Case Nos: J30BM090-J30BM097

IN THE COUNTY COURT AT BIRMINGHAM
BUSINESS AND PROPERTY WORK

The Birmingham Civil Justice Centre
The Priory Courts, 33 Bull Street, Birmingham B4 6DS

Date: 8 September 2023

Before :

HHJ WORSTER

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Between :

Stuart Angel and others	**Claimants**
- and -	
Black Horse Limited	**Defendant**

(heard with claim numbers: J30BM091, J30BM092, J30BM093, J30BM094, J30BM095, J30BM096, and J30BM097)

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Andrew Clark (instructed by **Barings Law**) for the **Claimants** in **all 8 claims**
Iain MacDonald (instructed by **TLT LLP**) for the **Defendants** in the **1st** and **2nd** claims (and instructed by **DWF LLP**) for the **Defendant** in the **5th** claim
Matthew Hardwick KC (instructed by **Eversheds Sutherland**) for the **Defendants** in the **3rd** and **8th claims**
Simon Popplewell (instructed by **Lester Aldridge LLP)** for the **Defendants** in the **4th** and **7th claims**
Lee Finch (instructed by **Equivo Limited**) for the **Defendant** in the **6th claim**

Hearing date: **5 May 2023**

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HHJ WORSTER

HHJ WORSTER:

Introduction

1. The Claimants in these eight claims purchased motor vehicles from car dealers. They all entered into credit agreements to finance their purchases. The Defendants are the finance companies who entered into the various credit agreements the Claimants made. Most of those agreements were regulated agreements under the terms of the Consumer Credit Act 1974 ("the Act"), but some were unregulated. In some cases the dealer introduced the individual Claimant to the relevant Defendant. In other cases there were intermediaries (brokers) who undertook that role.

2. The claims made against the Defendants allege that the relationship between the individual Claimant and the individual Defendant was "unfair" within the meaning of section 140A of the Act because of the failure to disclose the relevant commission arrangements made between the dealer or intermediary and the relevant finance company. The claims seek orders under section 140B. There are no other claims made other than those under the unfair relationship provisions of the Act.

3. The litigation currently involves claims by over 5,000 Claimants, all represented by the same solicitors. All the claims against a particular Defendant have been gathered together and made in one Claim Form, so that one Claim Form brought by multiple Claimants has been issued against each of the eight Defendants. The Claimants' intention is that sample cases, or common issues, are to be identified and tried. The intention is that by deciding a few cases, the parties will be able to test the arguments, and see how the rest of the claims are likely to be decided. The Claimants hope that this will enable the parties to resolve many of the untried claims by negotiation, and provide assistance to the courts which have to hear any claims which cannot be negotiated. The Defendants resist that course.

4. The eight Claim Forms were issued in November 2022 in the County Court in Birmingham. Following issue, the Claimants applied to transfer them to the Circuit Commercial Court in Birmingham, and for directions for the management of the claims as a whole. The claims and Claimants' applications were served on the Defendants on 10 November 2022. The Defendants opposed the applications for transfer, arguing that the High Court had no jurisdiction to hear unfair relationship claims under the Act. On 31 March 2023 I handed down a judgment in which I decided that the County Court's jurisdiction to hear and determine such claims was indeed an exclusive one. Consequently the applications to transfer was dismissed.

5. This judgment deals with the second set of issues between the parties. They interrelate, but can be conveniently divided into two strands:

   (i) whether the Claimants are permitted, pursuant to CPR Part 7.3, to use single Claim Forms for all claims being brought against each Defendant (the severance issue); and

   (ii) whether the litigation should proceed by trying a number of test cases, and if so, how that should best be done (the case management issue).

6. The hearing of those issues was listed for 5 May 2023. Prior to that hearing, the parties exchanged "sampling proposals", and Mr Clark set out the essentials of the Claimants'

position in his skeleton argument of 2 May 2023. He developed and modified that approach in the course of his oral submissions. Those developments were welcome and constructive, and sought to respond to matters raised by the Defendants. The Defendants adopted a united front in relation to both issues. Counsel for the Defendants all provided skeleton arguments, and divided up responsibility for making the majority of the oral submissions. Mr Hardwick KC and Mr Finch dealt primarily with the severance issue and Mr Popplewell and Mr MacDonald with the case management issue. I reserved judgment.

7. On 12 June 2023 I circulated a draft judgment. I concluded that the claims made in the eight Claim Forms could not all be conveniently disposed of in the same proceedings, and so found for the Defendants on the severance issue. One of the authorities relied upon by the Defendants in their submissions to me on 5 May 2023 was Master Davison's decision in *Abbott v Ministry of Defence* [2022] EWHC 1807 (QB). On 16 June 2023 the Divisional Court (Dingemans LJ and Andrew Baker J) handed down its judgment in the appeal from Master Davison's order; see [2023] EWHC 1475 (KB). On 20 June 2023, the Claimants asked the Court for the opportunity to make further submissions on the effect of that judgment. The Defendants objected, but I acceded to that request. My reasons are set out in a Note to the Draft Judgment dated 21 June 2023. The fact that the appeal was heard by a Divisional Court was an indication of its potential importance.

8. Those further submissions have been made in writing and were sequential. They are as follows:

Mr Clark	30 June 2023
Mr Hardwick KC	10 July 2023
Mr Finch	12 July 2023
Mr Popplewell	13 July 2023
Mr MacDonald	13 July 2023
Mr Clark	24 July 2023

As before, the Defendants present a united front, with Mr Hardwicke KC taking the lead.

9. As a consequence of the decision on appeal in *Abbott*, and the further submissions, I have revisited the draft judgment. Rather than attempt to amend it by simply adding or deleting sections, I have re-written it, albeit a significant amount of the judgment is as before. That is not to say that I have changed my views on the issues I set out in that first draft. It is that the nature of the issues I have to determine have changed somewhat, informed as they now are by the Divisional Court's analysis of CPR Part 7.3, and the factors which are (and which are not) relevant to the exercise of the Court's judgment under that rule.

Preliminary Matters

10. Before turning to the issues on the application, I deal with two preliminary matters. Firstly the Claimants appeal against the decision on the jurisdiction issue set out in my judgment of 31 March 2023. I was not asked for permission to appeal on handing down. However, on 21 April 2023 the Claimants in *Barlow v Vauxhall Finance plc*

(J30BM095) filed an Appellant's Notice with the Court. The appeal has been issued under number CH-2023-BHM-000016, and at the time of preparing this judgment, the issue of permission is yet to be determined. The Claimants in the other seven claims have not appealed. The Defendants expressed some concern about dealing with the balance of the issues between the parties with an appeal outstanding in one of the eight claims. The Claimants were more sanguine about the position. As I understand it, they are content to proceed with the balance of the application on the basis that the claims will be proceeding in the County Court before me. The claim chosen for an appeal is a claim which the Claimants would propose to stay, and so (from a practical point of view) that claim will not be proceeding in the High Court whilst the balance of the claims proceed in the County Court.

11. Secondly, the Defendants expressed concern as to the impact of further claims. In the weeks prior to the hearing on 5 May 2023, the Defendants received further letters of claim from the solicitors acting on behalf of the Claimants in these proceedings, giving notice of a substantial number of new claims which they intended to issue against these Defendants. The evidence from the Defendants is that there is a substantial overlap between the identities of the Claimants in these proceedings and the intended claimants referred to in the new letters of claim. These new letters of claim raise claims for secret commission and breach of fiduciary duty. These are not causes of action which are pursued in these proceedings, which are limited to unfair relationship claims pursuant to the Act. The Defendants' concern is that it appears to be the intention for Claimants in these proceedings to pursue unfair relationship claims against a particular Defendant in respect of a particular transaction, and for some of the same Claimants to pursue different causes of action against the same Defendant in respect of the same transaction, in separate proceedings.

12. The Claimants' solicitor, Mr Cooper, has filed a witness statement dealing with that issue. He says in terms that it is not the Claimants' intention to bring "dual claims". Mr Clark explained the reason behind this further round of letters of claim at the hearing on 5 May 2023. It is that his instructing solicitors anticipate discontinuing a good number of the existing claims once the Defendants have made good their case that many of the relevant credit agreements did not involve a discretionary commission arrangement as between the dealer or intermediary and the finance company. Amongst the Claimants whose unfair relationship claims have been discontinued, there will be those who have a valid claim for breach of fiduciary duty and/or secret commission against these Defendants arising out of the same transactions as the discontinued unfair relationship claims. This recent round of letters of claim is designed to preserve their opportunity to bring claims on those further bases.

13. Mr Clark acknowledged that there was an overlap between the Claimants in these eight claims and the intended claimants referred to in the recent round of letters of claim. But he confirmed that the Claimants in these eight claims had elected to proceed on the basis of unfair relationship claims. They were keen to have their claims heard on a single basis so that they could test the proposition (to the effect) that these discretionary commission arrangements gave rise to an unfair relationship which justified the grant of relief under the Act. Mr Clark also confirmed that there would be no attempt by the Claimants who proceeded with their unfair relationship claims in these proceedings, to bring a second round of proceedings for breach of fiduciary commission or secret commission after the determination of the current claims: what I described in argument

as a self-imposed *Henderson v Henderson* estoppel. In other words, there will be no overlap.

14. There are issues as to the mechanics of how this will all work in practice, and how the Claimants in the current proceedings are to be bound by this election. I would also observe that it would have been better if the Defendants had been provided with some prior explanation of what the Claimants intended before the recent round of letters of claim had been sent out. Proper communication between litigating parties tends to reduce the scope for misunderstanding and avoids unnecessary and sometimes costly disputes.

15. The Defendants were also concerned as to the potential for inconsistency between the two sets of proceedings. What was said in the recent round of letters of claim as to the agency of the dealer/intermediary was inconsistent with what was said about that issue in the current proceedings. How was that to be dealt with? Mr Clark dismissed the concern. If necessary the Claimants could be cross examined on the issue, but in his submission there was no inconsistency. The related concern was that it was apparent that these proceedings were not to be the end of the litigation; there was to be what Mr MacDonald referred to as "round two", comprising claims by Claimants in the current proceedings bringing claims for breach of fiduciary duty/secret commission, and the potential for others, who were not party to the current proceedings, to bring unfair relationship claims. The concerns the Defendants raise are not unreasonable.

16. Having heard the parties on these preliminary matters, I took the view that, notwithstanding the potential for future problems caused by the second round of proceedings and the appeal, I should proceed to hear and determine the applications before me.

The Claims

17. The brief details of claim endorsed on each of the eight Claim Forms provide as follows:

> *Pursuant to section 140B(1)(a) of the Consumer Credit Act, each of the Claimants claims an order for repayment of monies paid by them under a motor finance agreement on the basis that the relationship between them and the Defendant arising from the relevant credit agreement was unfair to them because of things done and/or not done by the Defendant and/or the relevant motor dealer on the Defendant's behalf, in particular their failure to make sufficient disclosure, and the Defendant's failure to take reasonable steps to ensure that the dealer made sufficient disclosure regarding the commission arrangement between them, contrary to the FCA's Consumer Credit sourcebook, together with interest …*

18. The Claimants have subsequently served generic Particulars of Claim, which set out in greater detail the nature of the claim made, the relevant legislative and regulatory provisions, how those have been breached, and how it is said that the relationships between the Claimants and the relevant Defendant were unfair within the meaning of section 140A of the Act. The only claims made are for orders pursuant to section 140B of the Act, and statutory interest. As I have already noted, there are no claims for secret commission or breach of fiduciary duty. The Particulars of Claim are generic, so that there is no reference to the particular terms of the transaction in which an individual Claimant was involved, or to the details of the particular commission arrangement.

19. In each claim there is a schedule in which the Claimants are identified. Over the months since issue, a number of Claimants have discontinued their claims, and that process is likely to continue as the Claimants' solicitors are satisfied that no discretionary commission arrangements applied to transactions affecting individual Claimants. The parties to the claims as at the hearing on 5 May 2023 were as follows:

J30BM090 Stuart Angel and 1,379 others v Black Horse Limited

J30BM091 Peter Green and 234 others v Close Brothers Limited

J30BM092 Sean Hallsor and 28 others v Aldermore Bank plc

J30BM093 Carl Thomas and 1,545 others v Volkswagen Financial Services (UK) Limited

J30BM094 Patrick Giltinane and 65 others v Startline Motor Finance Limited

J30BM095 Andrew Barlow and 175 others v Vauxhall Finance plc

J30BM096 Richard Bateson and 1,650 others v BMW Financial Services (GB) Limited

J30BM097 Rakab Sharif and 193 others v Motonovo Finance Limited

In total, some 5,277 Claimants, of which 4,577 are in the cohorts making claims against Black Horse, VW or BMW. The Claimants are all represented by the same solicitors, and I can assume that they will make common cause. But whilst they may all seek relief of the same nature, they are not jointly entitled to a remedy. They bring individual claims. As yet, no Defences have been filed.

20. The Defendants emphasise that these claims are legally distinct, and that an unfair relationship claim is peculiarly fact specific in nature. Mr Hardwick KC referred to the judgment of HHJ Waksman QC (as he then was) in *Harrison v Black Horse Limited* [2010] EWHC 3152 (QB) at [50]:

> *While it would be wrong to describe the exercise undertaken by the Court in determining whether there was a UR as the exercise of a discretion, the very broad terms in which section 140A is couched "provides the courts with maximum flexibility in considering unfairness" – see paragraph 3.12 of the OFT Guidance on Unfair Relationships: May 2008. The process involves an assessment of the facts and the balancing and weighing of different factors …*

21. Mr Hardwick KC also referred to the following passage from the judgment of Lord Sumption in *Plevin v Paragon* [2014] UKSC 61 at [17]:

> *… Section 140A, by comparison [with the ICOB rules], does not impose any obligation and is not concerned with the question whether the creditor or anyone else is in breach of a duty. It is concerned with the question whether the creditor's relationship with the debtor was unfair. It may be unfair for a variety of reasons, which do not have to involve a breach of duty. …*
>
> *It follows that the question whether the debtor-creditor relationship is fair cannot be the same as the question whether the creditor has complied with the ICOB rules, and the facts which may be relevant to answer it are manifestly different. An altogether wider range of considerations may be relevant to the*

> *fairness of the relationship, most of which would not be relevant to the application of the rules. They include the characteristics of the borrower, her sophistication or vulnerability, the facts which she could reasonably be expected to know or assume, the range of choices available to her, and the degree to which the creditor was or should have been aware of these matters.*

22. Mr Clark accepted that in the final analysis, each claim turns on its facts. His submission was that each and every one of these claims is based upon (what he describes as) "the single, simple premise" that the relationship between the Claimant as debtor and the Defendant as creditor arising from the credit agreement between them, was unfair because of the non-disclosure of the nature of the commission arrangements which gave the broker or intermediary the discretion to fix the interest rate payable by the Claimant under the credit agreement, and by doing so, to increase the commission they received.

23. The degree of commonality between these claims takes on a far greater significance for the outcome of this application following the Divisional Court's decision in *Abbott*. In his written submissions of 30 June 2023 Mr Clark deals with the common issues which might be determined by the court in test cases. I return to that aspect of the matter later in this judgment.

CPR Part 7.3

24. The Defendants' central point before me on 5 May 2023 was that the approach the Claimants had taken to the joinder of all the claims against one Defendant in one Claim Form was not permitted by the CPR. If the claims were not properly joined, they would have to be severed or dismissed. The relevant rule is CPR Part 7.3:

    > *A claimant may use a single claim form to start all claims which can be conveniently disposed of in the same proceedings.*

    Whilst the reference here is to a Claimant (singular) the rules expressly contemplate the joinder of multiple Claimants in the same proceedings. CPR Part 19.1 provides that:

    > *Any number of claimants or defendants may be joined as parties to a claim.*

    The limitation is whether all those claims can be conveniently disposed of in the same proceedings. Neither the rules nor PD7A provide any further test.

25. The first question is how should CPR Part 7.3 be interpreted? In their submissions before me on 5 May 2023, the Defendants adopted an essentially literal interpretation. Mr Hardwick KC submitted that:

    (i) the reference to the convenient "disposal" of the claims indicates that the rule requires the Court to look to the end result, recognising that disposal includes not only disposal at trial or by some form of summary adjudication, but also disposal by settlement;

    (ii) it follows from (i) that the rule is not concerned with the convenient commencement of a claim, although he observes that it is highly convenient for the Claimants and their solicitors to avoid the need to issue 5,000 plus separate Claim Forms, each with their own issue fee; and

    (iii) the rule requires that all claims be disposed of in the same proceedings; in other words in these proceedings in this Court.

26. The Claimants contended for a broader approach. Mr Clark's central point was a simple one, and well expressed at paragraph 6 of his skeleton argument of 2 May 2023:

> Ultimately, the question of convenience must involve a comparison between the position if a single Claim Form should be used and that if multiple Claim Forms [are] used …
>
> … the alternative is that there be more than 6,085 separate Claim Forms, separate Particulars of Claim, separate Defences, separate Replies, separate hearings to give case management directions and separate trials. By comparison, the use of a single Claim Form, generic statements of case, collective case management, and the trial of sample cases … represents a very convenient disposal of the claim.

I took the underlying point to be that in interpreting CPR Part 7.3 the Court should have in mind the process by which a claim is disposed of, rather than simply the end result.

27. I was referred to a number of first instance decisions which involved a consideration of CPR Part 7.3, including Master Davison's decision in *Abbott*, and to the notes in the White Book to Part 7.3. I also considered how to interpret the rule in the light of CPR Part 1.2(b) and the overriding objective. At paragraph 32 of the first draft judgment I concluded that, in principle, the rule was wide enough to allow for the joinder of these claims in one Claim Form. However, to comply with the "convenience test" there would have to be some confidence that there would only be a small number of cases left in the "rump" of claims which were not disposed of or settled by the process of litigation, such that they might be conveniently disposed of by trial (whether separately or together).

28. The approach I took in that first draft to the interpretation of rule 7.3 was different to the approach subsequently taken by the Divisional Court in *Abbott*. What I now do in this judgment is to apply the guidance given in the Divisional Court's decision in *Abbott*. Some of the views I expressed in the first draft judgment remain relevant, but it is not appropriate simply to carry them across wholesale and without qualification into this judgment. The nature of the test I am applying is different.

Abbott

29. In June 2021 a Claim Form was issued in proceedings against the Ministry of Defence on behalf of Mr Abbott and 3559 others. The Claimants alleged that they were all either employees or members of the Armed Services who had suffered hearing loss as a result of exposure to excessive noise during their employment or service. As here, the Claimants were all represented by one firm of solicitors. The case came before Master Davison for case management on 7 July 2022. It was common ground as between the Claimants and the Defendants that the just and proper way to deal with the litigation would be (i) to manage all the cases together, (ii) to identify and try first a number of lead cases to be selected from the larger cohort with tailored directions for disclosure (full standard directions for the lead cases and some measure of generic disclosure in relation to common issues) and (iii) for the Claimants solicitors to maintain a claims register. That approach had been used in earlier cases, and had some obvious similarities with the directions which would apply in a Group Litigation Order. It is also apparent from the terms of the Divisional Court's judgment at [78] that the parties had agreed a list of generic issues.

30. Master Davison held that the claims ought not to have been brought by a single Claim Form, and that such a course was not permitted by CPR Part 7.3 and 19.1. In his judgment Master Davison said this at [6]:

> *The 3,500 claims joined in these proceedings plainly cannot be conveniently disposed of in the same proceedings. Indeed, it seems to me that the contrary is not seriously arguable. The claims are far, far too disparate in terms of the periods and circumstances in which each claimant sustained his or her NIHL. They have a common defendant and a number of common themes. But that is all. They otherwise present a huge variety of unitary claims. ... There obviously could not be a trial of 3,500 claims at one sitting. Mr Steinberg met this point by saying that the intention was to select 16 "lead cases" for trial. Leaving on one side the question whether even 16 could be dealt with at one time, that does not meet the objection. It is not realistic to suppose that the other 3,484 cases would be resolved or fully resolved by the outcome of the lead cases. The other cases, or a great many of them, would still have to be litigated and ultimately tried. Thus this one claim, if allowed to proceed on the basis proposed, would generate or would, at the very least, be capable of generating multiple tracks and multiple trials. With respect to Mr Steinberg, this is not an arguable proposition.*

The Master was also concerned about the "impossible strain" the claim posed for the Court's CE file system. The Claimants appealed.

31. The main judgment in the Divisional Court is given by Andrew Baker J. Dingemans LJ agrees with that judgment and gives a short judgment of his own. The decision is intended to provide some general guidance. In the context of this case I note the following:

    (1) Whether claims can be conveniently disposed of in one set of proceedings is a fact specific inquiry; see [85].

    (2) "*disposed of*" means finally determined; [51].

    (3) *… the test of convenience is only that common disposal be convenient. It does not require common disposal to be the only possible or reasonable way of determining the set of claims in question, or that separate disposal would be inconvenient. No doubt it may often be the case that the reasons why common disposal will be convenient, if that is the position, will justify a stronger conclusion that common disposal will be the most (or even the only) convenient solution. But that is not required before CPR 7.3, on its plain terms, is satisfied.* [52].

    (4) *... convenience is an ordinary word conveying usefulness or helpfulness in respect of a possible course of action. It does not need further elaboration or lengthy definition. CPR 7.3 thus requires, but requires only, that common disposal, rather than separate disposal, would be convenient. That is to say, it asks of the claims that have been brought under a claim form, however few or many there are, whether, to the extent they are disputed, it would be possible and useful or helpful to have all of them finally determined in the same proceedings rather than in two or more separate proceedings*. [53].

(5) CPR Part 7.3 does not require that it be possible or practicable for all claims to be finally determined, if disputed, at one trial; [64(ii)]; [88].

(6) The burden is on the Claimants to show that it is convenient for the determination of the multiple claims to be achieved in a single set of proceedings rather than in multiple sets of proceedings; [66].

(7) The fact that claims can be case managed together does not establish that their common disposal is convenient; [66]-[68]. The corollary would be that difficulties in case management of themselves should not be relevant to the court's consideration of whether the convenience test in CPR Part 7.3 is met.

(8) *… what would surely make it convenient for there to be only one set of proceedings is that it would be useful and helpful, indeed highly desirable in the interests of justice, for significant common issues of fact and (it may be) all issues in at least some of the claims to be tried in such a way that, thereafter, in the context of each claimant's individual case the findings made would be binding on both the claimant and the MoD. That is achieved without more by the claimants being co-claimants on a single claim form. It may be that it could be achieved by other means too; but CPR 7.3 does not require that common disposal is the only method by which the advantage that makes it convenient might be achieved.* [70].

(9) *The question here was not whether the full cohort of 3,000+ M-NIHL claims encompassed by the omnibus claim form, as amended, could be tried at a single trial hearing; it was whether that cohort of claims had sufficient commonality of significant issues of fact that it would be useful or helpful, in the interests of justice, that any determination of those issues in proceedings brought by any one of the claimants against the MoD in respect of their M-NIHL injury claim would be binding also as between the MoD and any other of the claimants in respect of their such claim.*[71].

(10) *The governing principle, therefore, is not whether there is a large number of claimants and/or causes of action. Rather, it is the convenience of disposing of the issues arising between the parties in a single set of proceedings. The degree of commonality between the causes of action, including as part of that the significance for each individual claim of any common issues of fact or law, will generally be the most important factor in determining whether it would, or would not, be convenient to dispose of them all in a single set of proceedings.* [71(iv)].

(11) *If there are likely to be common issues of sufficient significance that their determination would constitute real progress towards the final determination of each claim in a set of claims, that could be enough for a conclusion that common disposal rather than separate disposal of that set of claims would be convenient.* [73].

(12) Whether there are or might be difficulties for the Claimants in issuing thousands of single Claimant claim forms, or for the Court in dealing with claims with thousands of Claimants (Master Davison's "impossible strain" point) do not affect the proper construction of CPR Part 7.3; [86].

(13) The impact on the Court's fee income was not a relevant factor in the interpretation of CPR Part 7.3; [20]-[21].

32. The parties in *Abbott* had agreed a list of generic issues, and counsel explained their significance to the Court during the course of argument. Both Andrew Baker J and Dingemans LJ were satisfied that the nature and likely importance of those common issues were such that it would be convenient for all the claims to be disposed of in the same proceedings rather than in separate sets of proceedings; see [78]-[79] and [90]. Andrew Baker J came to that conclusion "by a clear margin" recognising that a final determination of any given claim, if tried on its own, would involve other issues as well.

Discussion

33. The first issue to consider is whether there is a sufficient commonality of significant issues between the claims brought by the same Claim Form, that it would be useful or helpful to determine those issues within the one set of proceedings. The second is whether that determination would be binding on the other parties to the claim (i.e. the parties to that Claim Form).

34. At the hearing before me on 5 May 2023, Mr Clark's submission was that all these claims were founded on a simple, single premise, that the failure to disclose the discretionary commission arrangements as between the Defendant and the dealer, was a breach of CONC (see paragraph 22 above). At paragraph 13 of his skeleton argument of 2 May 2023 he submitted that:

> *… the common issue would be limited to the question of whether the relevant regulatory regime required disclosure of the nature of the discretionary commission arrangement.*

Given the limited nature of that issue, the Defendants expressed some doubt as to whether its determination achieved anything (I might now add, anything useful or helpful). They also questioned whether the decision in a sample case was binding on them or simply persuasive.

35. Mr Hardwick KC noted the "remarkably limited parameters" of this issue and directed me to the terms of CONC 4.5.3:

> *A credit broker must disclose to a customer in good time before a credit agreement or a consumer hire agreement is entered into, the existence of any commission or fee or other remuneration payable to the credit broker by the lender or owner or a third party in relation to a credit agreement or a consumer hire agreement, where knowledge of the existence or amount of the commission could actually or potentially:*
>
> *(1) affect the impartiality of the credit broker in recommending a particular product; or*
> *(2) have a material impact on the customer's transactional decision.*

This, he submitted, was an issue which any County Court Judge was well able to consider and apply. I agree with that submission.

36. Whether the conduct of the broker in any particular instance amounts to a breach of CONC is (i) not a complex matter; and (ii) will turn on the particular facts of the individual case. Section 140A(2) of the Act provides that:

> *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).*

At paragraph 12 of his skeleton argument of 2 May 2023, Mr Clark acknowledged that a determination in one case that the failure to disclose the nature of the discretionary commission arrangement gave rise to an unfair relationship between the relevant Claimant and the Defendant, would not give rise to a binding precedent that the relationship between other Claimants and the same Defendant was unfair.

37. However, at paragraph 11 of his written submissions of 30 June 2023 he says this:

> *The common issues here may be described as limited to two questions, being the question of breach of CONC and the question of the principle of unfairness arising from non-disclosure of the discretionary commission arrangement …*

As I understand it, what is proposed is that the Court be asked to determine whether a breach of CONC arising from the non-disclosure of the discretionary commission arrangement, may, **in principle**, give rise to a finding of unfairness under section 140A of the Act (my emphasis). There are two points to make here.

38. Firstly, this is by no means a difficult or perhaps even a controversial question. Mr Clark makes reference to my decision in *Kerrigan v Elevate Credit International* [2020] EWHC 2169 (Comm) at [190] where, in the context of breaches of CONC by "pay-day lenders", I said this:

> *Given the burden of proof [under section 140B(9) of the Act] when the rules are breached in a substantive way, it is likely to be difficult for the defendant to show that the relationship was fair.*

That is little more than the application of what Lord Sumption says in *Plevin* at [17] to the facts of those particular claims:

> *The view which the court takes of the fairness or unfairness of a debtor/creditor relationship may legitimately be influenced by the standard of commercial conduct reasonably to be expected of the creditor. The ICOB rules are some evidence of what that standard is.*

That latter statement of principle is likely to be a greater assistance to the Claimant and the Court than the finding of a County Court Judge in this litigation. In any event, it is, once again, the sort of finding which any County Court Judge would be making when determining a case like this, whether on the small claims track or the fast track.

39. Secondly, I question the utility of a determination such as this. The question of unfairness will turn on a wide range of factors. Mr Finch identified at least 18 in his skeleton argument at paragraphs 31-34. A breach of CONC (or compliance with it) will be one, but the determination of the second common issue Mr Clark now proposes is unlikely to provide a short cut, or to use the language of *Abbott*, be useful or helpful.

40. Mr Clark also seeks to expand the scope of the first issue, identifying six "anterior questions" at paragraph 9 of his written submissions of 30 June 2023. Whilst the second common issue Mr Clark now raises can be seen as a logical extension of the single simple premise he relies upon, these anterior questions are new. Mr Hardwick KC is right to object to the argument being raised in these written submissions, which were limited to matters arising from the Divisional Court's decision in *Abbott*. In any event (and without the benefit of oral argument on the point) there appears to be considerable force in the response Mr Hardwick KC gives in writing at paragraph 28.5 of his written submissions of 10 July 2023. He submits that the first anterior issue is really the CONC 4.5.3 issue, and the other five relate to whether the motor dealers were agents and/or acting for the Defendants such that there was a breach of CONC 1.2.2R(2). Whilst agency is likely to be an issue in this litigation, on the material before me it seems unlikely to have the degree of commonality necessary to meet the requirements outlined in *Abbott*. In his skeleton argument for the hearing on 5 May 2023, Mr Finch referred to Vauxhall using 118 different motor dealers. No doubt the other Defendants also operated through a number of dealers, and whilst the terms upon which they did so may have had provisions in common, that aspect of the matter has not been properly explored before me.

41. The second question is whether a determination of these issues in a "sample" test case would be binding on the other parties to that claim. Mr Clark's submission was that they would be. He relied upon the decision of Trower J in *Moon v Link Fund Solutions* [2022] EWHC 3344 (Ch) at [81]. In his written submissions of 30 June 2023 at paragraph 7 he drew my attention to the approach of Andrew Baker J in *Abbott* at [70]. He submits that the Judge's approach is premised on the assumption that if there are common issues determined in a claim, the Court's finding on those issues binds the Defendant in respect of the claims made by the co-claimants to that claim form.

42. I am not entirely convinced that that is correct, at least without there being some direction to that effect given by the Court. I note that Dingemans LJ left the question of whether decisions in *Abbott* would be binding to the case managing judges; [91]. But assuming that it is, or that the Court makes a direction to that effect, a "binding" judgment on the two common issues Mr Clark puts forward has a limited effect (a) because of the general/in principle nature of a decision on the issues he proposes, and (b) because of the fact specific nature of a section 140A claim.

43. Nor am I persuaded that such a "binding" decision would make any real difference in practice. The well reasoned decision of a County Court Judge on a point of principle is likely to have a considerable persuasive effect. One example that occurred to me whilst considering this application was the well-known decision of HHJ Moloney QC in the Cambridge County Court in *Gosling v (1) Halio (2) Screwfix* (29 April 2014). That was one of the first judgments on the meaning of "fundamental dishonesty" in the QOCS provisions. For a number of years, it was the key authority on a point litigated daily in the County Court around the country, and was followed by the Courts and parties alike (and subsequently by the Court of Appeal).

44. The central question is whether there are significant common issues, the determination of which would amount to real progress towards the final determination of each claim in a set of claims. I agree with Mr Clark, that it is not the number of issues which matter, but their significance and commonality. Having considered the issues argued before me on 5 May 2023 and supplemented in writing, I am not

satisfied that there are … *common issues of sufficient significance that their determination would constitute real progress towards the final determination of each claim in a set of claims…* . In those circumstances, I am not satisfied that the convenience test provided for by CPR 7.3 and explained in *Abbott*, has been met. That is the same decision I came to in the first draft of this judgment, but one which is reached by a different route.

The Case Management Issue

45. The sampling arrangements which the parties had been discussing prior to the hearing on 5 May 2023 had proceeded on the basis that all the claims were properly joined in the eight Claim Forms. My understanding was that if I found that the claims were to be severed, then the question of sampling fell away. I may have misunderstood what was being said, but from the written submissions of Mr Hardwick KC of 10 July 2023, that certainly appears to be the Defendants' position. Indeed, one of their central arguments was that gathering together all these claims had only served to complicate matters, and that rather than trying to identify cases to try from amongst these eight claims (a process they doubted would lead to the settlement or disposal of many of the claims because of their fact specific nature) the Court should allow this litigation to follow the ordinary process as separate claims. If there were points of principle which needed working out, cases would emerge, much as they did in the body of litigation which led to the Supreme Court's decision in *Plevin*.

46. However, the Claimants' position following the circulation of the first draft of this judgment is that whether or not these claims are to be severed, the court should direct that sample cases (or lead cases) be identified and tried. I deal with that argument on its merits.

47. The Court is always alive to opportunities to decide issues which will assist in the disposal of a claim. Group Litigation Orders are one well developed example, and the judgment in *Abbott* illustrates the use the courts can make of the CPR to similar effect.

48. Mr Clark referred to the judgment of Mann J in *Tew v BOS (Shared Appreciation Mortgages) No 1 plc* [2010] EWHC 203 (Ch) at [34]. The claims raised the issue of the fairness of terms in mortgages under the Unfair Terms in Consumer Contracts Regulations 1994 and the fairness of the relationship under section 140A of the Act. The Judge said this:

> *Sample cases can be taken which represent various parts of the spectrum. Technically speaking, the actual findings of unfairness in those cases will not bind other litigants, whether under a GLO or not, but they will doubtless provide guidance for the disposition of a lot, if not all, of the other cases. Insofar as they do not lead to agreement on all outstanding cases, then any remaining cases can be dealt with more efficiently by virtue of the material which has already been rehearsed and ruled on in the lead cases.*

49. Mr Clark also referred to the judgment I gave in *Kerrigan* at [3]:

> *Trying a group of sample cases is a costly process. There have been a number of interlocutory hearings and the trial that lasted 16 days over 4 weeks. …. But that process has enabled the parties to investigate and argue the issues in greater depth than would be proportionate if each case were tried on its own.*

The process has involved the formulation and refinement of the way in which the claims are put, and a fuller consideration of the arguments which could sensibly be pursued. It has involved the substantial disclosure of documents and information about the process Sunny used to determine whether or not to lend money to a particular individual. The hope was that whilst the outcome of the claims would not determine all of the issues which may arise in the rest of this litigation, it would have provided some substantial assistance to the parties as to the merits or otherwise of their arguments.

50. I recognise the potential benefits of "test cases". I also recognise that in the context of litigation such as this, there may be benefits in rehearsing the arguments in a greater depth than might be proportionate in a single claim determined on the small claims track or the fast track. However, I am not persuaded that I should make the directions the Claimants seek in this case.

51. Firstly there is the point I have already explored in the context of the severance argument. The common issues the Claimants identify are not sufficiently significant and/or common.

52. Secondly, the process of the identification and trial of "lead cases" is unlikely to save time or cost. That is in part because of the limited effect of the decisions it will produce; in part because the process itself will add to the complexity of the litigation, take time and cost money; and in part because it is unlikely to achieve any more than the ordinary process of litigation.

53. During the hearing on 5 May 2023, I expressed my concern that the "superstructure" which was apparently needed in order to identify suitable sample cases was adding to the complexity of the litigation, rather than assisting in its resolution. In the first draft of this judgment at paragraph 43 I said that having heard the parties' oral submissions, I was left wondering whether it would not be quicker and simpler to determine the issue Mr Clark had identified by hearing a handful of claims on the fast track. That was not an indication that I was in favour of applying the sampling process to the severed claims. It was a reflection of my view that the issues which might need exploration and decision did not require a complex sampling process, but could be achieved by using the ordinary processes of litigation. That is still my view, and appears to me to be the better way forward.

54. As to the sampling arrangements proposed, the picture presented to the Court was somewhat complex. The parties might blame each other for the problems there have been, but it is fair to say that the burden must be on the Claimants to propose a workable, proportionate and fair sampling regime sufficiently early on (preferably prior to issue) so that the Defendants can see from the start what is proposed, and for any differences to be catered for. From what I have seen it is apparent that the Claimants made no detailed proposals for how the claims would be run in the course of Pre-Action correspondence, and that it has taken them some time to provide those details. Having done so, the Defendants responded, identifying a number of problems. I do not suggest that an early proposal would have avoided all disagreement, but it would have made for a more orderly discussion. So, whilst the Claimants' recent decision to limit the sampling process to the regime since 1 April 2014 is entirely sensible and to be welcomed, had that been resolved before or soon after issue, it would have saved a fair amount of time and cost. The impression is that the Claimants' solicitors did not fully think through what was being proposed and have

been playing catch up. I appreciate that I have the benefit of hindsight, but if litigation of this type and scale is to be manageable, it calls not only for cooperation between the parties, but for a particular level of efficiency from the solicitors prosecuting the claim.

55. These claims cannot proceed as they are presently constituted, and are to be severed. I am not in favour of a formalised sampling process. However, if I am wrong as to the severance issue, or as to the need for a formalised sampling procedure, I would approach the case management issue in the following way. The concession made by the Claimants as to the regulatory regimes the test cases need to cover reduces the scale of issues for the Court, and consequently the number of sample claims which would need to be tried. Whilst I recognise that individual Defendants might want to be involved in the test cases, so that they may argue their corner, I would be minded to limit the first round to the Defendants with the larger cohorts – Black Horse, VW and BMW.

56. Mr Clark indicated that there would be a weeding out of the claims where there was no discretionary commission arrangement, and the relevant unfair relationship claims would be discontinued. The intention would have been for those Claimants to then join the second round of claims relying upon breach of fiduciary duty and/or secret commission. He envisaged that this would take place at the same time as the questionnaires proposed. I agree that questionnaires are a good idea – borrowed as they are from the GLO procedure. Their content would need to be agreed. But I see no real purpose in requiring questionnaires in respect of Claimants who are going to discontinue.

57. There is then the issue of a pleading pool. I favour a relatively small pool. Mr Popplewell submitted that 32 did not give much scope given that the parties were working on the basis of 16 test cases. There is a balance to be struck between covering as many of the variable issues as possible, and ensuring that the test case process is manageable. In order to keep the length of the test case process within reasonable bounds, I would have been minded to reduce the number of test cases to 6-9 (2-3 against each of the 3 Defendants), with the Claimants choosing 1 and the Defendants 1 or 2. With some coordination, the 6 or 9 test cases could be chosen so that taken overall, they deal with a range of cases. The hope would be to try those within a week. A pleading pool of 24 (8 per Defendant) is sufficient.

Order

58. A draft of this judgment was sent to Counsel on 14 August 2023. The earliest date upon which Counsel were able to attend a hearing to hand down the judgment and deal with consequential orders was 10 November 2023. Given that, I directed that the judgment be handed down today without the attendance of the parties, and Counsel be invited to agree the terms of an order. No such agreement has been possible. The position is set out in emails from Counsel to the Court on 6 and 7 September 2023. Some significant issues remain which require argument, and consequently I have made an order which adjourns the hearing (and so the consideration of the terms of an order) to the hearing on 10 November 2023.

59. In the draft judgment I indicated that if this decision was to be appealed, it would be sensible if the question of permission was raised before me in the first instance. As a consequence, the Claimants have made an application in writing for permission to appeal, so that the matter is before me for the purposes of CPR Part 52.3(2)(a). The

Claimants invite me to determine the matter on paper. In principle I would be content to do so. There is much to be said for dealing with that issue before the hearing on 10 November 2023, and sufficient time to do so. I have directed that the Defendants file and serve any submissions in reply to the application within 14 days. I will then consider whether I can deal with it on paper. One concern I have is that an appeal lies against the order I make rather than the reasons for it, and there is no agreement on the form of order (as yet). If time is running, then for the avoidance of doubt, I extend the time for the filing of an Appellant's Notice to 21 days after the determination of the application for permission to appeal.