UT (Tax & Chancery) Case Number:

IN THE UPPER TRIBUNAL
(Tax and Chancery Chamber)

CA AUTO FINANCE UK LTD

Applicant

-and-

THE FINANCIAL CONDUCT AUTHORITY

Respondent

ANNEX A: REASONS FOR SEEKING REVIEW OF CONSUMER REDRESS SCHEMES IN THE MOTOR FINANCE SECTOR PURSUANT TO S.404D FSMA

A. INTRODUCTION

1. The Applicant (CA Auto Finance UK Ltd, "**CAAF**") challenges certain rules made by the Respondent (the "**FCA**") in Chapter 5 and Chapter 6 of the Consumer Redress Scheme sourcebook ("**CONRED**") which establish two consumer redress schemes in the motor finance sector (the "**Schemes**" and the "**Rules**"). CAAF seeks an order quashing the Rules themselves in whole or in relevant part and / or the FCA's decision to make the Rules (the "**Decision**").

2. CAAF's review is sought under s.404D(1) of the Financial Services and Markets Act 2000 ("**FSMA**"). These grounds constitute: (1) the reasons for referring the Rules and/or the Decision to the Upper Tribunal (the "**Tribunal**") under r.26B of and Schedule 3 to the Tribunal Procedure (Upper Tribunal) Rules 2008 (the "**2008 Rules**"); and (2) insofar as necessary, the reasons for making an application to the Tribunal under r.26A of the 2008 Rules.

3. The Rules were made by the FCA on 30 March 2026 pursuant to ss.404 and 404A of the Financial Services and Markets Act 2000 ("**FSMA**") by way of two instruments:

   3.1 the Motor Finance Commission Consumer Redress Scheme (2007-2014) Instrument 2026 (FCA 2026/20) relating to Scheme 1; and

3.2 the Motor Finance Commission Consumer Redress Scheme (2014-2024) Instrument 2026 (FCA 2026/19) relating to Scheme 2.

4. The Scheme established in CONRED 6 applies to finance agreements entered into between 6 April 2007 and 31 March 2014 ("**Scheme 1**") and the Scheme established in CONRED 5 applies to finance agreements entered into between 1 April 2014 and 1 November 2024 ("**Scheme 2**"). The two Schemes are otherwise materially similar, save that Scheme 1 requires a higher quantum of redress in some cases. Unless the context requires the Schemes to be differentiated, the two schemes are referred to below collectively as the Schemes and references to Rules in CONRED 5 include references to the equivalent Rules in CONRED 6 with the necessary changes. The Grounds for challenge set out below apply to both Schemes, unless otherwise indicated.

5. CAAF is part of the Crédit Agricole group and a UK based provider of motor finance for both new and used vehicles.[1] Prior to 2023, CAAF was the captive finance company of Fiat Chrysler Automobiles and has operated white-label partnerships since then, as well as offering used car finance under the 'CA Auto Finance UK' brand. CAAF currently offers a broad range of vehicle financing products for new and used vehicles through a network of over 600 franchised and non-franchised dealers and brokers, and in 2023 it closed with a portfolio exceeding £2.5 billion. As a lender with a material presence in the market at the relevant times and which stands to be liable for very substantial redress sums under both Scheme 1 and Scheme 2,[2] CAAF has a sufficient interest to be granted permission to apply for a review of the Schemes under s.404D(1) FSMA.

6. CAAF strongly supports the introduction of a consumer redress scheme to address any unfairness in motor-finance agreements and recognises that any such Scheme must comprise Rules capable of general application to a large body of consumers in an efficient way. However, it is essential that any such Scheme is lawful, including because it is properly targeted at providing just redress to consumers harmed by unfair relationships. The Schemes fail to do this and are unlawful.

7. The starting point of this challenge is to consider the limits on the powers of the FCA. The FCA is empowered by s.404(1) FSMA to make a consumer redress scheme only (1)

[1] CAAF is a subsidiary of CA Auto Bank SpA ("**CAAB**"), an Italian bank specialising in automotive finance. CAAB is a subsidiary of Crédit Agricole Personal Finance and Mobility ("**CAPFM**").
[2] CAAF entered into motor finance agreements in circumstances meeting the criteria in CONRED 5.1.6R and 6.1.6R.

in respect of widespread failures by firms that (2) have caused actionable loss to consumers and in relation to which (3) it is desirable to make redress in respect of the failures.

8. The Schemes have been introduced by the FCA based on its view that many relationships between lenders and consumers are unfair within the meaning of s.140A of the Consumer Credit Act 1974 ("**CCA**"), due to inadequate disclosures to consumers about commission arrangements between dealers (acting as credit brokers) and lenders, and that those inadequate disclosures have caused loss or damage. On that premise, the FCA advances the Schemes on the basis that they are said to provide an efficient means of redress for consumers who **have** suffered harm due to such unfair relationships.

9. The Schemes are therefore said to provide redress in respect of actual harm suffered. However, in fact the Schemes (1) define certain "**Relevant Arrangements**" relating to commission that give rise to a presumption of an unfair relationship and specify narrow bases on which the presumption can be rebutted; (2) further presume that any such unfair relationships caused loss (again subject only to rebuttal on narrow bases and, in the case of some types of agreement, with no possibility of rebuttal); and (3) require firms to pay redress to all consumers who are presumed to have suffered loss.

10. The Schemes as made are fundamentally flawed because they fail to provide an efficient or any means by which consumers who have actually suffered harm from unfair relationships are granted appropriate redress.

    10.1 In relation to **unfairness**, the Relevant Arrangements are not targeted at identifying which relationships were unfair or in fact caused harm to consumers. As a result, the Schemes require firms to treat as unfair many relationships in which consumers suffered no harm at all and which are not therefore properly to be regarded as unfair;

    10.2 In relation to **causation of loss**, the Schemes require firms to presume causation of loss. This is unlawful:

        (a). This presumption ignores the limits of the power conferred on the FCA by the legislation which, on this aspect, only permits the FCA to require matters to be "taken into account".

(b). Further or alternatively, the FCA cannot provide for matters to be taken into account if they have not been, or would not be, taken into account by a court and/or the presumption of causation of loss is not a matter which the court would take into account.

(c). In any event, the Rules fail to engage with the critical question of whether any unfairness did in fact cause loss, contrary to the clear statutory requirement that a consumer redress scheme is only available in respect of failures that cause actionable loss or damage to consumers.

10.3 In relation to **redress**, the Schemes require firms to pay compensation which is not rationally or reasonably connected to the loss actually suffered. In particular the sums are to be calculated by reference to the amount of commission paid by the lender to the broker and (in most cases) by reference to an arbitrary reduction in interest costs, which is not properly supported by evidence or analysis.

11. The effect of the Schemes is therefore to presume unfairness without evidence of harm, to presume loss without evidence of loss, and then to require redress to be paid arbitrarily to every customer deemed - without foundation - to have suffered loss.

12. The Tribunal is invited to conclude that these are not appropriate Schemes (to the extent, addressed in more detail below, that the Tribunal is exercising primary jurisdiction under ss.404D(6)-(7) FSMA) and/or that they are unlawful (to the extent that the Tribunal is exercising its supervisory jurisdiction).

13. In any case, Scheme 1 is *ultra vires* because the FCA has no power to make a consumer redress scheme for agreements and/or failures by firms prior to 1 April 2014. Scheme 1 should be quashed on this basis alone. The FCA in its Policy Statement ("**PS**") anticipated that it might lack the power to make a Scheme applying to agreements predating April 2014, which is the express reason given for dividing the Schemes into two in order to insulate Scheme 2 cases from the inevitable challenge anticipated by the FCA if it sought impermissibly to extend its powers back in time.

14. CAAF will seek permission for disclosure and expert evidence in order to develop its critique of the Schemes, including by reference to alternative approaches to assessing unfairness, loss and redress.

B. SUMMARY OF THE SCHEMES

15. The Schemes follow the four-part structure set out in s.404 FSMA:

    15.1 The first stage involves the determination of which cases fall within the scope of the Scheme (each a "Scheme Case");

    15.2 The second stage requires the determination of whether there is an unfair relationship subsisting in each Scheme Case;

    15.3 The third stage requires the determination of whether each unfair relationship determined at the second stage caused actionable loss or damage to the consumer; and

    15.4 The fourth stage requires the determination of the financial redress (if any) to be paid to those consumers determined to have been caused loss at the third stage.

16. A summary of the four stages of the Schemes is set out below.

Stage 1 (Scope)

17. In broad terms, agreements will fall within the scope of the Schemes if:

    17.1 They fall within the temporal scope of the Schemes;

    17.2 There were arrangements between the lender and the car dealer (broker) for the payment of commission by the lender to the broker in connection with consumers entering into the finance agreement with the lender; and

    17.3 The lender determines that if the consumer brought a claim under s.140A CCA, the limitation period would not have expired before the date on which the Schemes Rules were made.

18. The Schemes are broad in scope and will plainly apply both to fair and unfair relationships. It is therefore necessary for the relevant Rules to allow firms properly to distinguish between cases involving unfair relationships that caused loss requiring redress and those that do not.

Stage 2 (Unfairness)

19. For each finance agreement falling within a Scheme (a Scheme Case), lenders are required to determine whether any of three "**Relevant Arrangements**" are present, namely:

19.1 A discretionary commission arrangement ("**DCA**"), whereby the broker was entitled to vary the interest rate payable by the consumer under the finance agreement, which affected the amount of commission the broker received. A DCA is not a Relevant Arrangement if the interest rate applied was the lowest rate in the range at which the broker would not have received any additional commission (the "*not acted upon*" exception under CONRED 5.2.19R(3)). However, this exception does not cover, and thus the definition of a DCA would include, arrangements where a dealer exercised its discretion to provide consumers with competitive or even below market rates (unless it was the lowest rate).

19.2 A "**High Commission Arrangement**", which is defined in the Schemes as being where the total amount of commission was at least (i) 39% of the total charge for credit; and (ii) 10% of the total amount of credit advanced. This threshold is an arbitrary threshold set materially below the level of commission that was in issue in Johnson v FirstRand Bank Ltd [2025] 3 WLR 423, [2025] UKSC 33 (55%/26%), and applies irrespective of whether there is evidence that the level of commission or its non-disclosure affected the consumer's cost of credit.

19.3 A "**Tied Arrangement**", where there is a contract between the lender and the broker: (i) for the broker to introduce consumers exclusively to the lender; or (ii) to give the lender a right of first refusal (this is subject to an exception for captive and white-label relationships with franchised dealers in certain circumstances (CONRED 5.2.20R–5.2.22R)). Again, the definition captures tied arrangements irrespective of whether there is evidence that the existence of a tie or its non-disclosure affected the consumer's cost of credit.

19.4 None of the above is a Relevant Arrangement if: (a) the total amount of commission was £120 or less (under Scheme 1) or £150 or less (under Scheme 2) (the "*de minimis* thresholds"); or (b) the APR for the motor finance agreement was 0% (CONRED 5.2.19R(2)).

20. The Schemes provide that if a Relevant Arrangement was not adequately disclosed to the consumer, the lender must presume that there was an unfair relationship (CONRED 5.3.8R). Adequate disclosure is defined to mean the disclosure of information clearly and prominently provided to the consumer before entering into the motor finance agreement, in such a way that it was likely to have drawn the attention of the average customer

(CONRED 5.3.10R). The lender must presume there was no adequate disclosure unless specified primary or secondary records demonstrate otherwise (CONRED 5.3.12R). In practice, it is likely to be very difficult if not impossible for lenders to meet these evidential requirements. That is because any evidence of disclosure is likely to be held (if at all) by consumers and dealers, not lenders, and it is likely to be difficult for lenders to obtain these records given the passage of time and the capacity of dealers to respond to requests for information at the scale contemplated by the Schemes.

21. What is more, the regulatory rules in force at the time of the Relevant Arrangements required disclosure only of the fact of a commission arrangement; the amount of any commission had to be disclosed only if the consumer requested that information: CONC 4.5.3R; 4.5.4R. The effect of the Schemes is therefore to make lenders liable for redress by reference to standards which go beyond their regulatory obligations at the material times.

22. Where an unfair relationship is presumed under the Schemes, that presumption is capable of being rebutted only in limited circumstances, namely:

    22.1 Where there is evidence that the particular consumer could reasonably be expected to have known about or foreseen the undisclosed information because of their specific knowledge or experience, or because of prior transactions with the lender or broker involving adequate disclosure of the relevant arrangements (CONRED 5.3.14R(1)); or

    22.2 In respect of Tied Arrangements only, where it can be demonstrated that the lender had agreed to forgo reliance on the tie or the broker had a policy or practice of disregarding it (CONRED 5.3.14R(2)).

Stage 3 (Causation of Loss)

23. If the presumption of an unfair relationship is not rebutted, the lender must presume and determine that the consumer suffered loss or damage as a result (CONRED 5.3.21R and CONRED 5.3.25R). The Schemes rely on this universal presumption and do not provide for or permit any consideration or determination of whether an unfair relationship in fact caused loss. This presumption of causation of loss is rebuttable only where the lender can demonstrate that the consumer would not have been able to obtain a lower APR from another lender with which the same broker had a referral arrangement at the relevant time

(CONRED 5.3.22R(1)–(3)). This rebuttal does not apply to DCA cases, in respect of which the presumption of loss and damage is irrebuttable (CONRED 5.3.22R(4)). Even in non-DCA cases, it is likely to be difficult in practice for lenders to rebut the presumption, especially since lenders would not hold comprehensive data about rates offered by *other* lenders, and records held by brokers are unlikely to be complete, particularly in relation to older agreements where records of available rates are less comprehensive.

Stage 4 (Redress)

24. If the presumption of causation of loss and damage is not rebutted, the lender must calculate and pay redress. There are two methods of calculating redress:

    24.1 A "**Commission Repayment Remedy**", which is the total amount of commission plus interest (CONRED 5.4.4R).

    24.2 A "**Hybrid Remedy**", which is the default remedy in all cases where the Commission Repayment Remedy does not apply. It averages the Commission Repayment Remedy and the APR Adjustment (CONRED 5.4.16R).

    24.3 The APR Adjustment is calculated by reducing the consumer's APR by 17% (under Scheme 2) or 21% (under Scheme 1) to produce a market-adjusted APR, and recalculating what the consumer would have paid at that rate (CONRED 5.4.9R). This adjustment applies generally without taking account of whether the consumer in fact suffered any loss, without differentiating between different categories of consumers, lenders and unfair relationships and without taking into account any benefits received by the consumer in the form of a subsidised APR or deposit contribution, which were common features of the market.

    24.4 Where the agreement includes a DCA, the market-adjusted APR cannot be lower than the lowest rate of interest in the DCA range (CONRED 5.4.9R(3)). The Hybrid Remedy is then subject to caps:

        (a). A 90% commission cap: redress cannot exceed 90% of the total commission plus interest (CONRED 5.4.19R);

        (b). An adjusted realised cost of credit cap: redress cannot exceed the total cost of credit actually paid by the consumer, adjusted to deduct a minimal cost of

credit based on the 5th percentile APR (excluding 0% APR agreements) for the relevant year (CONRED 5.4.20R);

(c). A total realised cost of credit cap: redress cannot exceed the total cost of credit actually paid by the consumer (CONRED 5.4.21R); and

(d). Where the consumer's APR was at or below the 5th percentile APR for the year (again excluding 0% APR agreements), no redress is payable under the Hybrid Remedy (the "**5th Percentile Threshold**") (CONRED 5.4.6R).

25. A consumer will receive the Commission Repayment Remedy if the Relevant Arrangements include a High Commission Arrangement that is also a Very High Commission Arrangement, together with either or both of a DCA and a Tied Arrangement (CONRED 5.4.3R). A Very High Commission Arrangement is defined as one where the commission was at least 50% of the total charge for credit and 22.5% of the total amount of credit (CONRED 5.1.1R(29)).

26. In all other cases, a consumer will receive the Hybrid Remedy (subject to the caps).

C. LEGAL FRAMEWORK

27. There are four key aspects of the legal framework relevant to CAAF's challenge:

27.1 First, the scope of the FCA's rule-making powers under ss. 404 and 404A FSMA in relation to a consumer redress scheme.

27.2 Second, the nature of an "unfair" relationship under the CCA.

27.3 Third, the principles applicable on an application for judicial review, including A1P1 ECHR and s.6 HRA.

27.4 Fourth, the Tribunal's jurisdiction to review a redress scheme under s.404D FSMA.

(1) FCA's rule-making powers in relation to a consumer redress scheme

28. The FCA's power to make rules in relation to a consumer redress scheme is defined by the legislation conferring the relevant power, in this case ss.404 and 404A FSMA. The Supreme Court has emphasised the need to focus on the words the legislature has chosen to use in their context, in order to ascertain the meaning and intent of the legislation.[3]

[3] See, for example: Bilta (UK) Ltd v Tradition Financial Services Ltd [2025] 2 WLR 1015, per Lord Hodge at §20.

29. Section 404(1)(a)-(c) FSMA sets out three necessary pre-conditions for the FCA's power to make rules requiring relevant firms to establish a consumer redress scheme:

> *"(a) it appears to the FCA that there may have been a widespread or regular failure by relevant firms to comply with requirements applicable to the carrying on by them of any activity;*
>
> *(b) it appears to it that, as a result, consumers have suffered (or may suffer) loss or damage in respect of which, if they brought legal proceedings, a remedy or relief would be available in the proceedings; and*
>
> *(c) it considers that it is desirable to make rules for the purpose of securing that redress is made to the consumers in respect of the failure (having regard to other ways in which consumers may obtain redress)."*

30. The FCA's power is therefore premised on it being satisfied that consumers have suffered (or may in future suffer) loss or damage caused by a widespread or regular failure to comply with the relevant requirement, that such loss and damage be of a kind in relation to which consumers could obtain a remedy in legal proceedings, and that it is desirable to secure redress for the consumers.

31. Section 404(3) FSMA permits the FCA to "*make rules requiring each relevant firm . . . which has carried on the activity . . . to establish and operate a consumer redress scheme*" only where these preconditions are met.

32. Further, the FCA's power to make detailed rules governing how a scheme is to operate in practice is subject to clear statutory constraints.

33. Section 404(5) FSMA defines "*a consumer redress scheme*" as a scheme "*under which the firm is required to take one or more of*" the steps set out in ss.404(5)-(7). These steps reflect the preconditions to the FCA's exercise of power in s.404(1) and define what a scheme and its rules can do. The rules of the scheme are limited to requiring one or more of the following:

> *"(5) The firm must first investigate whether, on or after the specified date, it has failed to comply with the requirements mentioned in subsection (1)(a) that are applicable to the carrying on by it of the activity.*
>
> *(6) The next step is for the firm to determine whether the failure has caused (or may cause) loss or damage to consumers.*
>
> *(7) If the firm determines that the failure has caused (or may cause) loss or damage to consumers, it must then—*
>
> *(a) determine what the redress should be in respect of the failure; and*
>
> *(b) make the redress to the consumers."*

34. Sections 404(1)(b), 404(6), 404(7) and 404A(1)(c)(ii) distinguish between past losses actually caused, on the one hand, and possible future losses on the other. The phrases "*may suffer*" and "*may cause*" are evidently directed at future losses which have not yet crystalised (and are therefore irrelevant in the present case).

35. Section 404A FSMA then further defines the scope of the FCA's rule-making powers:

35.1 By s.404A(1)(b), the FCA is empowered to make rules "*setting out, in relation to any specified description of case, examples of things done, or omitted to be done, that are to be regarded as constituting a failure to comply with a requirement*", but s.404A(2) explains that "*the only examples that may be set out in the rules as a result of subsection (1)(b) are examples of things done, or omitted to be done,* ***that have been, or would be, held by a court or tribunal to constitute a failure*** *to comply with a requirement*" (emphasis added). This relates to the determination of failures under s.404(5).

35.2 By s.404A(1)(c), the FCA is empowered to make rules "*setting out, in relation to any specified description of case, matters to be taken into account, or steps to be taken, by relevant firms for the purpose of— (i) assessing evidence as to a failure to comply with a requirement; or (ii) determining whether such a failure has caused (or may cause) loss or damage to consumers*". Section 404A(3) then explains that "*matters may not be set out in the rules as a result of subsection (1)(c) if they* ***have not been, or would not be, taken into account by a court*** *or tribunal for the purpose mentioned there*" (emphasis added). This relates to the determination of failures under s.404(5) and the determination of causation of loss under s.404(6).

35.3 By s.404A(1)(d), the FCA is empowered to make rules "*as to the kinds of redress that are, or are not, to be made to consumers in specified descriptions of case and the way in which redress is to be determined in specified descriptions of case*", but s. 404A(4) adds that "*the FCA must exercise the power conferred as a result of subsection (1)(d) so as to secure that, in relation to any description of case, the only kinds of redress to be made are those which it considers to be just in relation to that description of case*". Section 404A(5) further provides that for these purposes the FCA must "*have regard (among other things) to the nature and extent of the losses or damage in question*". This relates to the determination of redress under s.404(7).

36. The effect of this statutory regime is therefore as follows:

36.1 The power to make a consumer redress scheme is conferred on the FCA by s.404(3) FSMA.

36.2 Section 404(1) FSMA sets out preconditions to the exercise of that power. It is only exercisable if all three conditions in ss.404(1)(a)-(c) are met.

36.3 Sections 404(3)-(7) then address what the firms can be required to do to establish and operate a "*consumer redress scheme*".

36.4 The steps a firm may be required to take under ss.404(5)-(7) reflect the preconditions to the FCA's rule-making powers in s.404(1).

36.5 The first such step (under s.404(5)) is to investigate and determine whether the firm has failed to comply with a requirement; in this case as to whether it has been party to an unfair relationship under the CCA. Section 404(5) envisages that it is the <u>firm</u> that is to investigate and determine any relevant failures.

36.6 Section 404A provides for a limited extension of the FCA's rule-making powers on specific matters, subject to the careful structure and controls it introduces.

36.7 Rules can (by s.404A(1)(b)) give "*examples of things done, or omitted to be done*" that must be treated by a firm as "*constituting a failure to comply with a requirement*". This is the only legal basis for the FCA to provide in the rules for circumstances to be treated or deemed as constituting a failure to comply with a requirement. It therefore permits the FCA to pre-empt the determination that would otherwise be made by firms under s.404(5). But the FCA's power under s.404A(1)(b) is limited to examples that "*have been, or would be held by a court or tribunal to constitute a failure to comply with a requirement*" (by s.404A(2)).

37. It is inherent in the nature of a consumer redress scheme that examples under s.404A(1)(b) must be capable of general application and cannot therefore set out in full every fact and matter that may be relevant to the determination of failure in every individual case. Nevertheless, s.404A(2) requires that any such examples: (1) be proxies for circumstances that a Court would, typically, treat as constituting an unfair relationship, applying the relevant principles of law; and (2) be no broader than necessary

to comply with the statutory purpose of providing examples of general application that would constitute the failure.

38. Section 404A(1)(c) is cast in different terms. Rules can also make provision requiring firms to take specific "*matters into account*" when determining whether there has been a failure to comply with a requirement and whether any such failure caused loss. As with the power to give examples, this power is limited to matters that have been or would be taken into account by a Court. It is not a deeming power; it is a power limited to requiring matters to be taken into account.

39. In relation to redress, rules can (by s.404A(1)(d)) specify "*kinds of redress*" and "*the way in which redress is to be determined in specified descriptions of case*". This power is constrained to that which the FCA lawfully considers "*just*" (s.404A(4)) and must have regard "*to the nature and extent of the losses or damage in question*" (s.404A(5)). A scheme that resulted in material over- or under. compensation of consumers would indicate that the redress provided for could not lawfully be considered just.

(2) The nature of an "unfair" relationship under s.140A of the CCA

40. Sections 140A-C CCA enable consumer debtors to bring claims against creditors on the basis that their relationship arising out of the credit agreement is unfair.

41. Section 140A CCA provides that:

> *"(1) The court may make an order under section 140B in connection with a credit agreement if it determines that the relationship between the creditor and the debtor arising out of the agreement (or the agreement taken with any related agreement) is unfair to the debtor because of one or more of the following—*
>
> *(a) any of the terms of the agreement or of any related agreement;*
>
> *(b) the way in which the creditor has exercised or enforced any of his rights under the agreement or any related agreement;*
>
> *(c) any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement).*
>
> *(2) In deciding whether to make a determination under this section the court shall have regard to all matters it thinks relevant (including matters relating to the creditor and matters relating to the debtor) . . ."*

42. Section 140B(9) provides that where a debtor pleads that the relationship between the creditor and the debtor is unfair, it is for the creditor to prove the contrary. As explained in Johnson at §40:

"This does not, however, mean that the claimant is absolved from pleading particulars of claim which identify concisely the facts on which the claimant relies. Nor does it mean that the claimant can make allegations of fact which the court is bound to accept unless the creditor disproves them; it is still the debtor who has the onus of proving facts on which he or she positively relies".

43. The assessment of unfairness under s.140A CCA is open-textured and holistic, taking into account the facts of each case (including, for example, the level of knowledge or understanding a consumer may have had about the relevant circumstances): per Lord Leggatt in Smith v Royal Bank of Scotland [2023] UKSC 34, [2024] AC 955 at §22.

44. Section 140B empowers the court to provide redress for unfair relationships. In particular, the Court may select among (and only among) a list of possible remedial orders under s.140B(1).[4] These include, at s.140B(1)(a), orders to "*require the creditor … to repay (in whole or in part) any sum paid by the debtor … by virtue of the agreement…*".

45. As explained in Smith at §25, the constraints on the Court's discretionary powers as to redress under s.140B(1) are informed by the purpose of an order under s.140B, which "*must be to remove the cause(s) of the unfairness which the court has identified, if they are still continuing, and to reverse any damaging financial consequences to the debtor of that unfairness, so the relationship as a whole can no longer be regarded as unfair*".

(3) Principles applicable on a JR application

46. A decision by a public authority may be challenged by judicial review on the basis that it is irrational or unreasonable. This basis for challenge encompasses two limbs: first, a decision is unlawful if it "*is outside the range of reasonable decisions open to the decision-maker*"; second, a decision is unlawful if "*there is a demonstrable flaw in the reasoning which led to it—for example, that significant reliance was placed on an irrelevant consideration, or that there was no evidence to support an important step in the reasoning, or that the reasoning involved a serious logical or methodological error*": see R (Law Society) v Lord Chancellor [2024] 1 WLR 3097 (Singh LJ, Jay J).

[4] See Smith, per Lord Leggatt at §16.

47. A decision may also be challenged on the basis of Padfield[5] unlawfulness, which is the principle that a statutory discretion must be exercised to promote, and not to thwart, the policy and objects of the enabling Act:

47.1 In Braintree DC Ex Parte Halls (2000) 32 H.L.R. 770, Laws LJ held that "*the rule is not that the exercise of the power is only to be condemned if it is incapable of promoting the Act's policy, rather the question is: what was the decision-maker's purpose in the instant case, and was it calculated to promote the policy of the Act?*".

47.2 As the Court of Appeal further explained in Khan v SSFCDA [2025] 1 WLR 2009 at §92: "*That principle requires that a discretionary power should be exercised so as to further the objects and policy of the legislation which confers it, and not to impede or frustrate that purpose*".

48. Section 6 of the HRA makes it unlawful for a public authority like the FCA to act in a way "*which is incompatible with a Convention right*".

49. A1P1 ECHR provides that:

> *"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."*

50. Interference by a public authority with A1P1 rights must comply with the principle of lawfulness and pursue a legitimate aim by means reasonably proportionate to the aim sought to be realised. The analysis "*focuses upon the question whether a fair balance has been struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights*": AXA General Insurance v Lord Advocate [2012] 1 AC 868 per Lord Reed at §108.

51. In applying the requirement of proportionality, it is necessary to determine the following matters (Bank Mellat v HM Treasury (No.2) [2014] AC 700 at [74]): (1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right; (2) whether the measure is rationally connected to the objective; (3) whether a less

[5] Padfield v Minister of Agriculture, Fisheries and Food [1968] AC 997.

intrusive measure could have been used without unacceptably compromising the achievement of the objective; and (4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter. In essence, the question at step (4) is whether the impact of the right's infringement is disproportionate to the likely benefit of the impugned measure.

(4) Tribunal's jurisdiction to review a redress scheme under s.404D FSMA.

52. Section 404D(1) FSMA permits any person with a sufficient interest to apply to the Tribunal for a review of any rules made under s.404. The Tribunal is empowered by s.404D(2) FSMA to either dismiss the application or to make an order quashing the rules made under s.404 or any provisions of those rules.

53. Section 404D(5) FSMA provides that "*the general rule is that, in determining an application, the Tribunal is to apply the principles applicable on an application for judicial review*". This general rule is subject to exceptions in s.404D(6) and s.404D(7) which grant the Tribunal primary jurisdiction to determine whether any examples of failures given in the rules under s.404A(1)(b) constitute a failure and whether matters to be taken into account under s.404A(1)(c) should be taken into account.

D. THE FCA'S FLAWED APPROACH TO LOSS

54. The statutory preconditions for a consumer redress scheme in s.404(1) include that it appears to the FCA that widespread failures by firms to comply with a relevant requirement have caused (or may in the future cause) actionable loss or damage to consumers.

55. The FCA identifies the following matters as justifying the Schemes:[6] (1) the relevant "*failure*" is said to be the failure adequately to disclose the commission arrangements comprising the Relevant Arrangements (giving rise to an unfair relationship); and (2) as a result of the unfair relationship, the consumer has suffered (or may suffer) loss or damage in the form of "*the loss of the opportunity to negotiate lower borrowing costs or seek alternatives*". The justification for the Schemes is therefore that the failure adequately to disclose the relevant commission arrangements caused consumers to suffer

[6] PS, §2.6, p.22.

loss. [7] A scheme which provided redress where inadequate disclosure did not cause loss would be both irrational and contrary to the requirements of the statutory scheme under s.404 FSMA.

56. Further, since a consumer redress scheme may be made only in respect of loss or damage for which a remedy or relief would be available in legal proceedings (s.404(1)(b) FSMA), the Schemes should not provide redress unless the inadequate disclosure gave rise to an unfair relationship for the purposes of s.140A CCA and would have given rise to a remedy under s.140B CCA.

57. The Schemes nevertheless treat the inadequate disclosure of Relevant Arrangements as sufficient to entitle a consumer to substantial redress, irrespective of whether the inadequate disclosure caused an unfair relationship or loss. As explained in further detail below, this approach is unlawful, unjust and inconsistent with the FCA's own recognition of the importance of causation.

58. **First**, the PS simply assumes that loss and damage is to be presumed because not adequately disclosing a Relevant Arrangement may potentially have deprived the consumer of the opportunity to behave differently when buying a vehicle using credit. For example:

    58.1 in respect of DCAs "*Adequate disclosure **could** therefore have affected consumer behaviour, increased competitive pressure on interest rates, and **potentially** reduced borrowing costs"* (emphasis added) (PS, p 28)

    58.2 in respect of High Commission Arrangements, the PS repeatedly uses the words "*may*" and "*could*" and concludes that "*[t]aking the case law and our economic analysis together, in our view, the evidence suggests that consumers **may** ultimately have borne at least some of the cost of commission through credit charges they paid*" which is said to support the view that "*inadequate disclosure of a high commission was **capable of contributing to** an unfair relationship* (emphasis added) (PS, pp. 30-31).

[7] This point is reflected in a number of the Rules. For example, the Schemes contain exceptions to ensure that firms are not liable to pay redress if the APR under the finance agreement was 0% (CONRED 5.2.19R(2)(b)) or there is evidence that a consumer obtained the best available interest rate (CONRED 5.3.22R(1)). These exceptions are justified by the FCA on the basis that, in such circumstances, inadequate disclosure of a Relevant Agreement will not have caused cause loss or damage: see PS response to Q.53, p.186.

58.3 In respect of Tied Arrangements the PS states "*[e]mpirical evidence of loss, while helpful in supporting our judgement, is* ***not a necessary condition*** *to conclude that undisclosed tied arrangements* ***could*** *lead to loss or damage*" (emphasis added) (PS, pp. 31-32).

59. That is an error. The mere hypothetical possibility that disclosure could have affected consumers' behaviour does not establish that it would have done so and is insufficient to establish causation of loss. In principle, loss would only be caused if disclosure would have led to a change of behaviour by the consumer which would in turn have resulted in the consumer paying less. The FCA has not properly assessed that question.

60. **Second**, in fact, the evidence does not support a robust link between non-disclosure of commission arrangements and worse outcomes for consumers (see §75 below). There is no proper basis for a presumption that loss has been caused by the mere non-disclosure of the Relevant Arrangements.

61. **Third**, the Schemes leave out of account important benefits received by consumers. For example:

61.1 The APRs of new cars are frequently subsidised (or subvented). Consumers with subvented APRs are therefore – by definition –paying less than the market rate for finance. But subventions are (for the most part) not taken into account under the Schemes, with the result that consumers with subvened APRs, including those who received some of the most favourably priced loans in the market will nevertheless receive significant compensation. Further, each of the APR Adjustment, the 5th Percentile Threshold and the adjusted cost of credit cap (see §§24.3 and 24.4(d) above) are calculated without any reference to partially subvented APRs (i.e. subvented APRs that are not 0% APR agreements). This means that the Hybrid Remedy will necessarily overcompensate consumers.

61.2 Subventions can also take the form of deposit contributions, which reduce the cost of finance by lowering the amount of finance. Again, these are not taken into account under the Schemes, with the result that consumers will be over-compensated.

61.3 Consumers may also receive benefits in the form of discounts on the headline vehicle price, upgrades to vehicles or additional services, such as free service packages.

62. According to the FCA's research the primary driver of the choice of motor finance for 68% of consumers is the monthly payment (Technical Annex 2 to CP 25/27, §§21 and 43). The monthly payment reflects the overall package (including, but not limited to, the cost of finance). Two points follow:

62.1 The relevant price for assessing economic harm to the consumer is not the APR, which reflects only the finance cost, but the bundle price. Focusing solely on the APR, as the FCA does, will overstate the actual loss suffered by consumers.

62.2 Because consumers negotiate over the terms of the bundle as a whole, higher margins on one component (e.g., the APR) may be offset by lower margins elsewhere (e.g., on the vehicle price) giving rise to "waterbed" effects. These waterbed effects are not taken into account in the Schemes, with the result that consumers are over-compensated.

E. GROUNDS FOR REVIEW

63. CAAF's reasons for challenge, and Grounds for review of the Schemes, are set out below. The Grounds are structured below by reference to each of the four principal stages of the Schemes contemplated in s.404 FSMA and summarised above, namely:

63.1 **Stage 1**: the scope of the Schemes (in relation to Stage 1, this application is concerned only with the **temporal scope of Scheme 1** and the FCA's power to extend a consumer redress scheme to before 1 April 2014);

63.2 **Stage 2**: the determination of an **unfair relationship** (being the relevant "*failure*" for the purposes of ss.404(1)(a) and 404(5) FSMA);

63.3 **Stage 3**: the determination of **causation of loss** (for the purposes of ss.404(1)(b) and 404(6) FSMA); and

63.4 **Stage 4**: the determination of **redress** (for the purposes of ss.404(1)(c) and 404(7) FSMA).

64. The Tribunal must consider also the cumulative impact of the different stages of the Schemes and ultimately ask itself not only whether any of the Rules comprising the

Schemes should be quashed based on any one Ground, but also whether the Schemes are lawful in their overall effect. A scheme defined broadly in scope, with poorly targeted rules for determining the relevant failures, coupled with both a presumption of causation of loss and rules providing for redress for all cases treated as involving such loss, will inevitably result in arbitrary and unlawful redress. That is so even if any one stage of the Schemes could be lawful when viewed in isolation.

F. STAGE 1: THE TEMPORAL SCOPE OF SCHEME 1

65. A consumer redress scheme under s.404 FSMA can only make provision for redress to "*consumers*" (s.404(1)(c) FSMA) and responds to failures by a "*Relevant firm*", meaning an "*authorised person*" (s.404(2) FSMA).

66. It follows that s.404 permits the FCA to create a consumer redress scheme only in respect of failures to give adequate disclosure so as to give rise to an unfair relationship arising between persons who were at the time of that failure: (i) an "*authorised*" lender; and (ii) a "*consumer*" borrower.

67. Section 404E(1) FSMA defines "*consumers*" for these purposes to be any person "*(a) who [has] used, or may have contemplated using, any of the services within subsection (2); (b) who [has] relevant rights in relation to any of the services within that subsection*".

68. Section 404E(2) FSMA includes "*services provided by … authorised persons in carrying on regulated activities*" and "*authorised persons who are investment firms, or credit institutions, in providing relevant ancillary services*".

69. "*Regulated activities*" are defined by s.22 FSMA and include credit broking, regulated credit lending, and exercising lender's rights and duties under a regulated credit agreement (see the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (SI 2001/544) ("**RAO**") Articles 36A and 60B). But those activities only became regulated activities when the FCA took over the regulation of consumer credit activities from 1 April 2014.[8]

70. Accordingly, entering into a motor finance agreement only became a regulated activity on 1 April 2014 (pursuant to the Financial Services and Markets Act 2000 (Regulated

[8] Article 60B RAO, in its original form, was introduced by way of amendment to the RAO on 1 April 2014, pursuant to Articles 1(6), 4 and 6 of the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No.2) Order 2013 (SI 2013/1881).

Activities) (Amendment) (No.2) Order 2013). It follows that a motor finance agreement entered into prior to 1 April 2014 was not an agreement between a consumer and a relevant firm, and so failures relating to disclosure in advance of any such agreement, or in the creation of such an agreement, cannot be within the scope of a consumer redress scheme.

71. Further or alternatively, for the same reasons, a consumer redress scheme cannot apply to failures by firms comprising being party to an unfair relationship in respect of credit agreements where the debtor-creditor relationship ended prior to 1 April 2014. In such cases, there was no credit relationship that could give rise to an unfair relationship constituting a failure by a "*relevant firm*" to a "*consumer*" within the meaning of s.404(1) FSMA.

G. STAGE 2: THE DETERMINATION OF AN UNFAIR RELATIONSHIP

Stage 2 requires firms to treat as an unfair relationship circumstances that are inappropriate or excessively broad

Inadequate Disclosure of Relevant Arrangements

72. The effect of any Relevant Arrangement where disclosure did not meet the standards set out in CONRED 5.3.10R is a presumption of an unfair relationship, rebuttable only on specific limited grounds.

73. The fundamental flaw in Stage 2 of the Schemes is that the inadequate disclosure of a Relevant Arrangement is not an appropriate basis on which to presume an unfair relationship.

74. The mere inadequate disclosure of a commission arrangement does not in itself give rise to an unfair relationship (see Johnson at §319). It is also necessary to consider whether any failure in disclosure materially impacted the consumer (see Carney v NM Rothschild & Sons Ltd [2018] EWHC 958 (Comm) at §51), and how the commission arrangements operated in practice (see Link Finance v Wilson [2014] EWHC 252 (Ch) at §46). On the facts in both Plevin and Johnson, the court found that the nature and amount of commission would have impacted on the customer's thinking.[9] If proper disclosure would not have made any difference to the customer's behaviour or outcomes, there is

[9] Plevin at §20; Johnson at §327.

no basis for concluding that the inadequate disclosure meant that the relationship with the lender was unfair (whether necessarily or presumptively).

75. It is therefore essential to consider the effect of disclosure on consumer behaviour. However:

    75.1 The FCA itself acknowledges that "*there is a lack of evidence showing a consistent link between disclosure and subsequent influence on consumer behaviour*" (PS, Technical Annex 1 §4.79). The review of academic literature commissioned by the FCA also found "*little directly relevant and high-quality empirical evidence* [i.e that disclosure had an effect on consumer behaviour]*, particularly with respect to clear applications for policy and practice*" and that generally "*the positive impacts of disclosure may be limited, suggesting that trials show 'modest effects'"* (CP25/27 , Technical Annex 1 §2.166).

    75.2 The FCA's own analysis and evidence presented as part of the consultation process does not support a robust link between non-disclosure of commission arrangements and worse outcomes for consumers. For example, the FCA found limited evidence of the impact of disclosures in relation to other product types in the past.[10]

76. The consumer motor-finance industry is a competitive market, as recognised by the FCA.[11] Lenders and dealer-brokers compete for customers on price, and customers regularly negotiate with dealers, are price sensitive and shop around for cheaper deals. There is no evidence that lenders in the sector are making abnormal profits so as to indicate that the market is being distorted by the non-disclosure of commission arrangements to consumers leading to higher costs for consumers, and certainly no evidence that the market was sufficiently distorted so as to justify the estimated £7.5 billion in redress that will be payable to consumers.

77. In any case, there is no basis for assuming that higher commissions resulted in consumers paying overall higher prices, which is the logical premise to the Schemes treating all inadequately disclosed Relevant Arrangements as giving rise to a presumption of unfairness.

[10] FCA (2013) "Occasional Paper No.1 – Applying behavioural economics at the Financial Conduct Authority", page 43.
[11] See: CP, Technical Annex 2: State of Competition in the Motor Finance Market.

78. The Schemes are therefore wrong to treat inadequate disclosure of a Relevant Arrangement as either necessarily or presumptively unfair.

79. The features of each of the three Relevant Arrangements are addressed further below.

DCAs

80. A DCA confers on the broker a *discretion* to adjust the interest rate. The mere existence of the discretion (and, *a fortiori*, its inadequate disclosure) cannot in itself give rise to an unfair relationship absent evidence that the discretion was exercised in a way that caused detriment to the consumer.

81. Where the discretion was exercised with a result which benefited the consumer, there can be no suggestion that inadequate disclosure of the DCA rendered the relationship unfair. For example, if a broker used its DCA discretion to select a rate at or below the lender's standard rate, or at a rate that was competitive in the market, the consumer suffered no harm or unfairness. That is so even if that rate was not the lowest rate at which the lender earned no increased commission.

82. Even if the broker did not select an APR that was below a comparable market rate, it does not follow that the consumer was worse off by reason of the DCA (let alone its inadequate disclosure); for example the broker may have provided other benefits to the consumer, for example through lower vehicle prices (reflecting the waterbed effect discussed above).

83. The impact of a DCA by its nature is likely to have varied between different customers. because the discretion is likely to be exercised differently from case to case. It is therefore inherently unlikely that all consumers will have suffered harm equally, yet this is the approach of the Schemes.

84. Even if some DCAs caused consumer detriment, a significant proportion of DCAs did not, including those that resulted in customers paying interest rates that were competitive in the prevailing market. The FCA's prior analysis showed that banning DCAs would result in higher interest costs for 44% of consumers who would otherwise have taken a DCA. [12] DCAs cannot, therefore, be treated as causing consumer harm or presumptively unfair as a category.

[12] See CP19/28 at §115 and fn. 33.

85. There is therefore no basis for treating the existence of a DCA or, *a fortiori*, its non-disclosure, as presumptively unfair unless there is evidence that the discretion was in fact exercised against the interests of the consumer and that the consumer suffered loss or damage as a result.

High Commission Arrangements

86. There is no obvious or necessary connection between the amount of commission and consumer harm. Indeed, the FCA itself found "*there was little clear evidence that the association between broker commission and total cost of credit increased with commission level.*"[13] There is no statistically significant relationship between commission levels and the cost of credit (see CP25/27 Technical Annex 1 §2.94) or APRs (see CP25/27 Technical Annex 1, Table 19). In the absence of evidence that High Commission Arrangements in themselves caused detriment to consumers, there is no basis for treating the inadequate disclosure of the commission arrangement in itself as causing an unfair relationship (whether presumptively or necessarily).

87. Dealers were incentivised to compete for customers on price in a competitive market. As a result, a dealer who chose to enter into an agreement with a lender who paid a high commission but also set a high APR would, at least in the absence of a DCA, be incentivised to offer competitive deals, such as by lowering the price of the vehicle (reflecting the waterbed effect). This would likely lower the monthly payment which (as explained at §62 above) is the primary driver of the choice of motor finance for the clear majority of consumers. The competitive nature of the market therefore makes it inherently unlikely that high commissions in themselves had a systematic harmful effect on consumers.

88. Higher commissions may simply have reflected differences in cost or business models between dealers. For example, if dealers operating in areas with higher real estate or labour costs may have earned higher commissions and charged higher prices to consumers to reflect such higher costs. There is no basis for treating higher commissions reflecting higher dealer overheads as causing an unfair relationship.

89. For any given commission threshold, the threshold is more likely to capture an agreement if it has a **lower** cost of credit. For example, where a dealer takes steps to reduce a

[13] PS, Technical Annex at §4.159.

consumer's cost of credit, such as offering deposit contributions, encouraging a lower loan amount, shortening the loan term or providing a lower APR, the total cost of credit will fall. That will necessarily increase commission as a proportion of the cost of credit, making it more likely that the commission threshold will be reached, despite the fact the consumer's cost of credit has been reduced to their benefit.

90. The mere fact of a High Commission Arrangement is therefore not a reasonable proxy for an unfair relationship and there is no basis on which it could be said that the non-disclosure of a High Commission Arrangement would in itself constitute an unfair relationship.

91. Further, the definition of High Commission Arrangements will include so-called four-party arrangements involving a credit broker separate to the dealer. As to this:

91.1 Under s.56 CCA, a lender is not responsible for any disclosure failures by a broker that is not the dealer. Accordingly, there is no basis to treat the inadequate disclosure of the Relevant Arrangements by the broker as constituting (whether presumptively or at all) an unfair relationship between the consumer and the lender. This is accepted by the FCA at PS §3.33.

91.2 Nevertheless, the FCA decided not to exempt four-party arrangements on the basis that it considers "*even in the absence of regulatory failures by the credit broker that are attributable to the lender under section 56 CCA, it is likely that there would still be an unfair relationship arising out of the lender's own failure to adequately disclose the relevant arrangement.*". There is, however, no basis for treating the inadequate disclosure of the commission arrangement to a consumer in such cases as a failure **by the lender** in the first place; any failure is that of the broker, and is not attributable to the lender. Accordingly, the inadequate disclosure could not give rise to an unfair relationship with the lender.

91.3 The FCA also rightly accepts that brokers engaged by a customer can facilitate customers getting more competitive deals and play an important role in helping non-prime consumers source credit (PS, §3.33). The FCA states that this is catered for by the 'no better deal' rebuttal to the presumption of loss, which applies where a lender can show that the consumer secured the lowest lending rate available for the customer. However there will be many cases in which a consumer did not receive the lowest available interest rate, or the lender cannot evidence this, but the

relationship with the lender was nevertheless not unfair. That is especially so where a four-party arrangement inherently involved consumers shopping around for the best deal in a competitive market.

91.4 There are other four-party arrangements which may trigger the High Commission threshold but which are not obviously detrimental to consumers. CAAF has arrangements with large-scale finance brokers who can be approached by dealers for finance options. Such finance brokers partner with a panel of lenders, thereby enabling their customers to find the most suitable deals. These multi-broker arrangements will more frequently be caught by the proposed High Commission threshold test when looking at the total amount of commission paid by the lender, even though that arrangement inherently involves shopping around for the best deal for the customer. It is difficult to see how failing the High Commission test in such circumstances could, without more, be a hallmark of an unfair relationship.

92. More generally, the 39%/10% commission thresholds adopted in the Schemes for defining a High Commission Arrangement are arbitrary and not a reasonable proxy for circumstances a court would generally treat as constituting an unfair relationship.

92.1 Reflecting updated analysis based on additional data, the PS departs from the FCA's previous claim in the CP that there was a stronger relationship between commission levels and borrowing costs at the 75th percentile. The PS and the Schemes instead adopt an arbitrary threshold for a High Commission Arrangement at what the FCA calculates is the commission representing the 85th percentile of the market without identifying a proper evidential or logical basis for this approach.

92.2 The decision of the Supreme Court in Johnson does not support the 39%/10% thresholds adopted in the Schemes. The commission in Johnson was approximately 55% of the total cost of credit and 26% of the amount advanced, materially higher than the 39%/10% thresholds in the Schemes (and, in any case, the level of commission was only one factor relied on by the Supreme Court when it determined that there was an unfair relationship in the circumstances of that case). Indeed, the FCA acknowledges that not every High Commission Arrangement is similar to the position in Johnson and has for that reason introduced a "*Very High Commission Arrangement*" threshold for cases that it considers to be most similar to Johnson and are eligible for the Commission Repayment Remedy

(notwithstanding that, unlike the position in Johnson, there may have been no deliberate suppression of the truth or other wrongdoing).[14]

92.3 As a result, even if High Commission Arrangements are to be treated as Relevant Arrangements under the Schemes, the relevant threshold cannot rationally be set at the 85th percentile of 39% and 10%.

Tied Arrangements

93. There is no obvious or necessary link between a Tied Arrangement and any detriment to a consumer such that the mere inadequate disclosure of such an arrangement could constitute an unfair relationship.

94. The FCA's own economic evidence does not establish that Tied Arrangements, in the absence of a DCA or high commission, systematically caused consumers to pay higher credit costs. Indeed, the FCA did not undertake any empirical analysis of the effect of relevant commercial ties as part of its consultation process.

95. As the FCA acknowledges, theoretical and empirical literature contains findings that ties can be neutral or even beneficial to consumers (PS, pp.31-32). The FCA attempts to reject the relevance of this on the basis that the literature does not systematically distinguish between disclosed and undisclosed arrangements but there is no evidence that disclosure would have changed anything for consumers at scale.

96. It appears that the only real justification for including Tied Arrangements as a Relevant Arrangement is a misapprehension about the treatment of ties in Johnson.[15] While it is right that *Johnson* involved an inadequately disclosed tie, the Supreme Court did not hold that this alone rendered the credit relationship unfair under section 140A CCA.

97. In any case, the facts of Johnson in relation to the tied arrangement were extreme: the Supreme Court held that there had been a "*deliberate suppression of the truth*" and that the documents given to Mr Johnson created, and were clearly intended to create, the false impression that the dealer was offering products from a select panel of lenders and recommending the most suitable financing when that evidently was not the case.[16]

[14] See PS26/3, Ch. 11, p. 200.
[15] PS p. 32.
[16] Johnson, §333.

98. If the FCA had wanted to give an example of an unfair tied arrangement based on Johnson, the example should have included the deliberate concealment of the arrangement or at least the making of inaccurate statements to the consumer. Absent such features, there is no basis for concluding that the mere existence of a Tied Arrangement is among examples that "*have been … held by a court or tribunal to constitute*" an unfair relationship for the purposes of s.404A(2).

99. Furthermore, it is common for motor finance agreements to share branding with vehicle manufacturers and dealers. The FCA rightly recognises that in most of these "captive"[17] and "white label"[18] relationships it would have been "*reasonably possible for a consumer to appreciate that there was a significant commercial relationship between the dealer and the firm*" such that inadequate disclosure of a tie would not generally give rise to an unfair relationship.[19] CONRED 5.2.19R(4) therefore provides an exception from the definition of Tied Arrangements for captive and white label relationships. This exception was introduced following the consultation process because the FCA concluded that "*a court would be unlikely to find that an unfair relationship arises in most such cases.*"[20]

100. However the exception is far too narrow:

100.1 This exception applies only where the lender was linked to the manufacturer (M) of the motor vehicle acquired with the motor finance agreement, and the dealer was also a franchised dealer of M. A customer entering a franchised dealer of M, purchasing an M-branded car, using M-branded finance would plainly appreciate that there was a significant commercial relationship between the dealer and the firm.

100.2 By the same logic, where a consumer obtains finance from a lender (L) through a dealer (D), and both D and L operate prominently under a common brand (including where D is a franchised or multi-franchised dealer and L was operating under the same franchise brand (or one of the franchise brands) as the dealer), it would have been similarly obvious to the consumer that there was a significant commercial relationship between the dealer and the lender, irrespective of the brand

[17] i.e. manufacturer-owner lenders.
[18] i.e. where a lender provides a 'white label' loan which is branded by a 'front-facing' business.
[19] PS, p.103.
[20] PS, p. 26.

of vehicle purchased.[21] Such cases are not, however, within the scope of the exception.

100.3 Since the relevant commercial relationship is the relationship between the dealer and the lender (and not any relationship with the manufacturer), it makes no sense for the scope of the captive and white label relationships exception to require (i) L to be a captive lender, or operating as a white label lender, of M or (ii) common branding with M. The effect of limiting the exception to such cases is that Tied Arrangements will include situations in which a court would be unlikely to find an unfair relationship because the relevant commercial link is obvious.

101. The captive and white label exception is further subject to onerous requirements for evidence as to the contemporaneous state of a dealer's premises and contemporaneous marketing materials (CONRED 5.2.20R(1)(c) and 5.2.22R).

102. The unfairness of starting with such a broad category of Tied Arrangements is compounded by the very narrow grounds on which the presumption of unfairness may be rebutted (see §22 above). In this regard:

102.1 The exception for a customer's specific knowledge or experience will be extremely rare in practice and will principally apply to those in the industry.

102.2 The exception for where the lender agreed to forgo reliance on the tie or the broker had a policy or practice of disregarding it will likely require the lender to have relevant transactional data and certain specified contemporaneous records to be able to prove it, which is likely to prove very challenging in practice (as the FCA themselves recognise at PS §10.71).

102.3 The 'no better deal' exception (§23 above) is only available where there was no better deal available from another lender with whom the broker had arrangements which is (i) in itself very narrow and (ii) will be very difficult for lenders to evidence.

[21] For example, many dealerships operate as multifranchise locations, selling both new and used vehicles which may not align with a single brand. For instance, a customer may enter a dealership (D) which prominently displays franchises for the Fiat and Jeep brands. If that customer purchases a Jeep or any other brand of vehicle apart from a Fiat, but is provided with a "Fiat Financial Services" branded finance agreement (L), the relevant commercial relationship between D and L will be obvious to the customer, but that would still be a 'Relevant Arrangement' caught by the Schemes.

Conclusion in relation to non-disclosure of the Relevant Arrangements

103. The law requires the relevant Rules to establish proxies for circumstances that (1) a Court would, typically, treat as constituting an unfair relationship, applying the relevant principles of law; and (2) are no broader than necessary to comply with the statutory purpose of providing examples of general application. For the reasons explained above, the inadequate disclosure of the Relevant Arrangements does not satisfy these requirements.

104. The fundamental flaw in the FCA's approach to the determination of unfair relationship is to define scenarios that *may* have given rise to unfairness and then to treat those scenarios as presumptively unfair without also requiring there to be evidence of consumer detriment constituting such unfairness.

Stage 2 of each Scheme is ultra vires

105. In the premises, Stage 2 of each Scheme is unlawful and should be quashed in its entirety (alternatively, such rules comprising Stage 2 that the Tribunal determines are unlawful should be quashed).

106. Each of the definitions of the Relevant Arrangements (CONRED 5.2.19R taken together with CONRED 5.2.20R) is *ultra vires* s.404A(1)(b) and s. 404A(2) FSMA in that the failure to disclose each Relevant Arrangement is not a proxy for circumstances that a court would typically treat as constituting an unfair relationship under s.140A CCA, applying the relevant principles of law, and, by reason of the matters set out in the Relevant Arrangements, includes categories of cases that would not be so treated.

107. The Tribunal also has primary jurisdiction under s.404D(6) FSMA to review the definitions of the Relevant Arrangements and for the same reasons as set out above should conclude the failure to disclose each Relevant Arrangement does not constitute (and / or would not typically be treated by the court as constituting) an unfair relationship under s.140A CCA.

Stage 2 of each Scheme is unlawful on JR principles

108. For the same reasons set out above Stage 2 of each Scheme is unlawful applying the principles applicable to an application for judicial review, in that each is:

    108.1 Padfield unlawful because it fails to promote the objects and purposes of ss.404 and 404A FSMA;

108.2 An unreasonable and/or irrational exercise of the FCA's statutory discretion to make Rules comprising a consumer redress scheme; and

108.3 An unlawful interference with CAAF's A1P1 rights by virtue of s.6 HRA, in that the relevant Rule is (i) unlawful in domestic law and the interference is thus not in accordance with law for the purposes of A1P1; and (ii) is a disproportionate interference with CAAF's A1P1 ECHR rights.

H. STAGE 3: THE DETERMINATION OF CAUSATION OF LOSS

The Schemes are ultra vires because of the presumption of causation of loss

109. Section 404(6) provides that if a relevant firm has identified a failure to comply with an applicable requirement "*the next step is **for the firm to determine** whether the failure has caused (or may cause) loss or damage to consumers*" (emphasis added). As s.404(6) makes clear, that determination must be made **by the firm**; the FCA has no power under s.404 itself to determine whether a failure has caused loss.

110. Section 404A(1)(c)(ii) empowers the FCA also to provide for "***matters to be taken into account**, or steps to be taken, by relevant firms for the purpose of … determining whether such a failure has caused (or may cause) loss or damage to consumers*" (emphasis added). This power is subject to s.404A(3), which states that rules made under s. 404A(1)(c) may not require matters to be taken into account "*if they have not been, or would not be, taken into account by a court or tribunal*".

111. Parliament thus carefully distinguished between the FCA's powers in relation to determination of failure under s.404A(1)(b) and the FCA's powers in relation to causation of loss under s.404A(1)(c)(ii). The former permits the FCA to define what constitutes the failure in question – i.e., to deem a failure – while the latter permits the FCA only the more limited ability to require matters to be taken into account.

112. Accordingly, the limit of the FCA's powers to make rules in relation to causation of loss is to specify under s.404A(1)(c)(ii) matters to be taken into account, or steps to be taken, by firms in determining whether a failure has caused loss. The FCA has no power to require firms to presume causation of loss in any case; the determination of causation of loss can be made only by the relevant firm.

113. Rules specifying "*matters to be taken into account*" by firms when determining causation of loss cannot pre-determine the outcome of any such determination; to do so would go beyond merely requiring certain matters to be included in the decision-making process and instead prescribe what is to be treated as constituting causation of loss. Similarly, rules specifying "*steps to be taken*" must be procedural only and cannot be used to pre-determine the outcome of the determination. See, by analogy, R (on the application of Palestine Solidarity Campaign Ltd) v Secretary of State for Housing, Communities and Local Government [2020] UKSC 16, [2020] 1 WLR 1774, per Lord Wilson at §31: "*HOW does not include WHAT. Power to direct HOW administrators should approach the making of investment decisions by reference to non-financial considerations does not include power to direct (in this case for entirely extraneous reasons) WHAT investments they should not make*".

114. The Schemes' requirement that firms presume causation of loss goes beyond the scope of the FCA's powers:

114.1 Where an unfair relationship is established under the Scheme, CONRED 5.3.21R provides that "*the lender must presume that the unfair relationship caused the consumer loss or damage*". This presumption is irrebuttable if a DCA is involved. If the Relevant Arrangement is a High Commission Arrangement or a Tied Arrangement, a lender can rebut the presumption of loss only if the lender "*can demonstrate on the basis of evidence that it is more likely than not that the consumer would not, in relation to the same transaction, have been able to obtain a lower annual percentage rate from another lender*" through the same credit broker.[22] The Scheme further limits the forms of acceptable evidence, including that such evidence must show what alternative rates would in fact have been available to the relevant consumer or that the broker would have offered the lowest available rate.[23]

114.2 CONRED 5.3.25R provides: "*If the presumption of loss and damage is not rebutted, **the lender must determine** that the unfair relationship caused the consumer loss or damage*" (emphasis added).

[22] CONRED 5.3.22R.
[23] CONRED 5.3.22-23R.

114.3 Therefore, for all those cases where the presumption is not rebutted, the Schemes expressly require firms to determine that the unfair relationship caused the relevant consumer loss, thereby usurping the firm's role under s.404(6) to make that determination.

114.4 The Schemes therefore go considerably further than merely making rules about the "*matters to be taken into account, or steps to be taken*" by firms to determine for themselves whether an unfair relationship has caused loss or damage on the facts of each case.

114.5 By placing the onus to rebut the presumption of loss on lenders, the Schemes also impermissibly reverse the burden of proof that would apply in court. The FCA has no power to make rules about the burden of proof under s.404A(1)(c)(ii) and, even if there were such a power, s.404A(3) precludes reversing the ordinary civil burden of proof that would apply in court.

115. For these reasons, the Schemes' approach to presuming loss is *ultra vires*, and the relevant rules in CONRED 5.3.21R to 5.3.25R should be quashed so that the FCA can make lawful rules that require firms to make the determination of loss in all cases, consistently with s.404(6) FSMA.

116. Further or alternatively:

116.1 The only possible source of the FCA's power to make rules in relation to causation of loss is the power to require matters to be taken into account under s.404A(1)(c)(ii);

116.2 Any rules made pursuant to s.404A(1)(c)(ii) may require matters to be taken into account only to the extent a court or tribunal would do so, applying the relevant principles of law (s.404A(3));

116.3 The Tribunal has primary jurisdiction under s.404D(7) to decide whether the matter should be taken into account, in the sense that a court would do so applying relevant principles of law.

116.4 CONRED 5.3.21R to 5.3.25R go far beyond specifying matters that a court would take into account when determining causation of loss or damage, applying the relevant principles of law. A court would not presume causation of loss and would

instead require causation of loss to be proven, and the Tribunal should therefore quash the Schemes.

Presumption of causation of loss unlawful on JR principles

117. A consumer redress scheme may provide redress only in respect of failures that have caused or may cause loss or damage to consumers. Causation of loss is a necessary precondition to the redress stage of any scheme — s.404(7) commences: "*If the firm determines that the failure has caused (or may cause) loss or damage to consumers, it must then….[determine redress]*".

118. Accordingly, the FCA may not dispense with the requirement for causation of loss, whether by presuming such causation or otherwise. This is so irrespective of whether or not proof of causation of loss would be required in order to obtain a remedy in legal proceedings in respect of the underlying failure to comply with the requirement. What matters for present purposes is that causation is a precondition for redress under a s.404 consumer redress scheme.

119. The FCA does not engage properly or at all with causation of loss in the PS. That failure is carried through into the Schemes, which simply presume that, if an unfair relationship exists that will have caused loss to consumers (in all cases involving DCAs, and otherwise unless rebutted on narrow grounds involving the proof that 'no better deal' could have been obtained). This presumption of causation of loss is inconsistent with the evidence that customer behaviour is unlikely to be substantively changed by disclosure. It will inevitably result in over-compensation.

120. In the premises, CONRED 5.2.21R to 5.2.25R are unlawful applying the principles applicable to an application for judicial review, in that each is:

120.1 Padfield unlawful because it fails to promote the objects and purposes of s.404 and 404A FSMA;

120.2 An unreasonable and/or irrational exercise of the FCA's statutory discretion to make Rules comprising a consumer redress scheme; and

120.3 An unlawful interference with CAAF'S A1P1 rights by virtue of s.6 HRA, in that the relevant Rule is (1) unlawful in domestic law and the interference is thus not in accordance with law for the purposes of A1P1; and (2) is a disproportionate interference with the A1P1 ECHR rights of CAAF.

I. STAGE 4: REDRESS

Redress not rationally connected to loss

121. The combined effect of (1) the presumption that the existence of an unfair relationship caused loss; and (2) the way redress is calculated under the Schemes de-couples redress from actual loss. That is unlawful:

121.1 The purpose of any financial redress under s.140B CCA is limited to reversing any damaging financial consequences of the unfairness in the relationship. That must involve, as a minimum, an assessment that is rationally connected to the actual financial damage suffered by a consumer and how that financial damage might be reversed.

121.2 This is consistent with ss.404(6)-(7) of FSMA, which provides that the FCA can only require firms to offer redress to consumers if it has first been determined that the unfairness has caused (or may in future cause) loss or damage to the consumer. In other words there must be some loss or damage before redress can be required and the redress must at least be rationally connected to that loss. That requirement is reinforced by s.404A(5), which provides that the FCA "*must have regard (among other things) to the nature and extent of the losses or damage in question*" when making Rules about redress.

121.3 In any event, a Scheme that results in material over- or under-compensation of consumers would indicate that the redress provided for cannot lawfully be considered just.

122. In the premises, in exercising its power under s.404A(1)(d) FSMA to make rules as to the kinds of redress that are to be made available in categories of case, the FCA can only require firms to offer redress if consumers have in fact suffered loss or damage and the redress is at least rationally connected to that loss. The requirement in s.404A(4) FSMA that the FCA must exercise the power conferred in s.404A(1)(d) so as to secure that the redress to be made is just will only be satisfied in those circumstances.

123. The redress provided by the Schemes fails to meet this requirement (and so is unlawful) for two main reasons:

123.1 since loss is presumed under the Schemes, it is inevitable that consumers will be treated as having suffered loss when they plainly did not; and

123.2 in any event, redress is calculated arbitrarily, in that it is not linked to any loss actually suffered (or likely to be suffered) by the consumer; rather, it will give the consumer a windfall. This is addressed further below.

Calculation of Redress

Hybrid Remedy

124. As set out above, the redress the Schemes require for most consumers is the Hybrid Remedy, which is comprised of the average of the APR Adjustment (i.e., 17% for Scheme 2 and 21% for Scheme 1) and the Commission Repayment Remedy, subject to the caps described in §24.4 above.

125. The Hybrid Remedy is designed to compensate consumers for more than their actual loss:

125.1 The FCA intends the APR Adjustment to compensate consumers for their loss (PS §§1.27, 11.26).

125.2 The Commission Repayment Remedy, by contrast, appears intended to compensate for some broader (though unexplained and unsubstantiated) concept of unfairness, decoupled from any actual loss (PS §11.10).

125.3 The FCA acknowledges that, in most cases, averaging the APR Adjustment and the Commission Repayment Remedy (as required by the Hybrid Remedy) will result in redress that is higher than under the APR Adjustment alone (PS §11.42). It therefore follows that, in most cases, consumers will receive compensation that, even on the FCA's own terms, exceeds their actual loss. Indeed, the FCA also explicitly acknowledges that the Hybrid Remedy is not even intended to target loss and damage, but claims that "*a loss-based approach would risk under-compensating consumers*" PS §11.49, p 201. This is simply not understood.

126. Accordingly, the Hybrid Remedy is not designed to provide redress to consumers that is rationally connected to any loss or damage they have suffered. In the premises set out above, it is unlawful.

127. Furthermore, for the reasons set out below, each of the APR Adjustment and the Commission Repayment Remedy are themselves essentially arbitrary remedies. The former does not measure and is not a reasonable proxy for loss, and there is no justification for using the latter to compensate for some broader concept of unfairness or harm. Because the Hybrid Remedy averages the sum of the APR Adjustment and the

Commission Repayment Remedy, it compounds the arbitrariness inherent in the redress provided by the Scheme.

The APR Adjustment of 17% for Scheme 2

128. As explained above, the APR Adjustment reduces the consumer's APR by 17% (under Scheme 2) or 21% (under Scheme 1) to produce a market-adjusted APR, and recalculates what the consumer would have paid at that adjusted APR.

129. The FCA has derived the 17% APR Adjustment for Scheme 2 by comparing the APRs of all loans with a DCA with loans with a flat commission over the same period. That approach is flawed:

129.1 It assumes that the harm to be remedied is the mere fact that the loan contained a DCA element when in fact the actual harm is the failure to disclose the DCA. But, as explained above, the mere presence of a DCA (or a High Commission Arrangement or a Tied Arrangement) does not imply harm.

129.2 Relatedly, it assumes that all consumers would have changed their behaviour as a result of adequate disclosure. This is not supported by the evidence.

129.3 It assumes that all consumers suffered equally. But, as explained above, that is inherently unlikely to have been the case. The FCA itself acknowledges (PS §11.27) that the 17% APR Adjustment "*is not tailored to the different risk profiles of firm segments, precise estimates for individual consumer agreements or different types of DCA models*".

129.4 It assumes that <u>all</u> DCAs were harmful. However, the evidence does not support this, nor does it show that the market was distorted by the failure of lenders adequately to disclose commission arrangements: see §76above.

129.5 There are a number of difficulties with the FCA's approach to deriving the 17% APR Adjustment figure by comparing DCAs with flat rate loans. These will be addressed in expert evidence in due course.

129.6 The APR Adjustment (and therefore the Hybrid Remedy more generally) ignores the effect of any deposit contributions or other benefits obtained by the consumer as a result of the waterbed effect: see §§24.3 and 61.2 above.

130. For those reasons, the 17% APR Adjustment is not a measure of or a reasonable proxy for any loss consumers have suffered in relation to DCAs.

131. As regards High Commission Arrangements and Tied Arrangements, the FCA has provided no econometric analysis of any kind that even attempts to assess whether the failure adequately to disclose High Commission Arrangements or Tied Arrangements caused consumers any harm. Instead, the use of the 17% APR Adjustment from the purported DCA analysis is said to be justified in the "*interests of operational simplicity*" (PS §1.31). However it should be self-evident that operational simplicity cannot justify the payment of redress in circumstances where there is no evidence of harm.

132. Moreover, High Commission Arrangements and Tied Arrangements do not involve any discretion. There is therefore no logical basis for applying the 17% APR Adjustment to them because that figure is derived from comparing loans with a discretionary element (DCAs) to loans without a discretionary element (flat commission loans).

The APR Adjustment of 21% for Scheme 1

133. This adjustment is even more flawed. It has no proper foundation in any evidence before the FCA, and it will result in over-redress to an even greater extent than would a 17% APR Adjustment. It is not a measure of or a reasonable proxy for any loss consumers have suffered in relation to DCAs:

    133.1 The FCA acknowledges that it does not have sufficient economic data to determine the average APR differential between DCAs and flat rate loans in the period prior to 2014 (PS, p.29). There is therefore no econometric analysis underlying the 21% adjustment.

    133.2 Nevertheless, the FCA concludes that it is "*reasonable*" to treat the 17% APR Adjustment as a conservative indicator of loss for the pre-2014 period (PS, p.29) and indeed that a higher APR Adjustment should apply during this period to "*account for the view that there was greater harm in earlier years*" (PS, p.202). Accordingly, the stated (and entire) justification for a higher APR Adjustment for Scheme 1 is the FCA's subjective and unevidenced view that consumers will have suffered greater harm from DCAs before April 2014.

    133.3 The 21% figure is not based on any evidence. It is said to reflect a "*bounded regulatory judgment*" representing the mid-point between the 17% figure and 26%.

The 26% figure is the point at which (it is said) the Hybrid Remedy redress would equal the Commission Repayment Remedy, which is reserved for Very High Commission Arrangements: PS §§1.28-1.30 and p. 205. The problems with this approach include that the FCA is: (i) assuming, without any evidence, that 17% is a conservative floor; and (ii) confusing two distinct and different concepts by setting the APR Adjustment (which is intended to compensate consumers for loss) in part by reference to the Commission Repayment Remedy (which is intended to compensate consumers for some broader concept of unfairness).

133.4 The result is that the APR Adjustment does not compensate consumers for their actual loss but rather overcompensates consumers to an even greater extent than the 17% APR Adjustment. The problems with the FCA's approach to the 21% figure will be addressed further in expert evidence.

134. As regards High Commission Arrangements and Tied Arrangements, there is neither any econometric analysis nor even any attempt to justify a 21% APR Adjustment for these arrangements as a matter of logic. Rather, as in relation to the 17% APR Adjustment, the application of a 21% APR Adjustment to these arrangements is said to be justified "*in the interests of operational simplicity*" (PS §1.31). But operational simplicity cannot justify the payment of redress in circumstances where there is no evidence of harm.

135. For those reasons, the APR Adjustment is not rationally connected to the actual financial damage suffered by a consumer.

The Commission Repayment Remedy

136. As regards the Commission Repayment Remedy, the FCA is clear that that remedy is not intended to compensate consumers for actual loss: see §125.2 above. There would be no basis for treating the commission as a loss for which consumers are entitled to be compensated. Consumers do not pay commission directly.

137. Rather, the Commission Repayment Remedy is intended to compensate consumers for some broader concept of unfairness on the basis (it appears) of a misreading of Johnson (PS §§11.4, 11.10 and p. 213). There is no basis for reading Johnson as establishing that a consumer would be entitled to the repayment of the commission in all or the majority of cases where there was a mere failure to disclose (or adequately to disclose) a Relevant Arrangement. Rather, the remedy in Johnson was a fact-specific decision and, as noted

above, the facts in Johnson were extreme; the Supreme Court held that there had been a "*deliberate suppression of the truth*", and that finding bears a close resemblance to fraudulent misrepresentation cases, where even at common law claimants benefit from a relaxed standard of causation and fewer restrictions on recoverable loss for reasons of policy.

138. Johnson therefore cannot rationally be read as establishing, or even as suggesting, that a Commission Repayment Remedy would be available to consumers at large. Indeed, elsewhere the FCA accepts that the remedies in individual cases should not be used as the basis for a market-wide consumer redress scheme,[24] and the only rational view it could have taken is that that proposition applied equally to Johnson.

139. For those reasons, there is no justification for the amount of redress under the Hybrid Remedy to be calculated in part by reference to the Commission Repayment Remedy.

The caps

140. In broad terms the caps only limit redress by reference to the lower of (i) 90% of the total commission or (ii) the cost of credit: see §24.3 above. The caps therefore do not relate to the loss consumers have suffered at all and they therefore do nothing to address the fundamental flaw in the Scheme's approach to redress.

141. Further, as noted above, no redress is payable under the Hybrid Remedy where the consumer's APR was at or below the 5th Percentile Threshold (excluding 0% APR Arrangements). That 5th percentile, however, is calculated by reference to the market as a whole, without taking into account the effect of partial subventions.

Rules relating to redress are unlawful

142. In the premises, the Rules in relation to redress are unlawful applying the principles applicable to an application for judicial review, because:

142.1 the Rules require firms to pay redress that is not rationally or reasonably connected to the loss or damage suffered by a consumer;

142.2 the FCA has failed properly to take into account actual loss or damage;

[24] PS, p.212: "*We do not consider the approach to remedy in Miss L/Clydesdale to be appropriate for a market-wide consumer redress scheme. It was an individualised assessment of the facts of these individual complaints*".

142.3 the Rules are Padfield unlawful because they fail to promote the objects and purposes of s.404 and 404A FSMA;

142.4 the Rules constitute an unreasonable and/or irrational exercise of the FCA's statutory discretion to make Rules comprising a consumer redress scheme, including because they cannot rationally or reasonable have been considered by the FCA to be "just" for the purposes of s.404A(1)(d) and s.404A(4) FSMA; and

142.5 the Rules constitute an unlawful interference with CAAF'S A1P1 rights by virtue of s.6 HRA, in that the relevant Rule is (i) unlawful in domestic law and the interference is thus not in accordance with law for the purposes of A1P1; and (ii) is a disproportionate interference with the A1P1 ECHR rights of CAAF.

J. REMEDY SOUGHT

143. For the reasons given above, CAAF seeks an order quashing (in whole or in relevant part) the Rules.

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27 April 2026