Reference Nos: UT-2026-000045
UT-2026-000046
UT-2026-000047
UT-2026-000048

IN THE UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

B E T W E E N :

(1) CA AUTO FINANCE UK LIMITED
(2) CONSUMER VOICE LIMITED
(3) MERCEDES-BENZ FINANCIAL SERVICES UK LIMITED
(4) VOLKSWAGEN FINANCIAL SERVICES (UK) LIMITED

Applicants

– and –

THE FINANCIAL CONDUCT AUTHORITY

Respondent

REPLY ON BEHALF OF MERCEDES-BENZ FINANCIAL SERVICES UK LIMITED

A. INTRODUCTION

1. This Reply sets out the Third Applicant's ('**MBFS**') response to the Respondent's (the '**Authority**') Grounds of Response dated 6 July 2026 (the '**Response**').

2. Pursuant to §10 of the directions order of 1 July 2026, filed with this Reply are MBFS's evidence of fact and its application for permission to rely upon expert evidence ('**Expert Application**'). The Tribunal is invited to read this Reply in conjunction with those materials. Definitions in MBFS's Grounds are adopted herein.

B. MBFS'S POSITION IN SUMMARY

3. For the avoidance of any doubt, MBFS (in common with all of the other Applicants)[1] remains in favour of regulatory intervention to ensure an orderly resolution of complaints and claims pertaining to motor finance commissions.

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[1] CA Auto Finance UK Limited Grounds, §6; Consumer Voice Limited Grounds, §3; Volkswagen Financial Services UK Limited Grounds, §7.

4. However, as the Authority acknowledges, the Schemes are "*by some margin, the biggest such intervention the FCA has made*" under section 404 FSMA.[2] In those circumstances both firms and consumers are entitled to expect that proper time and care is given to the design and execution of the Schemes to ensure that they are legally robust and operationally fit for purpose.

5. However, they are not:

   (a) Despite the Authority's own apparent concerns, it has published rules covering the period pre-1 April 2014 despite being without statutory power to do so. The interpretation of sections 404 and 404E FSMA which the Authority now seeks to advance in response to Ground 1 is wrong. The short answer is that HM Treasury ('**HMT**') is expressly empowered to implement any amendments to the scope of the Authority's powers to make a consumer redress scheme ('**CRS**') as may be thought necessary. HMT, having been approached by the Authority, has not done so. It is neither necessary nor appropriate for this Tribunal to adopt the strained reading of the relevant provisions contended for by the Authority.

   (b) As identified in Ground 2, the Authority has erred in law in its approach to the application of section 32(1)(b) LA and wrongly seeks to justify its approach on the basis of operational exigency. However, section 404(1)(b) FSMA makes clear that a CRS can be made <u>only</u> if "*a remedy or relief would be available*" from a court or tribunal in respect of the failings in question. As the Authority accepts, that necessarily engages the question of whether claims are time-barred. As has been made clear at the highest level, the requirement upon a claimant to prove each relevant requirement of section 32(1)(b) LA is not a matter of mere procedure but is a substantive part of the operation of the provision which must be properly addressed by the rules of any Scheme. Claims in respect of consumer agreements which expired prior to March 2020 were already barred by limitation before the Schemes were introduced. Once a right of action is barred by limitation it is not capable of revival: section 29(7) LA.

   (c) In any event, as to section 404(1)(b) FSMA, the Authority is wrong to take such a broad view of the words "*loss or damage*". There is no good reason why those words would mean something other than financial loss or damage in the context of market failings impacting upon consumers. In any event, as its own evidence tacitly accepts, the Authority had no proper evidential foundation to find "*loss or*

[2] First witness statement of Mario Theodosiou ('**Theodosiou 1**'), §38.

damage" (even in a wider sense), particularly in relation to high commission and tied arrangements. The approach taken is the result of the Authority having started from the erroneous conclusion that such arrangements were harmful and working backwards in order to justify that view.

(d) As identified in Ground 4, the Authority's approach to redress for the captive market is irrational. It now places undue weight upon its statutory power to grant such remedy as it considers "*just*", seeking to draw inapposite parallels with the jurisdiction of the Financial Ombudsman Service ('**FOS**'). The Authority's failure to properly account for the particular features of captive lenders, who even on its own evidence formed an identifiable and significant market segment, renders the approach economically unsound. Only in rationally and properly accounting for those features, could it have arrived at a "*just*" approach.

6. The above errors were, no doubt, the consequence of the fact that the Schemes have been hurriedly implemented. The Authority's evidence acknowledges its desire to "*work at pace*"[3] towards publication of the Scheme rules. Despite the obvious importance and complexity of the task faced by the Authority, the Response seeks to avoid further scrutiny by the Tribunal. Overmuch emphasis is placed on its expertise as the sector regulator, implicitly suggesting that substantive errors of law can and should be disregarded if there are policy reasons to do so.

7. Moreover, the Authority suggests that the Tribunal should "*draw its own conclusions*"[4] from the fact that the Schemes are under challenge both by CV and the lender Applicants. MBFS respectfully agrees: the obvious conclusion is that the Scheme rules strike entirely the wrong balance and are liable to be quashed by the Tribunal.

C. PART XXVIII FSMA

8. Before turning to the Authority's position on each of MBFS's Grounds, it is appropriate to address its position on the scope and function of the provisions in Part XXVIII FSMA.

9. As originally enacted, section 404 FSMA – then-headed "*Schemes for Reviewing Past Business*" – required HMT to be satisfied that there was evidence to suggest failures on the part of authorised persons to comply with Handbook rules which had led to loss by private persons. If HMT was so satisfied it could, by order, authorise the Financial Services Authority (as then) to further investigate the alleged failure, establish liability and

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3 Theodosiou 1, §40.

4 Response, §5.

determine amounts payable. It appears that only one order was ever made by HMT under the old section 404 FSMA.[5]

10. The present regime, as set out in sections 404-404G FSMA, was introduced from 12 October 2010.[6] It therefore pre-dated both the creation of the Authority and the regulation of consumer credit under FSMA by virtue of the Financial Services Act 2012.

11. As rightly noted in the Response, the only substantive consideration of section 404 FSMA was by the Court of Appeal in ***FCA v BlueCrest Capital Management (UK) LLP*** [2025] 1 WLR 746. There the Court examined it in order to contrast so-called "*market wide schemes*" under section 404 FSMA with the Authority's power under section 404F(7) FSMA to impose a requirement on a firm to operate "*a single firm redress scheme*" (at [67]). In doing so, it observed the requirements of section 404(1)(a)-(c) FSMA as "*threshold conditions*" such that a CRS can be made only if they are met (at [68]).

12. At [76] Popplewell LJ drew out "*a number of differences between single firm schemes and market wide schemes*" as follows:

    (a) A market-wide scheme is "*a form of redress*" whereas a single firm scheme is "*a form of regulation of permission to continue to undertake regulated activities*".

    (b) The threshold condition in section 404(1)(a) FSMA reflects that a market wide scheme "*is intended to address a market wide or sector wide concern and enables investigatory obligations to be imposed on a collective basis irrespective of any grounds for believing that each and every firm which is subjected to it has been in contravention of any requirement*." Thus, market wide schemes "*can be used to protect public confidence in sectors of the market as a whole.*"

    (c) Significantly, "*(market wide) consumer redress schemes are to be made only where it is desirable having regard to other ways in which consumers may obtain redress*", whereas the Authority is not so constrained when imposing a single firm scheme.

13. Consequently, while some high-level conclusions can be derived from ***BlueCrest***, it must be approached with care. The Court was not directly concerned with the scope or

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5 Financial Services and Markets Act 2000 (Transitional Provisions) (Reviews of Pensions Business) Order 2001/2512.

6 Financial Services and Markets Act 2000 (Commencement No. 1 and Transitional Provision) Order 2010/2480, article 2(c).

operation of section 404 FSMA and the Authority's power to make a CRS thereunder. Rather, it was used only as a comparator to test the limits of the Authority's power to make a single firm redress scheme under section 404F(7) FSMA. To the best of MBFS's knowledge, these challenges are the first instance of a court or tribunal being directly seized of the issue.

14. As noted above, the Response puts very considerable emphasis on the regulatory deference due to the Authority by the Tribunal. In support it highlights the various references in section 404 FSMA to what it describes as the exercise of "*regulatory discretion and assessment*".[7] As noted further below, that is a compelling reason to interpret section 404 FSMA in a narrower way. The expansive approach contended for by the Authority risks clothing it with power to intervene in issues in which it has no real expertise. Moreover, if it is right as to the high degree of deference due to it – which, for the avoidance of doubt, MBFS does not accept – it would severely limit the Tribunal's ability to scrutinise such interventions.

D. LAWFULNESS OF SCHEME 1

(i) The statutory context

15. The illegality of Scheme 1 is an issue taken by all the lender Applicants. Indeed, it was evidently a point of sufficient concern to the Authority following the consultation as to justify a significant restructuring into Schemes 1 and 2 to "*mitigate*" potential consequences "*if a legal challenge was brought*" in relation to it.[8]

16. As with much else, the Response emphasises a purposive interpretation of the relevant statutory provisions even insofar as it contradicts their express language. At §77 it invites the Tribunal to accept the Authority's analysis because, on the approach of MBFS and the other lender Applicants, "*there would be an unjustifiable lacuna in enforcement.*"

17. MBFS wishes to emphasise at the outset that the assertion is wrong:

    (a) Parliament has deliberately and carefully prescribed the class of persons in relation to whom, and in whose favour, a CRS can be made. It did so by way of the defined terms "*relevant firms*" and "*consumers*" in section 404 FSMA. A "*relevant firm*" is an "*authorised person*"; and a "*consumer*" is an individual who has used, or contemplated using, services provided by "*authorised persons carrying on*

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7 Response, §42.

8 Theodosiou 1, §71.

regulated activities": sections 404(2)(a) and 404E(2)(a) FSMA. Thus, a CRS can be made only in respect of persons falling within those definitions.

(b) The concepts of an "*authorised person*" and a "*regulated activity*" are fundamental to the operation of the UK financial services regime since they define the regulatory perimeter. Even in the context of a CRS, it is to be borne in mind that the provisions do not apply only to failings in the consumer credit market. Widespread failures in any regulated market – from pensions to claims management – might be made subject to such a scheme. Thus, while an expansive reading might have some attraction in the context of these challenges, it risks (potentially significant) unintended consequences elsewhere.[9]

(c) Nonetheless, Parliament has expressly recognised that the current definitions of "*relevant firms*" and "*consumers*" might not be fit for all purposes. By section 404G FSMA it empowered HMT to amend those definitions by order. That is the release valve by which – if the Authority is correct in its analysis – any potential "*lacuna*" can be resolved.

(d) It is, therefore, HMT's statutory function to consider whether amendments to the definitions are necessary or appropriate. It is able to consider the wisdom of so doing in the round having regard to any possible consequential effects for the wider UK financial services regulatory framework.

(e) Indeed, the Authority's disclosure (annexed hereto) shows that it was alive to these issues at an early pre-consultation stage, including the potential to liaise with HMT about a section 404G FSMA order:

i. What appears to be an internal Authority "chat" between Charlie Gluckman (the Authority's Head of Redress and Reporting Policy) and others dated 25 July 2025 refers to a potential letter from the Authority's CEO, Nikhil Rathi, to the then Chancellor, Rachel Reeves MP. Mr Gluckman appears to have been pushing for the inclusion of a statement that an order from HMT to amend the scope of the Authority's powers "*will save firms at least £2.0 billion compared to not amending in terms of non-redress costs.*"

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9 For example, carrying on a "*regulated activity*" without authorisation is a criminal offence pursuant to sections 19 and 23 FSMA. If the Authority is right that consumer credit firms are to be treated as carrying on the article 60B(1)-(2) RAO activities in relation to things done prior to 1 April 2014, assuming the scope of the relevant activities must be applied consistently throughout FSMA, it would put such firms at risk of criminal sanction.

Notably, Mr Gluckman makes no reference whatever to these discussions in his First Witness Statement dated 6 July 2026 ('**Gluckman 1**'). Likewise, Theodosiou 1, §71, robustly asserts that the Authority "*does have such statutory power*" and suggests that it divided the Schemes into two time periods merely to "*mitigate against the risk of delay and disruption to consumers…*" No mention is made of the *vires* risk which was seemingly considered internally from the outset and evidently resulted in engagement with HMT on the issue. Those omissions are troubling, particularly bearing in mind the Authority's duty of candour. His colleagues responded that they had "*serious reservations using the number*" and were "*not comfortable using these figures…*"[10]

ii. In August 2025, the relevant Board Sub-Committee "*agreed with the recommended approach for the scope of the scheme to date back to 2007, subject to the outcome of discussions with HMT. The Sub-Committee agreed that if HMT had not provided a response by the time of publication of the consultation paper, it would be made clear within the paper that this had been sought.*"[11]

iii. By October 2025 the Authority was in communication with HMT which, by e-mail of 21 October 2025, noted that it was "*keen to dig into the [cost-benefit analysis] and some of the assumptions*" on a possible pre-2014 scheme.[12]

iv. Internally, by early December 2025 (before the consultation had closed) a steer was sought from the ExCo on whether "*the final scheme should cover pre-2014 agreements if HMT confirm they do not want to make an SI? We note there are forthcoming discussions with HMT on this…*"[13]

18. The fact that such discussions with HMT were considered at all suggests serious internal concerns about the Authority's lawful ability to proceed in respect of the pre-1 April 2014 period. Moreover, the obvious inference from the lack of any mention anywhere in

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10 Disclosure ref. FCA00000487.

11 Disclosure ref. FCA00000515: "*Minutes of FCA Board Sub-Committee (Project Irwell)*", 26 August 2025, 14:00, §2.3(iii).

12 Disclosure ref. FCA00000378: e-mail from HMT's Emily Shipton to the Authority's Laura Tough, 21 October 2025, 14:54.

13 Disclosure ref. FCA00000256: "*2025 December 02 Exco Paper on scope of scheme, pre-2014 cases*" (p.4).

CP25/27, PS26/3, the Response or the Authority's evidence of fact is that HMT was either unwilling to make the order sought, or would do so only on a basis which the Authority was unwilling to countenance.

19. These are important points in framing MBFS's Ground 1. Contrary to the position now confidently asserted in the Response, there are good reasons to reject the Authority's expansive purposive reading of "*relevant persons*" and "*consumers*" in sections 404 and 404E FSMA. If those definitions are to be expanded, it is for HMT to do so, not this Tribunal.

(ii) Authorised persons

20. As to the requirement, via the definition of "*relevant firms*" in section 404(2)(a) FSMA, that the "*widespread or regular failure*" triggering the CRS have been perpetrated by "*authorised persons*", the Authority's position is that all that matters is that firms were so categorised "*at the time the FCA's power was exercised (i.e. when the rules were made).*"[14] In other words, it asserts an entitlement to impose an obligation to pay redress in respect of acts and omissions taken by persons during a period when they were not, nor could they have been, authorised under the UK financial services regime. That assertion is made without any support by way of either authority or textual analysis. It is plainly wrong.

21. The threshold condition for the making of a CRS in section 404(1)(a) FSMA is that it must appear to the Authority "*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…*". The plain language of the provision requires that the "*failure*" in question was perpetrated by "*relevant firms*". If a firm was not "*authorised*" at the material time, then it cannot have been a "*relevant firm*" at the time of the perceived wrongdoing and, in consequence, the condition is not met.

22. There are obvious reasons why Parliament limited section 404 FSMA in that way. In circumstances where, on the Authority's own case, section 404(1) FSMA envisages the exercise "*of regulatory discretion and assessment*" involving "*expert judgement*",[15] it prevents the Authority from embarking upon a CRS based upon an assessment of issues on which it has limited or no expertise. For example, where the purported failure was

14 Response, §64.

15 Ibid, §42.

committed by firms who were at the time subject to a different regime under the supervision of a different regulator but are now within the Authority's jurisdiction.

23. Moreover, the Authority's analogy[16] between sections 404(1)(a) and 415AA FSMA is misplaced. The latter confirms the Authority's powers in respect of "*persons who were at any time authorised persons (in addition to persons who are authorised persons at the time when the power is exercised)*". In other words, where a person was previously authorised but is no longer, the Authority may exercise its powers under specified provisions (sections 168, 205, 206 and 384 FSMA). Thus, it caters for precisely the <u>opposite</u> scenario to that in issue here in relation to section 404(1)(a) FSMA. In consequence, the concern identified above does not arise.

(iii) "Consumers" and "regulated activities"

24. As to the question of whether those engaging with consumer credit firms prior to 1 April 2014 were "*consumers*" within the meaning of section 404E FSMA, the Response focuses on the wrong point.

25. It is correct that the "*regulated activities*" undertaken by motor finance firms under the post-1 April 2014 regime are those defined by articles 60B(1)-(2) RAO respectively. Namely: (i) "*entering into a regulated credit agreement*", and (ii) "*exercis[ing], or hav[ing] the right to exercise, the lender's rights and duties under a regulated credit agreement.*" Further, that a "*regulated credit agreement*" is defined by article 60B(3)(b) RAO as including an agreement made before 1 April 2014 which, at the time of execution, was "*a regulated agreement*" within the meaning of section 189 CCA.

26. However, the meaning of "*regulated credit agreement*" in article 60B(3)(b) RAO does not, as the Authority suggests[17], of itself provide an answer. It defines the <u>subject-matter</u> of the article 60B activity, but not its <u>scope</u>. Thus, even if an agreement now falls within the definition of a "*regulated credit agreement*", the question remains as to whether a "*regulated activity*" was carried on in respect of it. The Response does not address that point.

27. In fact:

    (a) The article 60B(1) RAO activity is of "*entering into*" such an agreement. For agreements made prior to 1 April 2014, even though they are now defined as "*regulated credit agreements*", they were not at the time of being made. Thus, at

16 Ibid, §64.

17 Response, §70.

the time of the act of "*entering into*", they were not "*regulated credit agreements*". Accordingly, the article 60B(1) RAO activity was not engaged. The Authority effectively seeks to construe article 60B(1) RAO retrospectively as if it read: "*Entering into [or having entered into] a regulated credit agreement as a lender is an activity of a specified kind.*" However, there is no proper basis for implying the additional words in square brackets. Such implication is neither "*necessary*" nor "*compellingly clear*."[18]

(b) As explained in the Grounds,[19] the effect of the definition of "*regulated credit agreement*" is merely to ensure that agreements made before 1 April 2014 fell within the article 60B(2) RAO activity.

(c) There is good reason for the distinction between the activities specified by articles 60B(1) and (2) RAO. The former is, by its very nature, static: an agreement can only ever be entered into once at a particular moment in time. By contrast, the latter is ongoing: a firm can exercise rights and duties throughout the term of the agreement and beyond. Thus, it was necessary to clarify the scope of the definition for the purposes of the article 60B(2) RAO activity for reasons which simply did not arise in respect of the article 60B(1) RAO activity.

(d) Certainly, however, the amended definition in article 60B(3)(b) RAO was not intended to have retrospective effect in the way now contended for by the Authority. It is in that context that the Explanatory Memorandum to the implementing order[20] explains that pre-1 April 2014 agreements fall to be "*determined primarily by reference to the regulatory status of such agreements under the regime… before the transfer of regulatory oversight to the FCA in April 2014…*".

28. Accordingly, the Authority's analysis errs in asking the wrong question. It is its approach (not that of MBFS) that impermissibly implies language into article 60B(1)-(2) RAO and, in so doing, wrongly applies a retrospective interpretation.

29. The suggestion that the Authority's reading "*promotes the remedial statutory purpose*" is likewise wrong for the reasons set out at §17 above. While it may suit the Authority's purpose in the context of these challenges, the relevant concepts are of far wider

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18 ***Pwr v Director of Public Prosecutions*** [2022] 1 WLR 789, at [34].

19 At §19.

20 Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2016/392.

application within the regulatory landscape. The Tribunal must be astute to the unintended consequences of the broad purposive interpretation for which the Authority contends.

30. Accordingly, for the reasons set out in the Grounds and above, Scheme 1 should be quashed as unlawful.

E. LIMITATION

(i) Relevance of limitation

31. The Authority's position on MBFS's limitation challenge rests largely on an assertion that it was entitled to take the approach it did for operational reasons. It justifies its approach by distinguishing between "*the substantive law on limitation*" – which it accepts must be reflected in the Scheme rules – versus mere "*procedure and approach*".[21] That is a false dichotomy.

32. Limitation periods are substantive rules of law which prevent a claimant from obtaining a remedy from the court on a cause of action. As the Authority accepts,[22] their application is therefore directly relevant to the threshold condition in section 404(1)(b) FSMA. The only basis upon which the Authority has been able to satisfy section 404(1)(b) FSMA in respect of otherwise time-barred claims is, as noted above, by drawing an artificial distinction between "substantive" and "procedural" aspects of the law of limitation. However, what the Authority refers to as the "*approach*" of the courts is not a matter of mere procedural convenience. It is how judges proceed on questions of limitation in these claims because, properly construed, it is what is required by the relevant statutory provisions. Section 404(1)(b) FSMA is clear: if relief would not be granted by a court in respect of the failure in question, the Authority may not include it within a CRS. The court would regard any claim arising from a consumer agreement which expired prior to March 2020 as having been barred by limitation before the Schemes were introduced unless the claimant could prove the facts necessary to bring the claim within section 32 LA. The burden of proving the application of each aspect of section 32(1)(b) LA is not something the Authority may simply disapply because it is operationally convenient to do so.[23] Once

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21 E.g. Response, §§180, 202 & 206.

22 Response, §181.

23 The Authority effectively attempts to adopt a distinction akin to that which was formerly drawn in private international law, by distinguishing between the *lex causae* (section 32 itself) and the *lex fori* (the burden of proving section 32). It has applied the substantive *lex causae*, but as the relevant forum has asserted a right to take its own approach to the burden of proof. However,

a right of action is considered by the court to be barred by limitation it is not capable of revival: section 29(7) LA.

33. The substantive principles governing section 32(1)(b) LA can be summarised as follows:

(a) In general terms, the effect of the application of the LA is to "*bar a claim or action*." Thus, although there remains a liability on the part of the defendant, no remedy is available in respect of it from the court. See ***R (McIntyre) v Gentoo*** [2010] EWHC 5 (QB), at [66].

(b) On its face, section 32(1)(b) LA imposes a distinct two-stage test on those claimants who wish to rely upon it: (i) whether there has been "*deliberate concealment*" of any fact relevant to a claimant's cause of action; and (ii) when the claimant could "*with reasonable diligence*" have discovered that fact. A fact is relevant for that purpose if, without it, the claimant's cause of action would be incomplete: ***Potter v Canada Square Operations Ltd*** [2024] AC 679, at [96]. If a claimant fails at either stage, then he/she cannot rely upon the provision to extend the running of time.

(c) As confirmed by the Court of Appeal in ***OT Computers Ltd (in liquidation) v Infineon Technologies AG*** [2021] QB 1183, at [47], the question of "*reasonable diligence*" can also "*be asked at two distinct stages, (1) whether there is anything to put the claimant on notice of a need to investigate and (2) what a reasonably diligent investigation would then reveal…*".

(d) Section 32 LA generally aims to strike a balance between, on the one hand, ensuring clarity and finality for defendants and, on the other, fairness for those who through no fault of their own have been unable to advance a claim sooner.[24] It does not serve the same function or operate in the same way as section 140A CCA which is primarily aimed at protecting borrowers from unfair conduct by lenders. Thus, as illustrated by ***Potter***,[25] the concept of "*deliberate concealment*" in section 32(1)(b) LA is narrower than "*inadequate disclosure*" in an unfairness claim as seen in ***Plevin***.

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that runs contrary both to the express requirements of section 404(1)(b) FSMA and the modern approach to this distinction (e.g. Foreign Limitation Periods Act 1984, section 1).

24 See, e.g., ***European Real Estate Debt Fund (Cayman) Ltd (in liquidation) v Treon*** [2021] EWHC 2866 (Ch), at [775].

25 While mere reckless non-disclosure would suffice to establish unfairness under section 140A CCA, it clearly falls short of "*deliberate concealment*" under section 32(1)(b) LA.

(e) The burden of proof in limitation cases "*rests on the claimant against whom the defence of limitation is pleaded… it is for the claimant to establish that he has a claim which he can bring which is not statute-barred*": ***MAC Hotels Ltd v Rider Levett Bucknall UK Limited*** [2010] EWHC 767 (TCC), at [42]. In the particular context of section 32 LA, as stated by Lord Scott in ***Cave v Robinson Jarvis & Rolf*** [2003] 1 AC 384, at [60], a "*claimant who proposes to invoke section 32(1)(b) in order to defeat a Limitation Act defence must prove the facts necessary to bring the case within the paragraph.*"[26] Lord Scott's statement was expressly re-affirmed by Lord Reed in ***Potter*** (at [68] & [97]), noting that "*deliberate concealment*" is a "*critically important element of section 32(1)(b)*" and "*must be satisfied*" for the provision to apply. Moreover, per ***Potter*** at [98] & [108], for that purpose "*deliberate concealment*" in fact requires proof of two distinct matters, that: (i) there has been "*concealment*" in the sense of keeping "*something secret, either by taking active steps to hide it, or by failing to disclose it*"; (ii) the concealment was "*deliberate*" as opposed to merely reckless.

(f) For the avoidance of doubt, the burden of proof is not a matter of mere "*procedure and approach*". Rather, where a claim is on its face time-barred a court will not grant the claimant a remedy unless he/she can prove the application of section 32(1)(b) LA. Returning to "*the clarity and simplicity of Lord Scott's authoritative explanation in Cave*", Lord Reed in ***Potter***, at [109], reaffirmed that the burden of proof is integral to the proper interpretation of section 32(1)(b) LA as enacted by Parliament. Thus, motor finance unfair relationship claims may be (and are) dismissed by judges in the County Court for want of evidence from claimants on the application of section 32 LA.

34. However, as set out in the Grounds, the Scheme rules jettison those important principles in favour of what the Response now describes as the "*operational exigencies of introducing workable guidance for this part of the Schemes.*"[27] Notably, the KC's Opinion published in support of CP25/27 did not consider the above principles in any detail,[28] and they were not addressed at all in the Further Opinion in support of PS26/3.

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26 See also ***Paragon Finance Plc v DB Thakarar & Co (A Firm)*** [1999] 1 All ER 400, 418.

27 Response, §210.

28 Limitation was considered in a single paragraph, at §30.

(ii) Conflation of statutory tests

35. The Response rightly identifies three strands to MBFS's Grounds on this point. However, it fails to provide any satisfactory answer to them.

36. As to the conflation of the two-stage enquiry required by section 32(1)(b) LA, the Response cites CONRED 5.1.21G to demonstrate that the Authority has properly taken account of the distinction.[29] However, it is able to refer only to the distinction drawn in high commission cases. It accepts that no distinction is drawn between "*deliberate concealment*" and "*reasonable diligence*" in relation to either DCAs or tied arrangements and seeks to justify that on the basis that it "*reflects the fact-specific nature of the s.32(1)(b) test…*".

37. In truth, the Scheme rules do precisely the opposite. The failure to make the distinction in relation to either DCAs or tied arrangements means that <u>no matter the facts</u> a firm's ability to rely upon limitation will always stand or fall solely on whether there has been "*clear and prominent*" disclosure. As set out in terms by CONRED 5.1.21G(5):

> *…the fact or facts relevant to a claimant's right of action are likely to have been deliberately concealed, and the claimant is likely to be able to show that they could not with reasonable diligence have discovered them, to the extent that the information in CONRED 5.3.10R(1)(a) to (c), as applicable, was not clearly and prominently provided…*

38. For example, CONRED 5.3.10R(1)(a) requires by way of adequate disclosure of a DCA not only the fact of the commission and that it was linked to the APR but also a clear and prominent statement that "*the credit broker was permitted to select the interest rate… in a way that affected the amount of commission that would be received.*" Unless a specific explanation to that effect was made the rules provide that there will have been inadequate disclosure for the purposes of section 140A CCA. Further, on the Authority's analysis, the firm would also be <u>prohibited</u> by the Scheme rules from determining that the claim was statute-barred. It would instead be required to conclude that the relevant arrangement had been "*deliberately concealed*" and in such a way that it could not "*with reasonable diligence*" have been discovered by the customer. That is despite the lender having (i) disclosed the commission itself, (ii) flagged the link between the commission and borrowing costs, (iii) provided customers with the means to seek further information,

29 §§194-5.

and (iv) in the event of such a request, the lender being obliged by the Authority's own rules to respond in a "*clear, fair and not misleading*" manner.[30]

39. On any fair reading, such conclusions would be fanciful. They illustrate the Authority's failure to grapple, properly or at all, with what section 32(1)(b) LA requires of claimants and how it is regularly applied by the courts in motor finance unfair relationship cases. Ultimately, no matter what was disclosed to a consumer regarding commission, absent full compliance with what is now required by the Scheme rules on adequate disclosure, a limitation defence will be taken out of play.

40. As to the conflation of the question of "*inadequate disclosure*" for the purposes of section 140A CCA and "*deliberate concealment*" under section 32(1)(b) LA, the Response[31] serves only to underline the Authority's error. Its attempt to justify its approach on the basis of Lord Reed's observation at [154] of ***Potter*** is wrong for two reasons:

    (a) ***Potter*** was a case about payment protection insurance. As cautioned by the Supreme Court in ***Johnson*** when considering ***Plevin***, "*it is not possible simply to apply the reasoning*" of a PPI case to the motor finance context – they are "*different products on different markets*" (at [326]).

    (b) It is wrong to suggest that Lord Reed in any way "*endorsed*" the factual findings at first instance. On well-established principles, an appellate judge merely applies the law to the factual matrix as determined at trial; he or she should not interfere with those findings save in exceptional circumstances.[32] Thus, no value judgement can or should be inferred from Lord Reed's application of the finding of deliberate concealment.

41. As explained at §33(d) above, section 140A CCA and section 32(1)(b) LA have different policy underpinnings and the concepts of "*inadequate disclosure*" and "*deliberate concealment*" which arise thereunder are obviously distinct.

42. Finally, the Response seeks to justify the approach on the basis that it would not be "*practically feasible*" to do otherwise. It is "*required in order to operationalise the applicable legal principles*" in the context of a CRS.[33] In other words, because the law is

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30 CONC 3.3.1R(1)-(2).

31 §§196-8.

32 See ***Montgomery v Lanarkshire Health Board*** [2015] AC 1430, at [97].

33 §202.

difficult to apply in the context of the Schemes, the Authority should be excused from doing so.

43. That is a surprising assertion for a regulatory body exercising a statutory function which, as the Response acknowledges, requires the Schemes to "*be designed to reflect any applicable limitation periods*."[34] As noted above, the ways in which the Scheme rules depart from section 32(1)(b) LA are not matters merely of "*approach*" or "*practice*". The judicial approach is dictated by binding authority on the meaning and application of the provision. As illustrated by §38 above, the approach in the Scheme rules represents a substantive departure from the relevant law.

(iii) Burden of proof

44. The Response downplays the burden of proof as a matter of "*approach*" by the courts. It leans heavily on the Authority's right to depart from the law insofar as "*the operational exigencies of introducing workable guidance*" justify it.[35] MBFS does not accept that, largely for the reasons already set out in this Reply.

45. In summary:

    (a) As the Response expressly accepts at §181, the Authority has power to introduce a CRS "*only to failures to comply with a requirement where, if a customer brought proceedings, a remedy or relief would be available.*" Since limitation bars relief, "*any CRS must be designed to reflect any applicable limitation periods.*"

    (b) The burden of proof is a substantive aspect of the law relating to section 32(1)(b) LA. Thus, in cases which are otherwise time-barred, if the claimant cannot satisfy the court on both limbs of section 32(1)(b) LA the claim will fail. It is not merely a matter of "*practice*" or "*approach*" employed by judges as a matter of convenience. The proper evidential approach to section 32(1)(b) LA has been settled law on high authority for nearly 30 years: ***DB Thakarar***, ***Cave*** and ***Potter***.

    (c) The weight of emphasis placed upon the Authority's regulatory discretion on this issue proves too much. It amounts to a contention that if the Authority takes the view that the ends justify the means then it is entitled to act accordingly. That simply cannot be right.

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34 §181.

35 §§205-11.

46. The Response also feigns incomprehension as to §§39-40 of the Grounds.[36] MBFS's point is straightforward: given the particular features of the captive market in which it operated, consumers are unlikely to have lost out. Thus, it is difficult to see what fact(s) which might otherwise be required for an arguable claim under section 140A CCA could be said to have been "*deliberately concealed*" from them for LA purposes.

(iv) Conclusion on limitation

47. MBFS notes the attempt to criticise it for not having suggested any alternative workable approach.[37] The short point is that it is for the FCA to design the Schemes. As set out in section 404D(5) FSMA, MBFS need only show that the Authority has erred on public law grounds.

48. The bottom line is that in enacting section 404 FSMA, Parliament placed a statutory duty upon the Authority to apply the law relating to limitation. It has failed properly to do so. Such failure cannot be excused on wider policy grounds, as to which MBFS does not accept that the sole alternative to the Authority's approach is a highly individualised assessment.

49. Had the Authority taken greater time and care to consider the issue of limitation, the rules could have properly reflected that: (i) the application of section 32(1)(b) LA involves two distinct questions; (ii) the "*deliberate concealment*" enquiry is not the same as the substantive issue under section 140A CCA; (iii) section 32(1)(b) LA may or may not apply to an unfairness claim based upon any one of the relevant arrangements; and (iv) the burden of showing that section 32(1)(b) LA applies is borne by the claimant. Doing so in a more thoughtful way is not, as the Authority now attempts to suggest, inappropriate, impractical, unfair or inconsistent.

F. LOSS OR DAMAGE

50. It is common ground that the Authority did not rely upon "*loss or damage*" in any strict sense in concluding that the section 404(1)(b) FSMA threshold was satisfied. The Response proceeds on the basis that, having regard to the element of subjective judgement built-in to the provision, it was entitled to take the wider view of those words as explained in PS26/3.[38]

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36 §§212-3.

37 Response, §§204 & 210.

38 As explained in the Grounds at §43

51. Even if it is right that the words "*loss or damage*" can be read broadly to reflect the approach of sections 140A-B CCA, the Response entirely fails to address the more fundamental evidential point advanced by MBFS. Namely, that even on the Authority's own evidence, there is no rational basis for concluding that "*loss or damage*" eventuated from non-disclosure, particularly in respect of high commission and/or tied arrangements.

52. Even then, the Authority's approach wrongly assumes that a court would simply presume that an unfair relationship exists and, further, that a borrower will have suffered loss based on the presence (or absence) of one of the three "*relevant arrangements*". That runs contrary to the proper approach to assessing both unfairness and remedy under sections 140A-C CCA, as recently re-confirmed by the Court of Appeal in ***Angel v Black Horse Limited*** [2026] EWCA Civ 831.

(i) Meaning of "loss or damage"

53. The words "*loss*" and "*damage*" are, it is accepted, capable of a range of meanings. Generally speaking, however:

    (a) A "*loss*" connotes a deprivation of, or a failure to retain, something, e.g. a possession, appurtenance, right, quality or faculty, etc.[39]

    (b) By contrast, "*damage*" is a wider term "*apt to refer to any form of harm whether physical, psychological or economic.*"[40] It therefore includes financial or physical loss, but its precise meaning depends on the context in which it is used.

54. Since section 404(1)(b) FSMA refers to "*loss or damage*" it is reasonable to suppose that the words are intended to connote different ideas. On the face of the provision there is no reason to suppose that "*loss*" has anything other than its ordinary meaning as explained at §53(a) above. By contrast "*damage*" must mean any relevant non-loss-based harm.

55. In either case, the Response is wrong insofar as it asserts that "*the requirement of "loss or damage" must be construed in the same way as it would be in a s.140A claim.*"[41] In fact, the phrase would not be "*construed*" at all in an unfair relationship claim because the concepts simply do not arise in that context. The conceptual error which underpins the Response is revealed by the references therein to the "*court's enquiry into liability*"

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39 As defined by *The Compact Oxford English Dictionary*.

40 ***FS Cairo (Nile Plaza) LLC v Lady Brownlie*** [2021] UKSC 45, per Lord Lloyd-Jones at [176].

41 §128.1.

and a claimant "*establish[ing] liability*" under section 140A CCA.[42] The unfair relationship regime is not concerned with establishing liability. As revealed by its opening words – "*[t]he court may make an order under section 140B in connection with a credit agreement if…*" – section 140A CCA's exclusive function is to operate as a threshold for the court's powers under section 140B CCA.

56. The Response suggests that MBFS's interpretation imposes a double causation test and thereby creates "*a bizarre lacuna*".[43] It would do nothing of the sort. There is no reason in principle why a CRS should not be limited to failings which are causative of loss or damage in a financial sense. That is likely to be the case in the vast majority of failures in relation to which the Authority might wish to exercise its powers under section 404 FSMA. It is only the unique operation of the unfair relationship provisions of the CCA which gives rise to the present difficulty.

57. There are obvious and compelling procedural reasons why Parliament might have thought it desirable to limit the scope of mass redress schemes in that way. Indeed, despite the Authority's assertion as to the breadth of "*loss or damage*" for the purposes of the threshold condition in section 404(1)(b) FSMA, it has tellingly sought to anchor redress to consumers' putative financial losses arising from each of the three relevant arrangements.

(ii) Evidential failings

58. In any event, the Response does not address MBFS's second point on loss and damage: that the Authority's conclusions in relation to high commission and tied arrangements in particular were irrational for lack of any proper evidential foundation.[44] Even if "*loss or damage*" can be read in the broader sense contended for in the Response, which for the avoidance of doubt is not accepted by MBFS, the Authority's own research did not disclose any supporting evidence for the positions adopted, particularly as to high commission and tied arrangements.

59. <u>High commission arrangements</u>: PS26/3 stated in terms that the Authority's updated post-consultation data did "*not imply that commission at or around the levels observed in our dataset was harmful…*" (§2.19, p.30). Moreover, its "*analysis indicated little clear evidence… that the association of commission with the cost of credit for flat fee loans increased with commission level*" (§2.19, p.31). In other words, the Authority's market

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42 §§119-20.

43 §§127 & 128.2.

44 Grounds, §48.

research on high commission arrangements did not show any clear link either to financial loss for consumers or general harm. Indeed, as now confirmed by the First Witness Statement of Katherine Collyer of 2 July 2026 (‘**Collyer 1**’), the Authority’s initial (pre-consultation) research “*did not find a statistically significant relationship*” between the cost of credit and commission. Post-consultation, the revised analysis found a relationship between commission and cost of credit but it remained unclear “*why that increasing relationship exists*”, with “*little clear evidence that this relationship increased with commission level.*”[45] In other words, cost of credit and commission increased together, but it was impossible clearly to ascertain that the high commission was the cause of the increased cost of borrowing. Unsurprisingly, Ms Collyer thus accepts MBFS’s critique of the limitations in the Authority’s approach.[46]

60. Tied arrangements: Even pre-consultation the Authority conceded that it was impossible to draw “*robust conclusions about empirical evidence of loss*” following from tied arrangements (CP25/27, §3.34). As is evident from Collyer 1, the Authority was unable to improve its analysis thereafter:

    (a) §122: “*…these analyses did not provide a sufficient basis to allow us to estimate a quantitative relationship between tied arrangements and the cost of credit. We were not able to test whether there is a statistical relationship because the data was not sufficiently detailed, its commercial status was not consistently and reliably defined in our data set and there were gaps in our data set.*”

    (b) §124: “*The policy team’s recommendation, which my team contributed to, was that it was not proportionate to collect more data due to the large-scale reconstruction required and the low likelihood that this work would materially improve the evidence base…*”.

    (c) §125: “*The literature review was also inconclusive for the purposes of quantifying potential consumer loss in tied arrangements…*”.

61. In relation to both kinds of arrangement the Authority was therefore obliged to rely on what it describes as “*regulatory judgement*” to satisfy the section 404(1)(b) FSMA threshold.[47] The question then arises as to whether there was any rational basis for it to

45 §§109 & 113-4.

46 Collyer 1, §115.

47 Collyer 1, §§116 & 126.

exercise that judgement. The Grounds assert that there was not, and the Response fails to offer any further clarity.

62. Even if it were appropriate for the Authority to deploy its "*regulatory judgement*" in that way, it does not excuse it properly engaging with section 404(1)(b) FSMA to consider whether a court would grant relief in respect of such "*loss or damage*". In the context of section 140A CCA that exercise engages the question of whether the credit relationship is unfair "*because of*" (in this instance) the non-disclosure of any one of the relevant arrangements. The Schemes are premised on the assumption that there is unfairness because consumers have lost the opportunity to shop around, in consequence of which they have suffered "*loss or damage*" at least in some general sense.

63. However, that has now been confirmed to be wrong in principle. The Court of Appeal handed down its judgement in ***Angel v Black Horse Ltd*** on 30 June 2026. In determining the meaning of Civil Procedure Rule r.7.3 in relation to "*omnibus*" motor finance claims, it offered its observations on the correct approach to section 140A CCA. At [57], it reiterated that it engages a "*broad and holistic enquiry, with no limit on the factors that may be relevant*". Moreover, that "*this wide range of factors may also be relevant to the issue of the precise remedy awarded to a successful claimant.*" Thus, at [87], it would be "*wrong in principle*" to assume that one factor alone would justify a finding of unfairness. At [90], it ultimately rejected the claimants' "*continuing attempt to tilt what is supposed to be a level playing field, where everything is potentially relevant, towards some sort of presumption of an unfair relationship. It is simply not appropriate for the court to give undue weight to any one particular factor over another: it is for the court to evaluate all relevant factors in order to come to a conclusion as to the nature of the relationship.*"

64. Further, at [105] the Court of Appeal in ***Angel*** specifically noted that the Authority's methodology conflicts with the proper approach to unfair relationships claims arising out of the non-disclosure of motor finance commission ("*It is a separate scheme, <u>which operates on the basis (which the law does not) that nondisclosure of the commission creates a rebuttable presumption of an entitlement to compensation</u>*"). That is a problem for the Authority. Under section 404(1)(b) FSMA the Authority is restricted to what a Court or Tribunal would do. As such, the *dicta* in ***Angel*** is a clear indication that in the view of the Court of Appeal the Authority is doing something it is not entitled to do. The Court of Appeal's comments on the Scheme's use of a rebuttable presumption with respect to unfairness apply in equal measure to the Scheme's use of a rebuttable presumption for loss and damage (CONRED 5.3.21).

65. Thus, even if the Authority's approach was right in general (which it is not) it cannot survive contact with any proper consideration of the particular features of the captive segment of the market. In particular, the use of nationalised campaigns and manufacturer subvention meant there was often no real incentive to shop around. Even in the second-hand market, the captive emphasis on customer retention and brand loyalty meant the finance deal was likely to be far more closely linked to the vehicle itself. See further §§72-80 below.

66. Theodosiou 1 offers potential insight as to why the Authority ultimately adopted the approach it did, rather than rationally following the data and concluding the section 404(1)(b) FSMA threshold was not met in respect of such arrangements. The Authority's "*starting point*" was that there were widespread failures in the market, meaning that "*large numbers of consumers may have entered into finance arrangements, over many years, which involved them paying more for their motor finance loans (including in the form of higher interest rates) than would likely have been the case had they received adequate disclosure.*"[48] In other words, it believed <u>from the outset</u> that consumers had lost out in some sense and, even though it was unable to produce any clear corroborative evidence, it had (or, at least, might be seen to have) resolved to intervene no matter what. In doing so the Authority approached the issue with a closed mind and thereby irrationally failed to take any or proper account of plainly relevant econometric evidence.

<u>G. REDRESS</u>

67. MBFS's final ground relating to redress will, to a large extent, depend upon expert evidence, as to which the Tribunal is referred to the Expert Application. Nevertheless, it is appropriate to address two points by way of this Reply: (i) the scope of the Authority's jurisdiction to award "*just*" redress, and (ii) the extent to which it properly took account of the captive market in making that assessment.

(i) The Authority's jurisdiction

68. Section 404A(4) FSMA provides that the Authority must determine redress according to what "*it considers just*." The Response describes this as conferring upon it an "*exercise of evaluative, inherently multi-factorial judgement*" and seeks to draw a comparison to the "*fair and reasonable*" jurisdiction of FOS.[49]

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48 Theodosiou 1, §§16 & 22.

49 §§155.8 & 155.10.

69. The attempted comparison with the jurisdiction of FOS is self-serving and unhelpful. The Authority's jurisdiction to make a CRS is inherently different to the subjective and non-legalistic approach of FOS. As sections 404(1)(a)-(b) FSMA make clear, at the first stage the Authority must consider whether there has been some widespread or regular action-able failing by firms in the market. Only if satisfied of that can it proceed with a CRS. By contrast, no such constraints are placed upon a FOS decision-maker: ***R (Heather Moor & Edgecomb Ltd) v Financial Ombudsman Service*** [2008] Bus LR 1486, at [36].

70. The better approach is to consider section 404A(4) FSMA on its own merits. In that context, what the Authority considers "*just*" is necessarily fettered:

(a) Before getting to the question of redress, under sections 404(1)(a)-(b) FSMA the Authority must first be satisfied of the existence of widespread or regular failings in respect of which a court would give relief. When the question of "*just*" redress is considered, the Authority is then obliged to have regard to the "*extent of the loss or damage in question*": section 404A(5) FSMA. To that extent, if there is any analogy to be drawn with the jurisdiction of another similar body, it is with the Financial Services Compensation Scheme established under Part XV FSMA.[50] By contrast, there is no such fetter on FOS in its assessment of "*fair and reasonable*" compensation.

(b) The Authority is also constrained by its own statutory operational objectives. As set out in Theodosiou 1, §10, they are to: (i) protect consumers, (ii) protect the integrity of the UK financial system, and (iii) promote effective competition. In addition, it is required to adhere to a secondary objective of "*facilitating international competitiveness of the UK economy and its growth…*" Thus, in considering what is "*just*" under section 404A FSMA, the Authority must consider whether and, if so, how different redress options best promote one or more of those objectives. FOS has no equivalent overarching objectives within which it must operate.

71. In this context, those tramlines necessarily meant, when designing a redress methodology, the Authority ought to have considered (amongst other matters) (i) the structure and

50 E.g. ***Emptage v Financial Services Compensation Scheme*** [2013] EWCA Civ 729, at [19]: "*the first step must be to identify the breach of duty which has given rise to the claim, because without that it is impossible to make any principled assessment of what is essential to pay in order to provide fair compensation.*"

integrity of the motor finance market, and (ii) any evidence available to it of "*loss or damage*" resulting from the alleged failings.

(ii) The "captive" market

72. The Response variously suggests that, in framing Ground 4 by reference to the particular features of the captive lending market, MBFS is seeking "*an individualised*" determination of redress "*from scratch in every case.*"[51] That is a gross mischaracterisation of the position advanced by MBFS in the Grounds.

73. The simple point is that, even on the Authority's own evidence, captive lenders represented both (a) a distinct, and (b) a significant segment of the market. Having acknowledged those features, any rational regulator would have gone on to consider how its core assumptions regarding loss and remedy applied to the captive segment of the market, given its particular characteristics. Merely including the captive/white label exclusion for tied arrangements[52] did not in any way adequately address the different characteristics of captive lenders. Rather, it seems to have been a late reaction to the compelling feedback received from captive lenders during the consultation process. A "*just*" approach to redress – paying due regard to the principles outlined at §70 above – could and should have reflected the particular interests of captive lenders such as MBFS.

74. In particular:

    (a) Technical Annex 2 to CP25/27 ('**CP TA2**') showed that in 2023 captives represented 84% of the new car market ("Figure 7", p.14) and 41% of the used car market ("Figure 10", p.23).

    (b) Technical Annex 3 to CP25/27 further recognised the specific features of the captive (as distinct from independent) lending market. In particular, that they "*help achieve wider group objectives by enabling vehicle sales and establishing long-term relationships with customers to nurture brand loyalty.*"[53]

    (c) As recognised by Gluckman 1, the Authority received consultation feedback from the captive market drawing to its attention the key features of the market including "*very low or zero APR agreements through promotional offers*" and "*subvention*".[54] This appears to have been reflected by the econometric analysis which

51 §160.

52 See Theodosiou 1, §117.

53 §46.

54 §80.

showed that “*they typically offer lower, on average, APRs for new vehicles*”: Collyer 1, §51.

75. Thus, the Authority was faced with evidence showing a distinct category of lender which: (i) dominated the new car market and represented a substantial share of the used market; (ii) had its own commercial imperatives differing from those of third-party lenders; (iii) therefore employed different pricing structures on its agreements, including widespread use of subvention; and (iv) on average offered finance at a lower cost than rival third-party lenders.

76. Nonetheless, the Authority failed to consider what (if any) consequence those might have on captive customer behaviours and, therefore, its approach to redress. For example, Collyer 1 explains the matched regression analysis undertaken by the Authority in an attempt to identify the economic impact of each of the relevant arrangements. She confirms that the Authority “*did not conduct analysis of loss specific to captive lenders*”. Rather, it purportedly took account of “*the characteristics of loan agreements that typically differ between captive and third-party lenders in our matched regression analysis*.” In “*accounting for these loan characteristics in estimating APR-17, we compare the APR for DCA agreements from captive lenders with the APR of the most observably similar non-DCA agreements.*”[55] The Authority fails to consider how the distinct characteristics of the captive segment of the market may have affected consumer behaviours (for instance, whether lower APR offers, brand loyalty and the features of a vehicle purchase transaction as a whole may have reduced the propensity for consumers to shop around and, further, the possibility of consumers finding better deals if they had). Crucially, no account seems to have been taken of subvention as a relevant characteristic differing between captive and third-party lenders. Consequently, the Authority’s model wrongly treated any resultant APR gap as “DCA harm” when, in the case of captive lenders, at least part of the gap reflects the material effect of the manufacturer’s subsidy.[56]

77. Moreover, the Authority wrongly categorised retailer subvention, as routinely used in captive finance deals in the used car market, as mere “*after-the-fact rationalisations*”.[57] However, it can have a significant (if not greater) effect on the consumer’s overall cost of credit than an APR reduction to even the lender’s base rate. It may also impact on a consumer’s behaviour (for instance, it may prompt a consumer whose DCA is disclosed

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55 §§51-53.

56 The Authority’s error in this respect is illustrated by Theodosiou 1, §92, which (wrongly) asserts that subvention is a “*separate question directed to the overall attractiveness of the transaction…*”.

57 PS26/3, §2.19 (p.33).

to simply accept that feature, rather than to shop around to seek better deals). The Authority's failure properly to understand its significance risks illogical and unjust redress outcomes. It means that customers who may have had a higher APR but, in consequence of retailer subvention, paid an overall lower amount may be entitled to more redress than those who had a lower APR but paid an overall higher amount.

78. Allied to the above is that, even if the lack of an opportunity to shop around might constitute "*loss or damage*" under section 404(1)(b) FSMA – which, as explained above, is wrong – in considering redress, the question must be whether in fact that would have happened. As explained above, at §§62-65, shopping around in the event of full disclosure of any relevant feature was far less likely in the captive market. That is made directly relevant to this Ground by section 404A(5) FSMA, which required the Authority to "*take account of the loss or damage*" in considering redress. However, at the redress stage, the Authority entirely failed to follow through with its work in identifying the particular features of the captive market. It thereby erred in failing to take any or proper account of the very limited (if any) "*loss or damage*" in that context.

79. Had the Authority taken proper account of these important factors, it would have been clear that "*just*" redress, having regard to the likelihood of a lesser degree of "*loss or damage*" in the captive segment of the market, meant a different APR adjustment for captives. Instead, however, §56 of Technical Annex 2 to PS26/3 noted only that there was "*no industry agreed standardised categorisation of the motor finance market*."

80. Ultimately, the Authority's 'one-size-fits-all' approach to remedy across all segments of the market risks sowing the seeds of failure for the Scheme as a whole. It risks over-compensating customers of captive lenders like MBFS. If the Authority had properly distinguished between captive and third-party lenders in designing an approach to redress it would have achieved a more accurate and "*just*" redress outcome. In failing to achieve the basic objective of the redress methodology the Authority's approach is irrational.

H. CONCLUSION

81. The Tribunal is, therefore, respectfully invited to quash the Schemes for the reasons identified by MBFS in its Grounds.

28 August 2026

LORD RICHARD KEEN K.C.
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