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# SUPREME COURT HANDS DOWN JUDGMENT ON PPI MIS-SELLING AND UNFAIR RELATIONSHIPS UNDER THE CONSUMER CREDIT ACT 1974

## Introduction

On 12 November 2014, the Supreme Court handed down judgment in *Plevin v Paragon Personal Finance (1) Limited*. This deals with the unfair relationship provisions in Section 140A of the Consumer Credit Act 1974 (**"CCA"**) and alleged payment protection insurance (**"PPI"**) mis-selling. The Supreme Court considered two issues: (a) whether non-disclosure of the amount of commission received for arranging the PPI could amount to unfairness (particularly given the Court of Appeal's decision in *Harrison & Harrison v Black Horse Limited* [2012] Lloyd's Rep IR 521) and (b) the meaning of "*on behalf of*" in the context of Section 140A(1)(c) of the CCA.

The effect of the Supreme Court's decision is that (a) the Court of Appeal's decision in *Harrison* was wrong and non-disclosure of the amount of a commission (which was 71.8%) created unfairness in Mrs Plevin's relationship with Paragon Personal Finance (1) Limited (**"Paragon"**) and (b) the Court of Appeal's earlier decision in *Plevin* on the meaning of "*on behalf of*" was wrong because a lender is only responsible for things done, or not done, by its agent or deemed agent under the CCA.

## Facts

The facts of *Plevin* will be familiar to anyone dealing with PPI litigation or complaints.

Mrs Plevin is a widowed college lecturer. She received an unsolicited leaflet from a broker, LL Processing (UK) Limited (**"LLP"**), which was (a) authorised by the Financial Services Authority (**"FSA"**) to be an insurance intermediary subject to ICOB and (b) a member of the Finance Industry Standards Association. Mrs Plevin called LLP and it conducted a demands and needs assessment over the phone. LLP recommended PPI and sent her a letter enclosing a policy summary and a "*key facts*" document. Paragon was one of a number of lenders on LLP's panel and the insurer underwrote a number of policies for a number of those lenders.

After signing LLP's application form, and after Paragon conducted a 'speak with' call (which dealt with anti-money launder compliance) with Mrs Plevin, she entered into a credit agreement with Paragon on 21 March 2006 which was secured against her home by a second legal charge. Under the terms of the agreement, Paragon lent Mrs Plevin £34,000.00 and another £5,780.00 to pay for a policy of PPI. The policy was a single premium policy. The commission was split between Paragon (who received £2,280.00) and LLP (who received £1,870.00). Mrs Plevin's claim against LLP was settled in 2010 for £3,000, which was ultimately paid from the Financial Services Compensation Scheme.

## The Issues

There was essentially one issue to be determined: whether an unfair relationship existed between Mrs Plevin and Paragon within the meaning of Section 140A. Mrs Plevin argued that there was and this arose because of (a) things done "*on behalf of*" Paragon by LLP and/or (b) the non-disclosure of the amount of commission paid for the PPI.

## The Court of Appeal's Earlier Decision

Lord Justice Briggs, giving the leading judgment, decided in the Court of Appeal in December 2013 that:

- while he had not found the issues "*at all straightforward*" and his mind had "*changed more than once*", he preferred a "*broad approach*" on the meaning of the words "*on behalf on*";
- there were two prospective "*escape routes*" from the consequences of a broad interpretation: (a) the court may conclude that conduct on a lender's behalf, even if blameworthy, does not render the relationship unfair or (b) the powers given to the court are discretionary because Section 140A(1) says that the court "*may*" make an order; and
- on non-disclosure of commission, Mrs Plevin's case was "*indistinguishable from the Harrison case*" and the Court was bound by that judgment. He did, however, express discomfort with this conclusion.

## The Supreme Court's Decision

Lord Sumption (with whom Lady Hale, Lord Clarke, Lord Carnwath and Lord Hodge agreed), giving the leading judgment, decided that (a) the decision in *Harrison* was wrong and should be overruled and (b) the phrase "*by or on behalf of*" includes only the creditor's agent or deemed agent. His reasons were:

***'Harrison'***

- it does not necessarily follow that if there is compliance with the regulatory framework then there is no unfairness. When looking at ICOB, Lord Sumption said that that "*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… But they cannot be determinative of the question posed by section 140A, because they are doing different things*";
- the assessment of fairness requires a "*wider range of considerations… most of which would not be relevant to the application of the rules*". These included (for example) "*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*";

- a "*sufficiently extreme inequality of knowledge and understanding is a classic source of unfairness in any relationship between a creditor and a non-commercial debtor*", but it is a question of degree. In this case, the non-disclosure of the commissions payable out of the premium for the PPI made her relationship with Paragon unfair (but it was difficult to say where the "*tipping point*" was). Paragon could and should have disclosed the commission;

***"on behalf of"***

- the Court of Appel's decision on the meaning of "*on behalf of*" was wrong. LLP was not Paragon's agent; it was (correctly said the Supreme Court) Mrs Plevin's agent;
- LLP's "*only relationship with Paragon consisted in the facility… to introduce its principals [ie consumers] to them. No doubt it was in Paragon's interest to do more business, but even in a "non-technical sense" that does not amount to acting for Paragon or becoming involved on Paragon's side*";
- the advice given to Mrs Plevin "*was not even in the loosest sense a function that they performed for or for the benefit of Paragon. It was a function which they performed, however defectively, for the sole benefit of Mrs Plevin*";
- the phrase "*by or on behalf of*" means either (a) the creditor or (b) the creditor's agent or deemed agent.

Lord Sumption went on to conclude that Mrs Plevin's relationship with Paragon was (a) unfair because of the non-disclosure of the commission but (b) not unfair because of anything done, or not done, by the broker. The appeal was dismissed, although for reasons different from those given by the Court of Appeal, and the case will be remitted to the County Court at Manchester to decide what (if any) relief under section 140B of the CCA should be ordered.

## Comment

For many lenders, the Supreme Court's decision is a mixed blessing. There can be no doubt that the Supreme Court's decision on "*on behalf of*" is right for a number of reasons. These include (a) it would be unreasonable and impracticable to require a lender to be responsible for acts or omissions by (often) separate and independent dealers, brokers and intermediaries, (b) the scope for consumers to bring claims against parties who had no involvement in the alleged wrongful conduct was vast and problematic (particularly given the burden of proof), (c) there was significant doubt that a lender subject to a finding of unfairness could pass the responsibility back to dealers, brokers and intermediaries. The Supreme Court has also made it clear that codes of conduct are simply those; while they may show the standards to be expected they do not create any legal obligations (so the Court of Appeal's reliance on them was misplaced).

What is now clear is that lenders are only responsible for things they do or fail to do, or their agents (or deemed agents under, for example, Section 56(1) of the CCA) do or fail to do. This means that any claims alleging mis-selling or wrongful conduct by third parties (who are not the creditor's agent) are bound to fail. This will be a welcome relief to any lender involved in intermediated credit from motor finance providers to consumer finance providers to asset finance providers. It is also now clear that simply being a member of a trade association, which may seek in any code of conduct to place additional obligations which exceed the legal framework, will not result in a lender being responsible to a customer for failing to do something in the code of conduct. This is a very sensible conclusion: trade associations play an important role in helping lenders comply with the law and best practice and members can be free to engage with a trade association without the fear of future litigation.

The reasoning of the Supreme Court on the *Harrison* issue, and its decision to overturn the Court of Appeal's decision, causes problems for both lenders and borrowers (and very little guidance is offered). It was established in *Harrison* that the touchstone should be compliance with regulatory obligations and, in light of this, it was difficult for consumers to successfully argue that a lender or broker who had complied with its regulatory obligations on a particular issue had nevertheless acted unfairly. This certainty has now been removed. In its place is significant uncertainty: while compliance with regulatory obligations is a factor, it is not the deciding factor. Instead, the Court must look at the whole relationship (and balance the creditor's and the debtor's interests) before making an assessment of fairness. This will undoubtedly lead to an increase in litigation and complaints (and contested proceedings). In particular, for any borrowers arguing unfairness where the undisclosed commission was less than 71.8%, there is likely to be a hotly contested argument on whether there is any unfairness (and even the Court of Appeal said the 'tipping point' below 71.8% would be "*difficult to say*"). However, even if the Court makes a finding of unfairness, there is still no guidance on the appropriate remedy (and the Supreme Court simply said it was a matter for the County Court to decide the remedy (if any)). It is therefore entirely possible that Mrs Plevin, and other borrowers in her position, will obtain a finding of unfairness but then receive no remedy (or only a nominal award of damages).

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