Ombudsman reasoned, that the amount depended on Arnold Clark's choice of the interest rate she would pay; and that the higher that rate, the higher Arnold Clark's commission would be. She would not have stopped her enquiries there ([171]).

260. The Ombudsman did not think it likely that Ms Lewis would simply have agreed to the deal on the terms proposed. The "head office" commission would not have concerned her; it was standard and did not affect the interest rate she would pay. She would have asked herself why Arnold Clark chose that she should pay £1,326.60 to Clydesdale which in turn would remit it as commission to Arnold Clark, when if Arnold Clark selected the lowest, zero commission rate, Clydesdale was willing to lend at that rate ([173]-[175]).

261. Her concern would not, the Ombudsman thought, have been allayed by the offer of the advertised APR of 8.9 per cent. She would again be given "pause for thought". The discretionary commission comprised nearly 43 per cent of the total charge for credit ([176]). The Ombudsman then considered Ms Lewis' own representations made after he issued the provisional decision. She would "not have entered into any type of agreement at all", she said ([178]).

262. The Ombudsman did not accept that. Her recall of the occasion was probably limited. At the time, she wanted the car; now, she wanted compensation. She was being asked about a hypothetical situation. Though she was answering the questions as best she could, he placed little weight on her answers. She might have chosen not to buy the car but, more likely than not, she would have bought it. She was keen on the car. She was

not, at the time, unhappy with the credit terms; on their face, they seemed competitive ([179]-[183]).

263. She might, the Ombudsman said, have bought the car anyway on the disclosed terms, as Clydesdale submitted. But more likely, she would have declined to pay the £1,326.60 that would go to Arnold Clark via Clydesdale; and would have sought to negotiate a lower rate with Arnold Clark, namely the zero commission rate of 2.68 per cent, at which Clydesdale was willing to lend; especially since Arnold Clark would still receive £266.66 commission for introducing Ms Lewis to Clydesdale ([185]-[188]).

264. The Ombudsman had carefully considered Clydesdale's submissions, including their contention that Ms Lewis was primarily motivated by convenience; but was not persuaded. He accepted that convenience mattered to her, but pointed out that she secured changes to the deal during the discussions on 15 November 2018. She did not want to pay an extra £219 for a service and MOT plan; nor an extra £485 for an "Autocare Warranty". These changes reduced her payments by £14 per month ([189]-[191]).

265. The Ombudsman's reasoning and his calculation of what he considered "fair compensation" are stated in detail in his decision, at [349]-[396]. He began by asking himself the question "had [Clydesdale] acted fairly and reasonably in its dealings with Miss L – Miss L would have ended up in a better position overall, including in relation to the credit agreement" ([349]). Clydesdale would have lent to Ms Lewis at 2.68 per cent, which would have "satisfied [Clydesdale's own income requirements" ([351]).

266. It is likely that a court would find the relationship between Clydesdale and Ms Lewis was unfair within section 140A of the CCA, the Ombudsman thought. The impact of the unfairness was the possibility of Ms Lewis paying a higher interest than she should have done. The unfairness of Arnold Clark's conduct was attributed to Clydesdale by section 56 of the CCA ([352]-[354]), deeming it to be the principal in the transaction and Arnold Clark its agent.

267. The Ombudsman went on to set out Clydesdale's submissions which, he said, he considered carefully. They were similar to those now advanced to me which I will address shortly. They included reliance on the Evolution Funding report saying that Arnold Clark's 8.9 per cent APR was "significantly lower than the average prime business APR arranged by [Arnold Clark] (10.4%) and by aggregators (10.9%)" and much lower than the "broader industry average of 17.5% in 2017, as identified by the FCA in its research" ([359]-[360]).

268. He found those matters of "limited relevance" because Clydesdale was, as a matter of fact, willing to lend at 2.68 per cent. He accepted that such a low rate would not be sustainable if offered in the case of all loans, but he was "required to determine complaints based on the individual circumstances of the complaint" and thus he should proceed from Clydesdale's willingness in Ms Lewis' particular case "to lend to her at the flat interest rate of 2.68%", with Arnold Clark receiving its head office commission of £266.66 ([361]-[365]).

269. The Ombudsman noted (at [368]) that he had not received any evidence:

> "to demonstrate with any likelihood what affect [sic] a different arrangement might reasonably have had on the interest rate Barclays PF was prepared to offer Miss L in November 2018, beyond Barclays PF's general and high-level representations, for example about the APRs offered at the time by other brokers and average APRs including the fact that that immediately following the ban on motor finance discretionary commission arrangements, the Broker's advertised typical APR was 8.9%"

270. Although there were other possibilities, some of which the Ombudsman discussed (at [369] ff), the most likely outcome had Ms Lewis been treated fairly and reasonably was that she would have bought the car at a flat interest rate of 2.68 per cent. He thought it "fairest to assume" ([376]) that she would not have been prepared to pay more than 2.68 per cent. She would not have needed to know "the interest rate floor"; only, that "any commission received under the discretionary arrangement increased the interest rate". The result would be "to drive the interest rate down, ultimately to the interest rate floor" ([380]).

271. The Ombudsman referred to his provisional decision and said he had invited Clydesdale to produce evidence, if it could, that Arnold Clark would not have sold the car at the price that it did, but for Arnold Clark setting the interest rate at the rate it set in Ms Lewis' case. The response had been generic, not specific to her case; Clydesdale had "explained its view that if brokers generally did not receive commission that would inevitably increase prices" ([383]-[384]).

272. He decided, having "considered all the evidence and arguments about redress", and recognising ([393]-[395]) that the result might leave Clydesdale out of pocket on the transaction and could mean Arnold Clark would incur a loss on the transaction, that Clydesdale should compensate Ms Lewis as set out at [391], by paying her:

> - "the difference between (i) the payments she has made from time to time under the finance agreement (at the flat interest rate of 4.67%) and (ii) the payments she would have made had the finance agreement been set up at the lowest (zero discretionary commission paying) flat interest rate permitted (that is 2.68%); together with
> - interest on each overpayment at the rate of 8% simple per year calculated from the date of the payment to the date of settlement in accordance with my final decision. And:
> - if the finance agreement has not concluded by the date of settlement: Barclays PF should also reduce, or pay Miss L an amount equivalent to have the same effect, the monthly payments left on the agreement to what they would have been had Miss L's agreement been written at a flat interest rate of 2.68%, rather than 4.67%."

273. In final comments on this issue at [395] and [396], the Ombudsman said:

> "395. By establishing and operating the discretionary commission model, [Clydesdale] created the environment which permitted [Arnold Clark] to select a higher interest rate and to receive more commission without reference to the work involved, with the effect that Miss L paid more than she needed to on her conditional-sale agreement. And, as the finance provider, [Clydesdale] could itself have explained to Miss L the basis on which her interest rate was set, [Arnold Clark's] role in setting that rate, and the commission resulting from that.
>
> 396. In those circumstances, whilst I recognise [Clydesdale] may be out of pocket as a consequence of paying both the commission and the compensation, and I am mindful that

[Arnold Clark] rather than [Clydesdale] was the ultimate beneficiary of the commission arrangements, I do not think it would be fair and reasonable to reduce the compensation [Clydesdale] should pay Miss L for those reasons."

274. Clydesdale seeks to attack the findings and decision on compensation as tainted by irrationality. Mr Jaffey started from the premise that by section 229(2) of the FSMA, the FOS has power to award against a respondent to a complaint "such amount as the ombudsman considers fair compensation for loss and damage"; while section 229(3) provides that a money award may compensate for "financial loss; or … any other loss, or any damage, of a specified kind".

275. The Ombudsman should not have found that Ms Lewis would have negotiated the interest rate down to the "floor" of 2.68 per cent, Mr Jaffey contended. He should have accepted the evidence from Evolution Funding and Clydesdale that a broker's costs (for FCA authorisation, compliance, legal services, staff training, operational costs, sales, distribution, software and systems costs) are such that brokers would be unable to trade without receiving commission.

276. Those costs had to be covered in some way, Mr Jaffey reasoned; if not from commission, then by increasing the price of the car or charging the customer a separate brokerage fee. The Ombudsman's failure to accept that was, Mr Jaffey submitted, inconsistent with his own acceptance that, as a general proposition, it would be economically unsustainable to have a nil discretionary commission payment, without altering the price or other terms of the transaction.

277. No ombudsman behaving rationally could find that Ms Lewis would successfully have negotiated the interest rate down to the floor level, it was submitted. Ms Lewis herself did not say that; Arnold Clark's website announcement contradicted it; so did its sales history in November 2018; the brokerage agreement assumed an average APR not below 6.9 per cent, meaning that a rate as low as 2.68 per cent would be wholly exceptional.

278. It was also irrational to find that Arnold Clark could have made a profit on the sale at a flat rate of 2.68 per cent. That was contrary to the evidence that the car was sold for about 5 per cent less than the "CAP Retail Price"; while the Frontier Economics report, if allowed (not having been before the Ombudsman), states that the price paid was 6.2 per cent less than the "CAP HPI valuation". There would be little, if any, gross margin in a sale on the terms the Ombudsman found would have been agreed, given the costs to brokers of running their business.

279. Mr Jaffey further reproached the Ombudsman with failing to consider the FCA's conclusions about expected market conduct which, he said, were at odds with the findings. Arnold Clark's published accounts and Mr Jones' witness statement showed a net profit margin of only 2.68 per cent. Arnold Clark says it would not have arranged finance on a zero discretionary commission basis, with only head office commission. The FCA's modelling in its March 2019 report, "Our work on motor finance - final findings" supported that conclusion.

280. It was not an answer to state that the Ombudsman was assessing the individual circumstances of Ms Lewis' case and not market conditions generally. It is his apparent intention, said Clydesdale, to treat this as a lead case and (as it was put in Clydesdale's

skeleton), Ms Lewis "was engaging with the motor finance market on the same or similar terms as the majority of participants in that market". Why, Mr Jaffey asked rhetorically, would Arnold Clark offer her "a deal that it could not offer to the rest of its customers in the same position?"

281. Arnold Clark, through Mr Kirk, supported Clydesdale's position and added its own arguments that the Ombudsman erred in law and disregarded relevant considerations when deciding to award compensation; those relevant considerations being the evidence and arguments that Arnold Clark would have submitted to the Ombudsman if he had invited it to take part in the proceedings in its own right, rather than only by providing materials through Clydesdale.

282. Mr Kirk said the Ombudsman failed to consider the point that Arnold Clark could not have offered the zero commission rate. It would not have been commercially viable; its profit margin was already very low; the terms Ms Lewis got were considerably better than the market rate and value. Arnold Clark would have no reason to agree to such a low rate, far below the 6.9 per cent which, the brokerage agreement provided, must be at least the average APR.

283. Clydesdale did not, Mr Kirk pointed out, offer the zero commission rate directly to the public; it was only available to customers of Arnold Clark through Clydesdale's agreement with Arnold Clark. It offered a "best deal guarantee". If Ms Lewis had insisted on such a low rate, she would have been invited to look elsewhere and come back if she found a better deal.

284. The Ombudsman was wrong to find that Arnold Clark would still have made a profit on the sale at the zero commission interest rate and that this was "a considerable incentive" to proceed in that way. Mr Kirk submitted that Arnold Clark's evidence makes it clear that this is not so. The interest rate was only one part of the deal, which had three elements: sale price, interest rate and part exchange price. It was artificial to isolate the interest rate element.

285. Mr Kirk submitted that expert evidence on available market rates would have been "pivotal in assessing both the outcome of the hypothetical negotiation and whether the complainant could have achieved a better deal elsewhere". The Ombudsman was wrong in overlooking that. It is an error of law to make a money award under section 229 of the FSMA unless financial loss has been suffered. None was. Whether or not it was is a hard edged, binary question.

286. The FOS website said that if a consumer has "lost out financially", the FOS will "aim to put them back in the position they would have been in if the financial business complained about hadn't made a mistake". It is an error of law to misuse the jurisdiction to make a money award in order to penalise a regulatory breach. Ms Lewis could only have suffered loss if, absent the breach, she would have got a better deal from Arnold Clark or elsewhere. He could not without error of law find that Arnold Clark would have offered uncommercial terms.

287. Mr Kirk relied on the witness statement of Mr Cooper, which was not before the Ombudsman, and on the report of Mr Cullum of Frontier Economics, also not before him. That brings me back to the application to adduce Mr Cullum's report, which I

now consider. Mr Kirk said in oral argument that it goes to what the Ombudsman would have decided if he had had such evidence before him.

288. I gratefully adopt the summary of Mr Cullum's evidence in Mr Kirk's skeleton argument:

> "(a) The 8.9 percent rate obtained by the claimant was 1.8 percent lower than the mean average rate available across the market from dealers other than Arnold Clark.
>
> (b) The zero-commission rate of 5.2% identified by the Ombudsman as the rate the complainant could have obtained was 5.5% below the mean average motor finance rate.
>
> (c) The rate offered to the complainant was below average whether the comparison was made against fixed or discretionary commission loans.
>
> (d) The price of the car was also lower than the market rate.
>
> (e) It is more likely than not that a customer looking to purchase a comparable car at the material time would not have achieved a better overall deal."

289. The last proposition refers to "a customer" rather than to Ms Lewis. It is said to be "more likely than not" that she would behave like an average or typical customer. This explains how what on the face of it is a question of fact – how the individual parties would have behaved if the commission arrangements had been disclosed – is said to be a matter for expert evidence. Ms Lewis is imbued with attributes not personal to her but inevitable consequences of the market.

290. Mr Kirk refers me to *R (Secretary of State for the Environment ex p. Powis* [1981] 1 WLR 584, at pp. 595G-596A, stating three categories of "fresh evidence" (not just expert evidence) admissible in judicial review proceedings. He submitted further that a court may in what Collins J called "very rare" cases admit expert evidence to understand technical material placed before it (*R (Lynch) v. General Dental Council* [2003] EWHC 2987 (Admin), at [24]).

291. Mr Cooper of Arnold Clark in his first witness statement also addresses how he says the parties would have behaved. He agrees with Mr Cullum and disagrees with the Ombudsman's conclusion that Ms Lewis would have negotiated the price down to the lowest interest rate at which Clydesdale was willing to lend, which would have meant no commission for Arnold Clark. Zero commission requires "[s]pecial circumstances", he said, which were not present here.

292. For the FOS, Mr Strachan and Mr Hopkins opposed the application. The court does not need Mr Cullum's report to understand the issues. The suggestion (in the detailed grounds, paragraph 37) that the court might make its own findings in substitution for those of the Ombudsman, would usurp his role. The application was made very late. Mr Cullum's report is not "reasonably required to resolve the proceedings" (CPR rule 35.1, considered in *R (Law Society) v. Lord Chancellor* [2019] 1 WLR 1649, DC, at [36]-[40] (Carr J giving the judgment of the court, sitting with Leggatt LJ, as they then were)).

293. The Ombudsman did not, Mr Strachan submitted, and did not need to carry out any technical market analysis in order to reach his conclusion on compensation. He was

entitled to treat the issue as one of fact and reach a broad conclusion based on fairness. Mr Cullum's report is not required to illustrate a technical error of a kind not obvious to an untutored lay person. Further, the Ombudsman did not disregard the market in his reasoning. He had Clydesdale's arguments on the point, supported by the Evolution Funding report.

294. I reject Arnold Clark's submissions and I dismiss the application to adduce the report of Mr Cullum. I do not need it to understand why Arnold Clark says the Ombudsman erred. They say he should have presumed Ms Lewis would have behaved as a paradigm customer would behave, following the inexorable logic of the market. While she is an individual and not an artificial construct, she would most likely have behaved in the same way as an average customer.

295. Such is the premise of the Evolution Funding report and the submissions of Arnold Clark and Clydesdale. But the issue was one of fact and required an evaluation of what the Ombudsman considered fair, what would have happened if the regulatory breaches had not occurred and whether Ms Lewis suffered financial loss. If the market alone determined those issues, the Ombudsman need not have asked Ms Lewis for her own account on this issue. Yet, Arnold Clark and Clydesdale rightly did not criticise him for doing so.

296. I accept, as all parties did, that a money award under section 229 of the FSMA must meet a financial loss and must not be punitive. To decide whether there was financial loss, I accept that there was a place for informed industry evidence, i.e. expert evidence, about how the market operates. It can be argued that the individuals involved would have behaved in line with normal market behaviour, or at least would be likely to have done so, other things being equal. The Evolution Funding report and Clydesdale's arguments addressed that issue.

297. Evolution Funding's brief, it may be recalled, was "to provide a report on the motor finance market from the start of 2016 up to the end of June 2022 and to provide comment on the complaint from Ms Lewis and other complaints." Its report on Ms Lewis' case was in Mr Streets' letter of 24 August 2023. There was no particular need for wider market evidence, though Mr Cullum's report could have been proffered, had it been obtained earlier.

298. I see no basis for admitting wider market evidence now than was before the Ombudsman. Mr Cullum's report does not radically depart from the evidence of Mr Streets, of Evolution Funding. Mr Cullum's report could have been submitted to the Ombudsman. I do not need it to understand the arguments about market forces relied on by Clydesdale and Arnold Clark.

299. I will consider whether the Ombudsman erred in law in awarding compensation on the basis of the evidence before him, unadorned by the report of Mr Cullum. The witness statement of Mr Cooper was not before the Ombudsman and I treat it with caution for that reason, but Arnold Clark does not need permission to adduce it and I do not go as far as to rule it formally inadmissible.

300. I return to the merits of the second ground of challenge. Mr Strachan, quoting from Clydesdale's written grounds, submitted that the challenge rests mainly on the supposed "general proposition" that it would be "economically unsustainable to have a

discretionary commission payment of nothing, without at least altering some other aspect … ." But, Mr Strachan said, the Ombudsman took that factor into account; the weight to give to it was a matter for him; and the irrationality challenge is really just a disagreement with the outcome.

301. The CAP guide price was "merely one valuer's subjective valuation", the FOS submitted. It gives no clear and reliable indication of what the price would have been if circumstances had been different. Mr Strachan cited an example from another case where the mark up was £1,738 with an advertised sale price of £5,488 which was £962 less than the CAP guide price. It is wrong to submit, he said, that the Ombudsman must disregard the circumstances of the individual case and decide the case on market generalities alone.

302. In oral argument, Mr Strachan reminded me that Mr Cooper's evidence about what Arnold Clark would have done was not before the Ombudsman. It was evidence after the fact. Mr Cooper says in his witness statement that Arnold Clark would have wished to adduce evidence to the Ombudsman about what effect renegotiation of the commission with Ms Lewis might have had on the interest rate offered. But, Mr Strachan said, the Ombudsman dealt with that issue in his provisional decision, to which Arnold Clark was able to respond.

303. Further, Mr Strachan added, Mr Cooper's own evidence (not before the Ombudsman) shows that Arnold Clark frequently sold at less than an 8.9 per cent APR. At paragraph 38 of his witness statement he referred to a table showing an analysis of the APRs in 52,980 prime retail agreements for used cars in the period 1 September 2018 to 31 January 2019; which, Mr Strachan said, shows an average APR of 8.02 per cent, i.e. that customers are frequently successful in obtaining a discount on the advertised rate of 8.9 per cent APR.

304. The FCA made no submissions on this ground except to say this is "essentially an orthodox rationality challenge which this Court is particularly well-placed to decide". Accepting the invitation to do so, I am struck by the weakness of this irrationality challenge. The bar is a high one and the autonomy of the decision maker correspondingly protected, short of an indefensible decision resting on untenable reasoning or an indefensible conclusion verging on the outrageous.

305. The following are notable features of the decision. First, the Ombudsman applied sections 229 of the FSMA and applied DISP 3.6.1R, DISP 3.6.4R, DISP 3.7.1(1)R and DISP 3.7.2R. He was considering compensation for financial loss, not any other kind of loss such as pain and suffering or distress or inconvenience. He asked himself whether Ms Lewis suffered financial loss. He did not set out to punish the regulatory breaches or otherwise misdirect himself.

306. Second, he rightly treated as a question of fact and causation whether Ms Lewis suffered financial loss in consequence of the regulatory breaches he had found. He approached that question in a spirit of open-minded enquiry, not ignoring relevant evidence about the operation of the market, from Clydesdale and from Evolution Funding, with a contribution from Mr Forbes of Arnold Clark in his email of 19 September 2023, which Clydesdale sent on to the Ombudsman.

307. Third, the Ombudsman applied the right test when considering whether Ms Lewis had suffered financial loss justifying a money award to compensate her for it: what would have happened but for the regulatory breaches, and with what financial consequences, if any, for Ms Lewis. He had direct written evidence from both parties, i.e. from Ms Lewis and Clydesdale; and indirect evidence from Arnold Clark; in particular, Mr Forbes' email of 19 September 2023 and Arnold Clark's note giving details of the sale transaction on 15 November 2018.

308. Fourth, the Ombudsman, therefore, was adequately equipped with evidence on the basis of which to decide the issue. He did not need to hold an oral hearing, though he could have done. His decision not to do so is unchallenged and cannot be the subject of collateral attack. Evidence about the individual transaction and the attitude of the individuals and corporate entities who entered into it was relevant, just as evidence of the market and the way it operated was relevant.

309. Clydesdale's contention, supported by Arnold Clark, that what mattered was the operation of the market and not the attitude of the individuals involved, is not cogent because Clydesdale itself relied on attributes personal to Ms Lewis in its submissions to the Ombudsman. It stressed to him that Ms Lewis liked the car, was keen to buy it and was motivated by convenience. That argument would have no place in a world where customers are guaranteed to behave in a stereotyped way determined by market forces.

310. Fifth, by the same reasoning, the Ombudsman would have been acting unfairly to Ms Lewis if he had based his decision entirely on market forces. He was obliged by procedural fairness to consider her account. He might have accepted her evidence that she would have "walked away" or sought a bank loan. If he had accepted the latter proposition, he would have had to grapple with interest rates on bank lending at the time and compared them to Clydesdale's rates.

311. These observations support the FOS's contention that the issue was one of fact and causation for the Ombudsman to determine and not one to be determined by the parties, the market or the court. The scenario of a hypothetical negotiation down to the floor of 2.68 per cent was properly open to the Ombudsman. It was not an inherently implausible scenario. It was among those he considered and he was entitled to accept it, though, he acknowledged, it was not the only plausible scenario.

312. It was a permissible inference that Arnold Clark could still in this particular case have made a profit on the sale, even if that would not be possible should the practice be applied across the board. To make the point in a different way, had Mr Cooper sent to the Ombudsman the witness statement he subsequently provided, the Ombudsman would not have been bound to accept Mr Cooper's evidence of what Arnold Clark would have done; any more than he was obliged to accept that Ms Lewis would have walked away or sought a bank loan.

313. For those brief and simple reasons, I am far from persuaded that the Ombudsman's decision on compensation was flawed by irrationality. I am just persuaded to grant permission on this ground of challenge but I dismiss it.

Ground 3: Error of Law; Deemed Agency under the CCA

314. The third and final ground of challenge is summarised in Clydesdale's skeleton argument as follows (omitting footnotes):

> "… the Ombudsman erred in law by concluding that the pre-contractual negotiations between the Broker and the Complainant in relation to the commission were caught by s.56(1)(b) CCA, such that the Broker was the Claimant's deemed agent in respect of those negotiations. Stemming from this error, the Ombudsman made a second error of law by finding that the Claimant was responsible for the Broker's acts and omissions regarding the commission under s.140A(1)(c) CCA."

315. The Ombudsman did indeed reach those two conclusions, giving his reasons at [299]-[320] on the first issue (section 56(1)(b) of the CCA) and at [263]-[298] on the second (section 140A(1)(c) of the CCA). He found it likely that a court would decide the relationship between Clydesdale and Ms Lewis was "unfair" for essentially the same reasons as impelled him to find that the regulatory breaches had occurred: the presence of the discretionary commission arrangement and the lack of transparency and absence of proper disclosure.

316. He then explained why Arnold Clark's regulatory breaches would be attributed to Clydesdale "by virtue of the deeming effect of s56(2) CCA" ([299]). In the following paragraphs, he went through the other relevant provisions in the CCA and considered certain cases touching on section 56, including *Forthright Finance Ltd v. Ingate* [1997] 4 All ER 99; *Scotland and Reast v. British Credit Trust Ltd* [2014] EWCA Civ 790, [2014] Bus LR 1079; and *R (Shawbrook Bank Ltd) v. FOS* [2023] EWHC 1069 (Admin).

317. His "overall conclusions" on unfair relationships were then stated at [321]-[329], ending at [328]-[329] as follows:

> "328. Overall, I remain satisfied it is likely that a court would find [Clydesdale's] relationship with Miss L was unfair to Miss L for the reasons I have set out earlier in this section of my decision.
>
> 329. However, even if I am wrong about that, and even if a court did not find that there was an unfair relationship for the purposes of the CCA, I am satisfied that [Clydesdale] acting in breach of Principle 6 and against the guidance in CONC 4.5.2G (as I have explained above) meant that it failed to act fairly and reasonably towards Miss L in its dealings with her. This is independently of whether or not a court would also find that these breaches/failures are such as to make the relationship between [Clydesdale] and Miss L unfair under s140A CCA."

318. The effect of the tortuous CCA provisions is agreed except as to the meaning of the words in CCA section 56(1)(b): "in relation to goods sold or proposed to be sold by the credit-broker." It is agreed that "antecedent negotiations" with a debtor in a case falling within section 56(1)(b) are "deemed to be conducted by the negotiator in the capacity of agent of the creditor as well as in his actual capacity" (section 56(2)). In this case, the "debtor" is Ms Lewis, the "credit-broker" is Arnold Clark and the "creditor" is Clydesdale.

319. It is common ground that the conditional sale agreement is a "restricted-use credit agreement" within the definition of that term in section 11(1)(a) of the CCA, namely "a

regulated consumer credit agreement … to finance a transaction between the debtor and the creditor …". It is also common ground that by section 12(a) of the CCA, the conditional sale agreement is a "debtor-creditor-supplier agreement", i.e. "a regulated consumer credit agreement being … a restricted-use credit agreement which falls within section 11(1)(a) …".

320. As the conditional sale agreement falls within section 12(a), the relevant provision in section 56 is subsection (1)(b). That too is common ground. By section 56(1)(b), read with section 56(2), negotiations conducted by the 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 section 12(a)" are "deemed to be conducted by the negotiator in the capacity of agent of the creditor as well as in his actual capacity".

321. I should also mention section 56(4) of the CCA, which provides:

> "For the purposes of this Act, 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."

322. And section 140A(1) of the CCA provides:

> "(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)."

323. For Clydesdale, Mr Jaffey submitted that the Ombudsman misapplied section 56 of the CCA and wrongly attributed the conduct of Arnold Clark to Clydesdale. He submitted that the negotiations between Arnold Clark and Ms Lewis were not conducted "in relation to goods sold or to be sold …". There is only deemed agency, he submitted, insofar as the negotiations are "in relation to goods"; i.e., here, the Audi car. In its skeleton argument, Clydesdale submits:

> "The Broker is only the Claimant's agent in respect of any pre-contractual representations it made about the Vehicle, not about the transaction for motor finance more generally."

324. Here, Mr Jaffey submitted, Arnold Clark's representations to Ms Lewis about the commission arrangements did not relate to "goods". The Ombudsman was wrong to decide otherwise. Mr Jaffey argued that the concept of "goods" in section 56(1)(b) must be contrasted with that of a "transaction", the word used in section 56(1)(c), which must bear a different meaning from "goods" in (1)(b).

325. It is common ground that negotiations in relation to a "transaction" falling within section 56(1)(c) are also caught by section 56(2) so that there is deemed agency in such a case. Section 56(1)(c) refers to "negotiations … conducted by the supplier in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement within section 12(b) or (c)".

326. Section 12(c) defines another form of "debtor-creditor-supplier agreement", not of the kind at issue in this case; namely:

> "an unrestricted-use credit agreement which is made by the creditor under pre-existing arrangements between himself and a person (the "supplier") other than the debtor in the knowledge that the credit is to be used to finance a transaction between the debtor and the supplier."

327. Such is the position, Mr Jaffey said, where a customer buys a cup of coffee from a café proprietor, using a credit card. The "creditor" is the provider of the credit facility by making available the customer's use of the credit card to finance the transaction. The "supplier" is the café proprietor. The "debtor" is the customer who buys the coffee using the credit facility, i.e. using the credit card to pay.

328. Mr Jaffey accepted that "antecedent negotiations" is defined broadly in section 56(4), "so that, if this case fell within s.56(1)(c), antecedent negotiations would include *non-disclosure* of the commission model as being *'negotiations … in relation to a transaction financed'*" (italics in Clydesdale's skeleton). However, he submitted that the Ombudsman had (at [305]) wrongly treated *Forthright Finance Ltd v. Ingate* as authority for his proposition 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".

329. In *Ingate*, the broker had represented to a customer buying a Fiat that he would settle her existing finance agreement in exchange for her Austin, to which that agreement related. The outstanding balance under the finance agreement was agreed to equate to the part exchange value of the Austin. The Court of Appeal (Staughton, Henry and Thorpe LJJ) held that the broker's representation was "in relation to the goods" because sale of the Austin and purchase of the Fiat were "all part of one transaction" (per Staughton LJ at p.105e).

330. Mr Jaffey said that was not so here. The financing of Ms Lewis' purchase was separate from the goods, i.e. the Audi. The representations about commission arrangements were not made "in relation to" the Audi but in relation to the finance arrangements for its purchase. In response to a query from the court, he suggested representations "in relation to" the Audi would be about how many miles it had done, its physical condition or service record, and the like.

331. The Ombudsman had also erred at [316], Mr Jaffey said, in finding support in *Scotland and Reast* for the proposition that the test was whether arranging the credit "formed part of the same package as, and was in relation to, the sale of the vehicle …" (in the Ombudsman's words). *Scotland and Reast* concerned mis-sold payment protection insurance (**PPI**) by double glazing salesmen during negotiations about the financing of the customers' purchase of new double glazed windows and doors.

332. The Court of Appeal (Moore-Bick, Kitchin and Underhill LJJ) upheld the judge's decision that a misrepresentation that PPI was needed to secure the loan the customers needed to finance the purchase, was made "in relation to" the transaction. Mr Jaffey sought to distinguish that case on the ground that the negotiations were "in relation to the transaction financed or to be financed", within section 56(1)(c) (as the Ombudsman acknowledged); and not "in relation to goods sold or to be sold" within section 56(1)(b).

333. In oral argument, he suggested a policy reason for differentiating sale of goods cases from service cases where finance is provided, such as a credit card type arrangement. The latter should be more heavily regulated. In a "goods" case, the transaction with the lender providing credit should be treated as separate: the lender acquires title to and control over the car; the broker loses any control over it, but the buyer is not without a remedy; it lies against the broker, should he misrepresent the condition or qualities of the car.

334. In reply, Mr Jaffey suggested that section 75 of the CCA (which, I note, was considered by Kitchin LJ in *Scotland and Reast* at [70]-[72]) supported that policy justification for his argument that the scope of negotiations should be more narrowly confined in goods cases (section 56(1)(b)) than in transaction cases (section 56(1)(c)).

335. Section 75(1) provides in transaction cases falling within section 12(b) or (c) of the CCA (where it is section 56(1)(c), not (b) that applies) that the "creditor" and the "supplier" are jointly and severally liable to the "debtor" if the debtor has a claim against the supplier for a "misrepresentation or breach of contract" by the supplier; with an indemnity (under section 75(2)) from the supplier to the creditor in respect of the creditor's liability, subject to any contrary agreement.

336. As I understand the argument, it is that there is no parallel provision to similar effect in cases such as this one, where the agreement is within section 12(a); and it is (b) and not (c) of section 56(1) that applies to determine whether there is deemed agency under section 56(2) or not. That underlines, said Mr Jaffey, that in a goods case such as this, the customer's principal remedy is against the broker, for it is he who misrepresents the state or quality of the goods.

337. As for the finding that the relationship between Clydesdale and Ms Lewis was "unfair" under section 140A of the CCA, Mr Jaffey submitted that the Ombudsman should not have attributed the conduct of Arnold Clark to Clydesdale for the purpose of reaching that conclusion, since the words "by or on behalf of" in section 140A(1)(c) only cover common law agency and deemed statutory agency under section 56, both absent here: *Plevin v. Paragon Personal Finance Ltd* [2014] 1 WLR 4222, per Lord Sumption at [30]-[34].

338. Clydesdale also submitted that the Ombudsman had been wrong to find that its own conduct made its relationship with Ms Lewis unfair under section 140A of the CCA, on the basis of his prior findings that Clydesdale had acted in breach of the regulatory regime in the manner discussed in grounds 1(i) and 1(ii) in the present judicial review challenge. I have, however, already rejected those grounds of challenge for the reasons given above.

339. For Arnold Clark, Mr Kirk did not in oral argument repeat his unqualified support in written argument for Clydesdale's position on the deemed agency point. He was

inclined to adopt a neutral stance on this issue and did not make any separate submissions orally, either for or against Clydesdale's proposed narrow construction of the words "in relation to goods sold or to be sold" in section 56(1)(b) of the CCA.

340. For the FOS, Mr Strachan complained that Clydesdale had not pleaded its second alleged error of law, that the Ombudsman wrongly deemed Clydesdale to be responsible for Arnold Clark's acts and omissions regarding the commission arrangements, for the purpose of applying the unfair relationship provisions in section 140A of the CCA. That contention was in any event wrong because it depended on the success of Clydesdale's arguments on other grounds.

341. As for the deemed agency point, the FOS focussed on the breadth of the expanded definition of "antecedent negotiations" in section 56(4). There was no justification for Clydesdale's strained and artificial construction of section 56(1)(b). In *Ingate*, Mr Strachan pointed out, Staughton LJ had (at p.103h-j) rejected an argument based on the difference of wording as between (c) and (b) of section 56(1). The different wording meant:

> "[n]ot all negotiations were to deemed to have been made on behalf of the creditor, but only negotiations in relation to goods which were to be supplied under a credit agreement. That is not an answer to the question how one defines the extent of those negotiations".

342. Staughton LJ went on to hold at p.105c-f that there must be goods sold or proposed to be sold. They must form the subject matter of a debtor-creditor-supplier agreement. If that is so, one enquires next whether there were negotiations in relation to those goods and if there were:

> "then all that was said by the credit broker in those negotiations is deemed to have been said on behalf of the creditor. On the other hand, what is said in any other negotiations which do not relate to those goods, is not deemed to be said on behalf of the creditor.
>
> The question is then a simple one of fact, were the negotiations in this case all relating to the goods to be sold? The answer in my judgment is that they were, because they were all part of one transaction."

343. That was the court's reasoning, with which Henry and Thorpe LJJ agreed. The court in *Ingate* did not decide, Mr Strachan submitted, that section 56(1)(b) and 56(2) applied because the representation about settling the finance agreement related to "goods", i.e. the Austin to purchased in part exchange for the Fiat. It was not because the Austin was "goods" that the deemed agency provisions were held to bite; it was because all the negotiations related to the Fiat.

344. Here, the discussions were all "in relation to" the sale of the Audi. The loan from Clydesdale was critical to the sale transaction and part of the negotiations leading up to it, for without that loan the sale would not proceed. There was no reason to give the wide words "in relation to" in section 56(1)(b) an artificially narrow meaning, i.e. "confined to" or "limited to"; nor any convincing policy reason why "in relation to" should be narrower in (b) than (c).

345. Mr Strachan referred me in oral argument to Collins Rice J's decision in *Shawbrook Bank*, at [137]-[153] in her judgment. Clydesdale's argument there was quite similar to its argument here, he said. The judge considered *Scotland and Reast* and defended

its status and reasoning against criticism from Mr Jaffey, also then appearing for Clydesdale. There was no basis for downgrading the status of *Scotland and Reast* or confining it narrowly to its facts.

346. The FCA's oral submissions were made by Ms Aarushi Sahore. In written argument, the FCA referred to the same case law. Its arguments were consistent with those of the FOS. The FCA favoured a "broad ambit" for section 56 of the CCA, "to achieve the overall consumer-friendly objective of the deeming provision". It would be wrong to take a "legalistic or artificial approach" to interpreting the different parts of the transaction at issue.

347. In oral argument, Ms Sahore asked rhetorically, why should the focus be on the physical goods only? The provisions are not sale of goods provisions about the quality of the product sold. The context is the fairness of the lending relationship. The imputing of agency is to protect consumers. There is no good reason why parliament would provide for the lender to be responsible for representations about the goods but not about the finance to purchase them.

348. Ms Sahore added one further authority, mentioned in the FCA's detailed grounds: *Townson v. FCE Bank plc (t/a Ford Credit*) [2016] ECC 30. Her Honour Judge Carmel Wall, in the Birmingham County Court, allowed an appeal by a claimant customer who had bought a Ford Focus. The purchase price was made up of cash, part exchange of a Renault Clio and a £6,000 balance financed by a credit agreement with the defendant finance company. On the same occasion the customer had, she contended, been mis-sold a PPI policy.

349. The judge reversed the decision of the district judge that "the credit agreement and the PPI policy were in reality two separate agreements, not part of a single overall transaction (in the sense referred to in … *Forthright Finance Ltd v. Ingate* …" ([8]). She noted at [13] that the scope of antecedent negotiations is broad and held that the PPI policy was capable of being "any other dealings between them", i.e. between the negotiator and the debtor, within section 56(4).

350. As to the Ombudsman's finding that the relationship between Clydesdale and Ms Lewis was unfair under section 140A of the CCA, Ms Sahore said Clydesdale appeared to be arguing that his finding stood or fell with ground 1(i) and 1(ii) of the challenge. That was not correct, she submitted. The assessment of fairness under section 140A is independent of any regulatory breaches. The Ombudsman was entitled to consider fairness with reference to the core vice of discretionary commission arrangements, without any necessary breach of a rule.

351. I come to my reasoning and conclusions on this last ground. I accept that the word "transaction" in section 56(1)(c) bears a different meaning from the word "goods" in (b). Mr Jaffey is right about that. The interlocking provisions in sections 11, 12 and 56 of the CCA tell us that all the cases where there is deemed agency under section 56(2) involve transactions, but not all those transactions involve goods. Where they do, the goods may be supplied by the credit-broker or by a third party supplier.

352. We know from *Ingate* that the deemed agency provision (section 56(2)) can operate to attribute the broker's conduct to the creditor where a representation is made about goods but not about the goods to be sold. The representation made by the broker in *Ingate*

was about the Austin (to be part exchanged as part of the purchase price), not the Fiat (which the customer was to purchase). Even about the Austin, it was not a representation about its condition, mileage or the like but about an intention to settle the amount due in respect of it.

353. The decision in *Ingate* provides no support, in my judgment, for Mr Jaffey's proposition that for section 56(2) to bite in a "goods" case under section 56(1)(b), the representation must be about the goods that are to be sold as distinct from the financing of the sale. That was not so in *Ingate*. The representation had to do with the financing of the sale, i.e. about the contribution to the sale price of the part exchange value of the Austin. In so far as it was about "goods" it was about the value of the Austin, not the Fiat, as I have said.

354. The Court of Appeal allowed Mrs Ingate's appeal because the part exchange value of the Austin was a pre-condition of the sale of the Fiat. As Staughton LJ put it at p.102f, "there were not two independent transactions but two linked aspects of one transaction". On the facts, nothing turned on the difference in wording between the subparagraphs (a), (b) and (c) of section 56(1) (p.103h).

355. As Mr Strachan pointed out, citing the passage at p.105c-e, quoted above, the correct approach to section 56(1)(b) in a case where goods are to be sold and will form the subject matter of a finance agreement, is to ask whether there were negotiations in relation to those goods. If there were, what is said by the broker in those negotiations is caught by the deemed agency provision; but what is said by the broker in other negotiations that do not, is not caught by that provision.

356. Henry LJ, at p.106e-107a, rejected the suggestion that negotiations about the Austin and its value should be excluded from "what the district judge found to be part of the package, namely the Austin …". He noted the wide definition of antecedent negotiations in section 56(4) and, in particular, the concluding words "any other dealings between them". I do not think Mr Jaffey's narrow reading of section 56(1)(b) gives adequate content to those words or to section 56(4).

357. Next, we know from *Scotland and Reast* that the deemed agency provision (section 56(2)) can operate to attribute the supplier's conduct to the creditor where a representation is made by the supplier about the transaction financed or proposed to be financed, in accordance with section 56(1)(c). In that case, the representation was that the customers needed a PPI agreement to finance a loan to pay for the doors and windows and joinery work.

358. The Court of Appeal held that the misrepresentation about the need for PPI was made "in relation to" the transaction for the sale and supply of the windows and doors. The purchase of PPI formed part of the same package as the purchase of the windows and doors. The negotiations conducted by the salesmen in relation to the PPI were antecedent negotiations within section 56(1)(c) and (4). Kitchin LJ (at [49]) considered the case quite simple, despite the complexity of the statutory provisions and counsel's attractively presented submissions:

> "… they focus on the wrong transaction and ignore the fact that the Zenith salesmen told the claimants that in order to secure the loan they needed to purchase the windows and

doors they would need to purchase PPI. The claimants simply could not proceed with the purchase of the one without the other."

359. Kitchin LJ then referred to and endorsed the reasoning in *Ingate*, noting that it concerned section 56(1)(b) rather than (c), but observing at [54] that:

> "similar considerations apply to the interpretation of the words 'in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement' in section 56(1)(c) …. . it would run contrary to the purpose of the Act to exclude the negotiations concerning the PPI just as it would have run contrary to the purpose of the Act to exclude the negotiations concerning the [Austin] Metro in the *Forthright Finance* case."

360. In my judgment, the *Scotland and Reast* case provides no support for Mr Jaffey's narrow reading of the words "in relation to" in section 56(1)(b). On the contrary, the court drew support from the *Ingate* case where the representation in the negotiations had been "in relation to" goods. This provides support for the contention of the FOS and the FCA that the words "in relation to" in both (b) and (c) should be broadly construed and not artificially narrowed.

361. Next, in *Townson* we have a case where the alleged mis-sale of a PPI was found to be part of the same overall transaction in which a car was purchased for a mixture of cash, part exchange value of another car and a balance funded by a credit agreement with a finance company. The judge followed the reasoning in *Ingate* and referred to the reasoning of the subsequent Court of Appeal in *Scotland and Reast*. At [22], she held as follows:

> "When weighing all of the factors set out above, those which point towards and away from the separateness of the two transactions, I conclude that the PPI policy was part of the same overall transaction as the car. It was all part of the same package when the claimant was buying the car. Although I accept that there is a stronger case for finding a single overall transaction where there is mutual dependency by which I mean the insurance policy is a condition of the credit agreement (as the claimant believed was the case in *Scotland* [*and Reast*] …. mutual dependency is not necessary to make this finding. In this case the PPI policy was of no value without the credit agreement even though buying it was not a condition of the credit agreement. The whole approach to the PPI policy, by use of the same natural person to facilitate the conclusion of both contracts (Mr Watson), together with the same location, time and opportunity; when taken together with the documentation which for a consumer was likely to blur the differences between other two contracting parties to the agreements, in my judgment leads to the conclusion that the PPI policy was part of the same overall transaction as the car purchase. Mr Watson's conduct fell within the scope of antecedent negotiations in relation to the car."

362. I discount any suggestion that the leading Court of Appeal authorities (*Ingate* and *Scotland and Reast*) are other than binding, including the reasoning in them. I agree with the reasoning of Her Honour Judge Carmel Wall in *Townson* which I think, with respect, was rightly decided for the reasons she gave. No convincing critique of *Townson* was advanced. I reject any suggestion that my reasoning should not proceed along the same lines in this case.

363. I think the facts here lead to the same conclusion as in those three cases. The Ombudsman found that Arnold Clark recommended to Ms Lewis a finance agreement with Clydesdale, i.e. the conditional sale agreement. That was part of the package

enabling Ms Lewis to buy the Audi, along with the part exchange of her old car and a small amount of cash.

364. The conduct of Arnold Clark in recommending Clydesdale's finance terms was part of its antecedent negotiations "in relation to the goods sold or proposed to be sold", within section 56(1)(b) and 56(4) of the CCA. Arnold Clark's conduct during its discussions with Ms Lewis was therefore rightly attributed by the Ombudsman to Clydesdale pursuant to section 56(2).

365. I reject the submission that factual differences make the cases relied on properly distinguishable. I reject the significance of the linguistic argument that "transaction" is different from "goods". It is true but has no purchase. I reject the argument that "in relation to" should be any narrower in "goods" cases than in "transaction" cases. The same are used and bear the same meaning in both cases. Section 56(4) does not differentiate between the two kinds of case.

366. I also reject Mr Jaffey's argument that policy considerations point in the direction of the narrow interpretation of "in relation to the goods …" which he advocates. The argument is, with the greatest respect, arcane, obscure, speculative and unsupported by any *travaux*. The broad construction advocated by the FOS and the FCA is not inconsistent with the joint liability provision in section 75 for transaction cases.

367. I prefer the FCA's policy based argument that the provisions are designed to operate in a consumer friendly manner and to deter undesirable business practices, judged by the standard of fairness in section 140A of the CCA. And I accept the submission of Ms Sahore that there is no good reason to treat the provisions as if they concerned merchantable quality and fitness for purpose of goods, as if the context were sale of goods rather than consumer protection.

368. For those reasons, I reject the submission that the Ombudsman misapplied section 56 of the CCA. Having rejected grounds 1(i) and 1(ii) of the grounds of challenge, it is untenable to submit that, in consequence, the Ombudsman misapplied section 140A. He was also, as Ms Sahore pointed out, entitled to find and did find (see his decision at [329]) that the relationship was unfair within section 140A, independently of any breach of rule.

369. For all those reasons, the third and final ground of challenge is weak. I am just about persuaded that it is arguable and I grant permission to advance it but I dismiss it on its merits.

Section 31 of the SCA

370. It follows from the analysis above that the question raised in the text of section 31, whether the "outcome" would have been "substantially different" if the "conduct complained of" had "not occurred", does not arise. If it had arisen, the issue would have required more analysis than was presented to me in submissions. It would or might depend on how badly and in what ways the Ombudsman had erred, though I have found that he did not.

371. The correct approach to this issue has been considered in many cases. I find the most useful recent point of reference is the judgment of Hill J at [161]-[168] in *R (HPSPC*

Ltd) v. Secretary of State for Education [2022] EWHC 3159 (Admin), where the earlier cases are reviewed and the point reiterated that the "outcome" should not be construed in an artificially narrow procedural way, but should include what would have been the practical effects of the "conduct complained of" not having occurred. It is not feasible or necessary to embark on a speculative exercise of considering those matters in this case.

Conclusion; Disposal

372. For those reasons, I decline to entertain Arnold Clark's assertion of procedural fairness as against it. I allow Arnold Clark to assert its arguments in support of Clydesdale's second ground: that the monetary award was unlawful. I refuse Arnold Clark's application to rely on the report of Frontier Economics. I grant Clydesdale permission on all the grounds but I dismiss all the grounds.

373. I end by thanking counsel for the usual stellar quality of their advocacy and the solicitors and parties for the swift, efficient and professional manner in which they prepared for the hearing. I ask counsel kindly to prepare and file a draft of the court's order, agreed as far as that is possible. I will hear the parties or consider brief written representations on any consequential matters.