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## MOTOR FINANCE PCP ASSESSMENT REPORT

Report: 06/04/2023

Customer: Mr Tim Good

Lender: VWFS

Vehicle Registration:

**Combined total for this agreement: £10,596.20**

# INTRODUCTION

This document is prepared in order to provide a legal and financial analysis of a proposed claim by the above-stated Borrower against the Lender and, with regards to any secret commission claim and or any additional losses the consumer has been disadvantaged by the Lender's actions.

My intention is to set out the merits of the potential causes of action and also the likely quantum. The causes of action this report will predominately focus upon are, payment of undisclosed commission from the Lender to the Broker, whether there is an unfair relationship between the Lender and the Borrower within the meaning of section 140A of the Consumer Credit Act 1974, irresponsible lending, default charges, incorrect prescribed terms stipulate by the CCA legislation and FCA within the finance agreement and other unfair lending and enforcement practices.

It should be noted that this analysis is prepared in good faith based on the documents and information provided. However, the assessment of the merits and quantum may change as further evidence becomes available. Further, given that commission payments within the car finance market were generally undisclosed, it is not possible to provide an exact quantum until the amount of any commission has been confirmed. Therefore, estimates in such instances are provided based on my own knowledge of working in the industry as a car finance broker for over 15 years.

## **Details of Instructing Solicitors:**

The Refund Lawyer

## **Documentation Considered in Preparation of this report:**

- Loan Agreement

# ABOUT THE AUTHOR

The following represents my expert witness report based on the rules of CPR 35. In preparing this report I have considered documents provided to me by the Claimant's solicitors. I am instructed to consider and report on the matter with reference to the responsibilities of the brokers/intermediaries and Lenders and the applicable regulatory and statutory obligations. My analysis of the case will include consideration of the following:

- Consumer Credit Act 1974
- Consumer Credit (Agreements) Regulations 1983
- Financial Services and Markets Act 2000
- The Consumer Credit (Total Charge for Credit) Regulations 2010
- FCA Handbook
- Unfair Contract Terms Act 1977
- Misrepresentation Act 1967
- Unfair Terms in Consumer Contracts Regulations 1999
- Lender underwriting criteria
- Lender acceptance policies
- Debt management

## Qualifications

From 1999 to 2014 I was the owner and Director of an OFT/FCA approved and regulated financial brokerage. The business acted as an intermediary, brokering finance deals between consumers and Lenders. The loan products we arranged were both secured and unsecured loan products ranging from car finance to mortgages. We achieved recognition as a top five brokerage with a number of preferred prime and sub-prime Lenders. Our revenue was generated purely from commissions received from Lenders. In the years 2007 to 2009, the brokerage turned over in excess of £12.m per annum.

During my time as an owner and Director of this business, I gained an in-depth working knowledge of commission structures. I have an insight into the mechanics of the market including the different lending criteria, underwriting policies and likely commissions and remuneration payable all types of loan product. I hold this knowledge both generally and specific to each of the Lenders I conducted business with.

I am well versed in the legislative framework surrounding the business of lending, the FCA principles of business, including CONC and MCOB, 'know your customer' checks and treating the customer fairly.

I can confirm that in preparing this report my duty is to the Court.

Ms Joanne Brindle

# CASE OVERVIEW

## Customer Details:

<b>Name</b>	Mr Tim Good
<b>Address</b>	10A Belvue, Swansea, SA1 5BY

## Lender Details:

VWFS	Agreement date: 01/09/2016
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## Intermediary:

Helston Garages Ltd
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## Contract Details:

Cost of goods (including VAT): £19,495.00
Additional deposit: £500.00
Balance to finance: £18,995.00
Interest charges: £6,254.78
Total payable: £25,749.78
APR including fees: 11.2%
Payment term (months): 48
Monthly payments: £334.11
Final optional purchase payment: £9,202.50

# ANALYSIS

## SECRET COMMISSION

I consider that the Borrower can be categorised as a prime customer and the Broker owed the Borrower fiduciary duties. By not obtaining the informed consent of the Borrower to receive the commission the broker was in breach of those duties. Assuming commission was paid (which I consider to be highly likely) then the Broker has breached its fiduciary duties to the Borrower and the Lender has procured that breach under CONC App 1.2.3A and the Broker under CONC 4.5.3.

If the commission payments were completely secret\* then equitable compensation, rescission of the loan or damages for loss will be available for the Borrower.

**\*Please note that if the terms and conditions of the agreement refer to the fact that a commission may be payable but in circumstances where it does not disclose the amount payable it will be a 'half-way house' situation, or a 'half-secret' commission: see *Hurstanger v Wilson* [2007] EWCA Civ 299. Half disclosure of such means that the payment of commission is not a bribe, but equitable remedies are available if the disclosure is insufficient to satisfy the need for informed consent.**

Aside from the commission received, all main dealers and most volume used car dealers had an additional agreement with the Lender which was called an intermediary agreement. The agreement will state additional incentives the intermediary will receive for the amount of volume (of sales) the intermediary gives to the Lender. The agreement will state the rates of interest the intermediary would benefit from, the term of business, commission and other rewards the intermediary will receive.

The commission can take the form of a single one-off payment at the point of sale, which can be:

- a fixed commission
- a scaled commission or
- Difference in charges commission

Commission arrangements can also include other benefits such as a yearly or quarterly volume related bonus, access to software or other facilities to assist the firm (soft commissions), stocking facilities, penetration bonus, loyalty bonus, assisting with staffing costs and other non-financial rewards such as entertainment or marketing budgets.

The commissions and interest rates the intermediary received were predominantly derived from the volume of business the intermediary gave to the Lender, which, the Lender would normally pay to the intermediary on a quarterly or yearly basis. In some cases the additional bonuses and benefits far outweighed the standard commission paid on one consumer's introduction to the Lender. Therefore it was important that the intermediary hit the targets set by the Lender.

Consumers are not generally aware of the full details of any inducement arrangements that exist between intermediaries and Lenders. Therefore, are not aware of any drivers associated with those which could potentially influence an intermediary's recommendation to them.

The Central Bank's Consumer Protection Code 2012 requires firms to seek to avoid conflicts of interest. It also imposes requirements relating to inducements on firms when distributing their products through intermediaries and in relation to remuneration arrangements with employees, as follows:

"3.31 Where a product producer distributes its products to consumers through an intermediary and pays commission to an intermediary based on levels of business introduced, the product producer must be able to demonstrate that these arrangements:

- a) do not impair the intermediary's duty to act in the best interests of consumers;
- b) do not give rise to a conflict of interest between the intermediary and the consumer."

#### What impact could the agreement have on the consumer?

By the very nature of inducements and incentives described within the intermediary agreement, it can severely impact the consumer. As payments for hitting a sales target on a specific product, or paying more commission for the sale of one product over another competitor would seek to incentivise the behaviour of the intermediaries and create conflicts between an intermediary's duty to act in its customer's best interests and the intermediary's own interests.

The consumer may unbeknown to them be impacted by not being offered the best possible finance deal for their personal circumstances. They may receive higher monthly payments than if their business was introduced to another Lender and also be disadvantaged of possible consumer's incentives from other Lender i.e. free servicing. This can render the relationship unfair between the Lender and consumer under section 140A CCA.

## BREACHES OF THE AGREEMENT BETWEEN PARTIES

The credit agreement provided states that it is a Regulated credit agreement. Based on the disclosed information I am limited on my assessment. However, the Consumer Credit Act demands certain statutory requirements are adhered to in order for the Borrower not to be disadvantaged.

No pre-contract information was provided. This should have included the following:

- the amount of credit
- the total charges for credit
- the credit period
- the total amount payable
- examples of the amount payable if the debt is repaid early
- the interest rate
- the annual percentage rate (APR) (which if it is a fix sum loan MUST BE FIXED)
- any other fees or charges – for example for missing a payment.

The agreement should have included the following:

- Parties to the agreement including broker
- Key Financial Information including total amount repayable
- Total Charges For Credit
- Key Information, including cancellation rights, early repayment rights, and all other statutory rights and remedies available
- A signature box, with the statement "the Borrower must only sign if they wished to be bound by the loan according to the CCA1974."

The Borrower has been disadvantaged as the above-prescribed items have failed to be carried out by the Lender. In fact, it is often apparent that key information has been misrepresented by the Lender denying the Borrower to be aware of their rights.

The Lender has failed to provide the pre-contract information which should have been provided in good time in accordance with CONC 4.2.5 and Regulation 3 (2) of the Consumer Credit (Disclosure of Information) Regulations 2010.

If the Lender has failed to comply with the CCA's prescribed terms and the execution of the agreement the Borrower could seek a declaration that the consumer credit agreement is void pursuant to CPR 40.20

The Lender has failed to disclose the finance commission/fee paid to the broker for the Borrower's introduction in breach of CONC App 1.2.3A. The Borrower should seek a declaration

that this renders the relationship between them and the Lender unfair within the meaning of s.140A of the Consumer Credit Act 1974.

The Lender has failed to conduct adequate affordability checks pursuant to s.55B of the Consumer Credit Act 1974. Such conduct is irresponsible lending.

The Lender has failed to disclose the total cost for credit as there is no reference the Total Charges For Credit, commission paid and administration fees contrary to FCA rules CONC App 1.1.5 R and CONC App 1.1.6R

The Lender has failed to inform the Borrower that it is their right to request a copy of the executed credit agreement at any time, along with specific and current information concerning the debt in breach of s.77 and s.78 of the Consumer Credit Act 1974.

No alternative credit products were offered by the Lender or broker contrary to CONC 2.5(3) and PRIN 2.1.1

The Lender has failed to make the Borrower aware of their right to withdraw from the agreement without notice up to 14 days after entering the agreement in breach of s. 66A of the Consumer Credit Act 1974.

The Lender has failed to notify the Borrower within the signature box that they are only to sign if they want to be bound by the prescribed terms and conditions contrary to s.60A of the Consumer Credit Act 1974.

The credit agreement does not contain any of the prescribed terms as required by s.60(1) of the Consumer Credit Act 1974 and the Consumer Credit (Agreements) Regulations 1983 (SI 1983/1553) made under the authority of the "1974 Act". Since this agreement does not contain the required prescribed terms it is rendered unenforceable by s.127(3) of the Consumer Credit Act 1974, which states:

*The court shall not make an enforcement order under section 65(1) if section 61(1)(a)(signing of agreements) was not complied with unless a document (whether or not in the prescribed form and complying with regulations under section 60(1)) itself containing all the prescribed terms of the agreement was signed by the debtor or hirer (whether or not in the prescribed manner).*

## IRRESPONSIBLE LENDING

The Lender was under an obligation to lend responsibly. In short, this meant that the Lender needed to carry out an adequate assessment as to whether or not the Borrower could afford to repay the Loan. Lenders were required to take into account and assess a Borrower's income and expenditure. This involved a Lender assessing the amount of secured debt and unsecured debt against income and whether there was a sufficient amount for household expenses.

If the Lender advanced the Loan in circumstances where the Borrower could not afford to repay then the Borrower may be able to claim that an unfair relationship existed between themselves and the Lender within the meaning of section 140A of the Consumer Credit Act 1974

The following matters should also be examined to establish whether further breaches have occurred rendering an unfair relationship:

- There should be transparency in all dealings with potential and actual Borrowers, with full and early disclosure and explanation of all contract terms and conditions and all fees payable: see Schedules 3 and 6 of the Consumer Credit (Agreement) Regulations 1983;
- Advertising and other promotional material should not mislead, and there should be no cold-calling or canvassing off trade premises without the prior Borrower's consent CONC 3.3.1R;
- Brokers should disclose at the outset their status with regard to the Borrower and the Lender, and the extent of the service offered to the Borrower, together with any brokerage fee or commission payable by the Borrower or the Lender CONC 4.5.3;
- Lenders should take all reasonable steps to ensure that brokers and other intermediaries regularly marketing their products do not engage in unfair business practices, or act unlawfully, and that they serve the best interests of the Borrower FCA guidance;
- Contract terms and conditions should be fair, and should be written in plain English to ensure as far as possible that Borrowers understand the nature of the loan agreement and their rights and responsibilities under the CCA Unfair Contract Terms Act 1977;
- There should be responsible lending, with all underwriting decisions subject to a proper assessment of the Borrower's ability to repay and taking full account of all relevant circumstances: Section 25(2B) Consumer Credit Act 1974 and FCA CONC 5.2.3;
- Any ancillary charges (for example, on default or early settlement) should be brought to the attention of the Borrower before the agreement is entered into and should reflect as closely as possible the costs reasonably incurred by the Lender and not already recovered at the time when the charges are made CCA Total Charges Credit Regulation 2010 (for agreements made between 2010-2012) and CCA Unfair Contract Terms Act 1977.
- Making the Borrower aware of their rights to withdraw from the agreement and how to do so: CCA Section 66A Right to withdraw;
- Making the Borrower aware of the correct total charges for credit as per the CCA regulations TCC 2004/2010 (for agreements made between 2010-2012).

# QUANTUM

This redress calculation is based on a Secret Commission percentage that is made up of the multiple commissions paid by the Lender to the broker or intermediary and the sales company.

	<b>Creditor</b>
Secret Commission	£3,836.84
Rescission	£6,254.78
Statutory interest at 2% from end of agreement	£504.58

The combined possible for this contract is **£10,596.20 based on the following:**

## CALCULATION METHOD EMPLOYED

The method employed in this report seeks to calculate a refund of both the secret commission, interest and a proportion of payments paid by the Borrower.

The amount due to the Borrower is calculated as the total discrepancy between the balance of the loan as given by the Lender and the balance of the loan as defined.

The quantum calculations also include other incentives offered by the Lender to the intermediary e.g. VRB, loyalty bonus or marketing support (Lender specific). The expert also relies on the *Wood* decision as rescission is available as a right in fully secret commission cases. It is discretionary in half-secret commission cases.

The expert does appreciate there will be an argument from the Lenders on the usage of the vehicle and counter restitution. The expert has therefore not included the interest which the lender has had on the total amount payable as per the *Wood* decision.

The expert has not included in the report the statutory interest that could be awarded subject to the courts discretion.

***JR Brindle***

Prepared by Ms Joanne R Brindle

Expert Witness Con-000742364

Dated this 06th day of 04 month 2023

