Neutral Citation Number: [2013] EWCA Civ 1658

Case Nos: B2/2012/2767/CCRTF linked with B2/2012/3147/QBENF

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE MANCHESTER COUNTY COURT
RECORDER YIP QC
AND FROM THE HIGH COURT OF JUSTICE LEEDS DISTRICT REGISTRY
MR JUSTICE WILKIE
9CH00028 and MX1104

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/12/2013

Before :

LORD JUSTICE MOSES
LORD JUSTICE BEATSON
and
LORD JUSTICE BRIGGS

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Between :

PLEVIN	**Appellant**
- and -	
PARAGON PERSONAL FINANCE LIMITED & ANR	**Respondent**

linked with

CONLON	**Appellant**
- and -	
BLACK HORSE LIMITED	**Respondent**

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JAMES STRACHAN QC and **JOHN CAMPBELL** (instructed by **MILLER GARDNER LTD**)
for the **Appellant (Plevin)**
NICHOLAS ELLIOT QC and **IAN WILSON** (instructed by **SGH MARTINEAU**)
for the **Respondent (Paragon Personal Finance Limited)**
Hodge MALEK QC and **JAMES STRACHAN QC** (instructed by **MCHALE & CO**) for the **Appellant (Conlon)**
DAVID BAILEY QC and **RUTH BALA** (instructed by **SCM SOLICITORS**)
for the **Respondent (Black Horse Limited)**

Hearing dates : 18-19th November 2013

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Approved Judgment

Lord Justice Briggs :

Introduction

1. These two appeals raise issues about the interpretation and application of section 140A of the Consumer Credit Act 1974 ("the Act"), in the context of the selling of single-premium Payment Protection Insurance ("PPI") in connection with the lending of money under a credit agreement. They have been conjoined because they both raise questions as to the ambit and effect of the decision of this court (Lord Neuberger MR, Patten and Tomlinson LJJ) in *Harrison v Black Horse Limited* [2011] EWCA Civ 1128.

2. Section 140A (1) provides as follows:

> "The Court may make an order under section 140B in connection with a credit agreement if it determines that the relationship between the creditor and the debtor arising out of the agreement (or the agreement taken with any related agreement) is unfair to the debtor because of one or more of the following-
>
> (a) Any of the terms of the agreement or of any related agreement;
>
> (b) The way in which the creditor has exercised or enforced any of his rights under the agreement or any related agreements;
>
> (c) Any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement.)"

Section 140B gives the court wide powers, in effect, to reopen the credit agreement or any related agreement, by ordering the creditor (or any associate or former associate of his) to make repayments, or to refrain from enforcing the agreement in whole or in part, or by requiring the terms of the agreement to be altered.

3. In the *Harrison* case, the question was whether the non-disclosure by the lender to the borrower of the existence and very large amount of commission which the lender received in connection with the simultaneous sale of PPI to the borrower was capable of rendering the relationship between them unfair. The sale of the PPI was regulated by the Insurance Conduct of Business Rules then in force ("ICOB"), made by the Financial Services Authority by way of implementation of the Insurance Mediation Directive in January 2005. After deliberation and consultation, it had been decided not to impose any such disclosure obligation. This court held that non-disclosure of the existence and amount of the commission could not therefore, on its own, give rise to an unfair relationship.

4. Tomlinson LJ, giving the leading judgment, acknowledged at paragraph 58 that the amount of the commission in that case was:

> "on any view quite startling and there will be many who regard it as unacceptable conduct on the part of lending institutions to have profited in this way. I struggle however to spell out of the

> mere size of the undisclosed commission an unfairness in the relationship between lender and borrower. Moreover the touchstone must in my view be the standard imposed by the regulatory authorities pursuant to their statutory duties, not resort to a visceral instinct that the relevant conduct is beyond the Pale. In that regard it is clear that the ICOB regime after due consultation and consideration does not require the disclosure of the receipt of commission. It would be an anomalous result if a lender was obliged to disclose the receipt of a commission in order to escape a finding of unfairness under section 140A of the Act but yet not obliged to disclose it pursuant to the statutorily imposed regulatory framework under which it operates."

5. It is material to note that, in the *Harrison* case:

   (a) 87% of the premium paid by the Harrisons for the PPI was received by the lender (Black Horse) as commission. It sold the PPI as intermediary for an associated company, Lloyds TSB General Insurance Limited.

   (b) Black Horse was the lender under the credit agreement, selling the PPI directly to the Harrisons, rather than through any independent or tied broker.

   (c) The Harrisons did not put forward evidence to prove that they would have acted differently had they known of the existence or amount of the premium: see per HH Judge Waksman QC giving judgment on the first appeal [2010] EWHC 3152 (QB), at paragraph 31.

6. In both the present appeals, the facts are the same, so far as concerns non- disclosure of very large commissions, although none of them was quite as large as the commission in the *Harrison* case. Apart from that the facts are alleged to be materially different. At the trial of Mrs. Conlon's claim she gave evidence, which the judge (Mr Recorder Atherton) accepted, that had she known of the amount of the commission she would not have proceeded with the PPI part of the transaction. In Mrs. Plevin's case, the composite loan and PPI transaction was arranged by an independent broker, LL Processing (UK) Limited ("LLP"). Although she complained of the non-disclosure of commission paid both to the broker and to the lender, Paragon Personal Finance Limited ("Paragon"), a major part of her case was that the transaction had been initiated by serious failures in the assessment of its suitability for her, and of her demands and needs. Her case about these failures was primarily aimed at LLP, but alleged to have amounted to "things done (or not done)… on behalf of…" Paragon, within the meaning of Section 140A(1)(c).

7. At first sight, it might be thought the *Harrison* case had little if anything to do with the question whether conduct by a broker consisted of things done or not done "by or on behalf of" the creditor. At paragraph 4 Tomlinson LJ described the ambit of that appeal as "very narrow" and focussed only upon an alleged failure by a lender to disclose commission payments to the borrower in a transaction arranged directly with the borrower. But paragraph 1.2.3(2) of ICOB provides that:

> "Where there is a chain of *insurance intermediaries* between the *insurer* and the *customer*, *ICOB* applies only to the *insurance intermediary* in contact with the *customer*." (The italics denote defined terms)

In the context of the sale of PPI by a lender to a borrower, the lender is itself an intermediary within the meaning of ICOB, as is any broker intermediating between the lender and the borrower. In those circumstances it is the broker rather than the lender to which ICOB applies by reason of paragraph 1.2.3(2). If, as was submitted for Paragon, the "touchstone" for the identification of unfairness in a relationship created by regulated conduct is the standard imposed by the regulatory authorities, then it is at least arguable, as held by the trial judge in Mrs. Plevin's case (Ms. Recorder Yip QC) that the *Harrison* case is decisive of that question as well. It is probably for that reason that these appeals were conjoined.

8. Nonetheless, since both the relevant facts and the issues arising on appeal in the two cases are materially different in all but one respect (namely the non-disclosure of large commissions) I have not found it practicable to address the issues raised on these appeals in the abstract, leaving until the end the application of the ensuing principles to the facts of each appeal. It is necessary to address each appeal separately.

<u>Conlon v Black Horse Limited</u>

<u>The facts</u>

9. The uncontentious facts about Mrs. Conlon's transaction are set out with admirable precision and brevity in paragraphs 1 to 18 of the Recorder's judgment and need only to be summarised here. The credit agreement and associated PPI were entered into on 3rd and 4th April 2007. The amount lent was £17,500.00, to which was added the PPI single premium of £3,347.46. Leaving aside the PPI, the effect of the transaction was to repay the balance of two outstanding loans, and to provide an additional £1,267.26 to Mrs. Conlon, who was an auxiliary nurse employed by the NHS. Both the earlier loans had themselves been the subject of single premium PPI, so that those policies were both terminated early, along with their associated loans. Early termination of PPI gives rise to notoriously poor rates of premium refund.

10. The Recorder found that more than 40% of the premium was received by Black Horse as commission. Since the premium was itself lent to her by Black Horse, she would also be paying interest to Black Horse on the part of it which constituted that commission.

11. The judge accepted Mrs. Conlon's evidence (notwithstanding cross-examination) that:

> "if she had known that she would be paying Black Horse's commission with interest she would have shopped around and searched the internet for a cheaper quotation."

12. The Recorder was shown internal policy and staff training documentation disclosed by Black Horse, together with the Report on PPI by the Competition Commission, the combined effect of which led him to infer that:

> "The question as to whether to disclose the facts about commission would have been considered and decided by [Black Horse] at a high level."

and that:

> "It was decided that it was not in their own commercial interests to do so because disclosure might cause potential borrowers to decline the PPI offered and explore other options with consequent delay or disruption to the business."

We were shown a Black Horse internal policy document about PPI which stated in terms that PPI from sources not approved by Black Horse should not be financed by the company because (among other things) of a "considerable loss of commission earnings for Black Horse".

13. It is not clear in what detail the Recorder was taken to ICOB, but he was shown Judge Waksman's decision on the first appeal in the *Harrison* case in which ICOB featured, but for a different purpose than that relied upon in the Court of Appeal. His reaction to the submission that ICOB exonerated Black Horse from any obligation to disclose the commission may be found in paragraph 72.4 of his judgment:

> "In my view, the decision to withhold the facts about the commission would have brought valuable commercial advantages to the defendant but it ran contrary to good ethical practice and, when considering fairness in the present context, it is no answer to say that the defendant was not obliged to make such disclosure in law or by industry standards. The industry standards tended to benefit the industry to the potential disadvantage of consumers. I consider that Mrs. Conlon was entitled to know what she paying for."

14. Other matters of alleged unfairness had been pursued as part of Mrs. Conlon's claim, but it is clear that, by the end of the trial, the case had become focussed in substance upon the non-disclosure of commission. At paragraph 59, the Recorder said this:

> "Mr. Clark (*counsel for Mrs. Conlon*) ultimately conceded that non-disclosure of the commission is the single factor on which he rests his claim that the relationship was unfair."

My reading of the Recorder's judgment as a whole leaves me in no doubt that his decision that the relationship was unfair was indeed based in substance upon the non-disclosure of commission, although of course he viewed it in the context of all the material facts about the transaction by which the relationship had been created.

15. The Recorder's order for repayment of the amounts of instalments attributable to the PPI premium element of the credit agreement (in May 2011) was followed by the Court of Appeal's decision in the *Harrison* case in October 2011, and then by an appeal by Black Horse heard by Wilkie J on 7th November 2012. He concluded that Mrs. Conlon's case was indistinguishable from the *Harrison* case, and therefore allowed the appeal.

16. Two points of distinction from the *Harrison* case were pursued before Wilkie J, and again on appeal to this court. The first was that the Recorder's acceptance of Mrs. Conlon's evidence that, had she known the facts about the commission, she would have shopped around, was a factual finding that made all the difference. The second was that the Recorder's inference that Black Horse had been motivated by its own commercial interests in deciding not to disclose the commission was a factor separate and distinct from an assumed entitlement to rely upon ICOB.

17. The judge rejected both those points of distinction. As to the first, in the absence of the borrower positively asking for information about the commission costs, he concluded that there would be no way in which a lender could identify potential borrowers who might wish to shop around from those to whom disclosure about the commission would make no difference. He gave no specific reasons for rejecting the second point.

18. The Supreme Court gave permission to the Harrisons to appeal the Court of Appeal's decision. Thereafter, Black Horse repaid the Harrisons in full in respect of the PPI, so that appeal was not pursued. Permission to Mrs. Conlon to appeal to this court was given by Pitchford LJ as a second appeal on the express basis that the issue of law was whether the *Harrison* case was correctly decided by the Court of Appeal, although he considered it arguable whether this case was distinguishable.

19. For Mrs. Conlon, Mr. Hodge Malek QC leading Mr. James Strachan QC pursued both the points of distinction from the *Harrison* case advanced unsuccessfully before Wilkie J. In addition, Mr. Malek submitted that, in any event, it was incorrect to view the Recorder's judgment that the relationship was unfair as having been based solely upon the non-disclosure of the commission. He pointed to a number of other factors arising from the facts found by the Recorder, and from the Competition Commission's review of PPI. First, he pointed to the extraordinary feature that Mrs. Conlon subscribed for a PPI policy for the entire aggregate loan of £17,500-odd, at an additional borrowing cost of £5,800-odd (premium plus interest), when all she wanted was to borrow an additional £1,200-odd. This he said could have been achieved simply by an additional modest loan of that amount with a correspondingly much smaller PPI premium. Black Horse had, he said, taken unconscionable advantage of her by structuring the transaction as a complete refinancing.

20. Secondly, he submitted that, as found by the Competition Commission in general terms, the sale of PPI at the same time as the product which it insured (here the loan of £17,500) itself took unfair advantage of Mrs. Conlon as the consumer, an advantage described in the Competition Commission Report as the "point of sale advantage" or "POSA", which has since been banned. Further he said that a single premium PPI was inherently unfair to Mrs. Conlon, like any other consumer, because the single premium was invariably much more expensive than paying by monthly premiums. Again, single premium PPI has since been banned.

21. Taking the last of Mr. Malek's submissions first, I have not been persuaded by his eloquent focus upon these additional matters that, separately or together, they justify a conclusion that the Recorder decided the case otherwise than upon the basis of Mr. Clark's concession that non-disclosure of the commission was the single factor upon which the claim of an unfair relationship was based. There was no respondent's notice to that effect before Wilkie J. It is in my judgement too late to seek to support the

Recorder's judgment by reference to an alternative case about an unfair relationship emerging from the underlying facts, different from the sole basis upon which the Recorder based his conclusion.

22. Nor do I accept, as a relevant point of distinction with the *Harrison* case, the Recorder's finding that, had she known about the commission, Mrs. Conlon would have shopped around for cheaper PPI. The "touchstone" lying at the heart of the Court of Appeal's decision in *Harrison* was that it would be anomalous if a lender could be found to have created an unfair relationship, where there was no breach of the relevant regulatory regime, in relation to a point (whether or not to require disclosure of commission) specifically considered and decided by the framers of that regime. The evidence did not disclose that Mrs. Conlon said or did anything in her dealings with Black Horse to set herself apart from customers to whom the existence and amount of the commission was a matter of indifference. The ICOB regime exonerated Black Horse from any obligation to disclose the existence or amount of commission to its customers generally, rather than only to that invisible class to whom disclosure would have made no difference. Accordingly, like Wilkie J, I have been unable to see how this undoubted difference in underlying fact between the two cases separates Mrs. Conlon's case from the substance of this court's reasoning on this point in the *Harrison* case.

23. Finally, I have been equally unpersuaded that evidence of Black Horse's motivation makes any difference either. My reasons follow. First, it seems to me unlikely that any commercial lender would not, at the highest level, consider whether or not to disclose commission arrangements when offering single premium PPI at the point of sale. With commissions from such sales as high, and therefore profitable, as they were in both cases, it seems to me inconceivable that a perception that full disclosure might adversely affect the business can have been absent from the minds of the senior and sophisticated decision-makers. In that respect it is, in theory at least, a mere coincidence that the creditor was the same company in both cases since, as Mr. Malek points out, no evidence of its motivation was deployed or disclosed in the *Harrison* case.

24. My second reason is that, again, questions of motivation do not address the substance of the *Harrison* decision, which is based upon compliance with standards imposed by regulatory authorities which, at least in this context, appear to operate regardless of motivation.

25. It follows that I regard Mrs. Conlon's case as in substance indistinguishable from the *Harrison* case. To treat evidential differences between the two cases which do not go to the heart of the matter as sufficient to permit this court to form its own view about the point of principle decided in the *Harrison* case would, to my mind, be an illegitimate departure from the rules as to binding precedent. It would be a disservice to the requirement for legal certainty, and give rise to a welter of litigation about modest amounts, based upon fine evidential distinctions, rather than the application of clearly formulated legal principle to a statutory jurisdiction.

26. In so concluding, I do not mean thereby to express any sense of comfort about the principle laid down in the *Harrison* case. If I had been free to do so, I would have regarded a visceral instinct that the relevant conduct was beyond the Pale as a persuasive starting point in the analysis whether such conduct gave rise to an unfair

relationship, all the more so where, as the report of the Competition Commission makes plain, the standards imposed at the time by the regulatory authorities manifestly failed to prevent the abuse of point of sale single premium PPI, to an extent that it has since become a national scandal, and has been prohibited for the future. But these are questions which must be addressed, if at all, in the Supreme Court.

27. I would therefore dismiss Mrs. Conlon's appeal.

Plevin v Paragon Personal Finance Limited

The facts

28. The facts in Mrs. Plevin's case are, again, straightforward and largely uncontroversial. Because of the broader basis upon which she puts her case as to unfair relationship it is necessary to describe them in a little more detail than in relation to Mrs. Conlon.

29. Mrs. Plevin was a 61-year old widowed college lecturer, teaching hair and beauty, when she made the credit agreement in issue with Paragon on 21st March 2006. She lived on her own in a house which she had shared with her late husband. She had a mortgage and various unsecured personal debts in the form of loan and credit card borrowing. She wanted both to consolidate those debts and make some home improvements. The evidence does not suggest that she had any dependants.

30. She received an unsolicited leaflet from LLP, which was an independent finance broker regulated by ICOB in relation to insurance products, and a member of the Finance Industry Standards Association ("FISA") and thereby subject to its self-regulatory codes and disciplinary procedures, in relation to acting as a broker in lending transactions. LLP's leaflet emphasised its ability to "wrap up" a customer's existing liabilities into what it called "a LoanLine loan" at a competitive rate of interest over a long term, and offered to find for anyone completing its application form "the finance plan that's best for you".

31. In fact, Mrs. Plevin telephoned LLP on 24th February 2006, and LLP conducted a form of demands and needs assessment over the telephone, noting what it regarded as the important points on an internal standard form, including this statement:

> "After discussion you decided to take out the *Norwich Union* insurance policy providing you with the level of cover that you require."

The text was standard form, save for the reference to Norwich Union, which was added in manuscript.

32. There was no reliable evidence about the content of this oral demands and needs assessment. Mrs. Plevin could not remember much about it, and the employee of LLP who carried it out did not give evidence, LLP having by then settled with Mrs. Plevin and gone into liquidation.

33. In any event, LLP evidently considered that process to be sufficient to enable it to recommend a finance plan for Mrs. Plevin, because the essential features of it were set out in a letter from LLP to her three days later, which enclosed a policy summary in the form of a two page "key facts" document under Paragon's heading, described as a "Paragon Secured Personal Loan Payment Protection" for five-year cover. Paragon's policy was in fact underwritten by Norwich Union.

34. LLP's plan proposed that Mrs. Plevin should take a £34,000 loan from Paragon repayable over ten years, and the loan of an additional £5,780 to pay for the five year PPI. The key facts about the policy noted that it provided protection against inability to work because of sickness or accident and redundancy, and proffered an optional life cover in addition.

35. Paragon was one of a number of lenders on LLP's books, and Norwich Union was the underwriter both for Paragon's PPI policy and for the PPI policies of a number of LLP's other potential lenders. Mr. James Strachan QC for Mrs. Plevin submitted that it was an obvious inference from the manuscript inclusion of Norwich Union on the demands and needs assessment form that a finance package from Paragon was firmly in LLP's mind even during its telephone call with Mrs. Plevin. The judge made no finding about this, for reasons which will become apparent. As will appear, I do not consider that it matters precisely when LLP identified Paragon as its recommended lender for Mrs. Plevin. Plainly it had done so by 27th February.

36. Mrs. Plevin then completed and signed LLP's standard application form on 6th March and sent it to LLP, which forwarded it to Paragon. A Paragon employee then telephoned Mrs. Plevin to conduct a process known as a "Speak With". This process appears to have been mainly concerned with compliance with anti-money laundering regulations, but it enabled Paragon to ascertain directly from Mrs. Plevin that she wished to obtain a loan and associated PPI on the terms proposed to Paragon by LLP. It involved no separate appraisal by Paragon of Mrs. Plevin's demands and needs, or of the suitability of the proposed transaction for her purposes.

37. There then followed a short delay while the steps necessary to enable Mrs. Plevin to provide security for the loan by a charge over her house were completed. Nothing turns on them. The transaction was formally completed on 21st March 2006, as recorded in a letter to Mrs. Plevin from Paragon of that date which concluded by notifying her of Paragon's membership both of FISA, and of the Finance & Leasing Association ("FLA") and its policy of following their lending codes. I will have more to say about these codes later. By contrast with ICOB, which has statutory authority, they were forms of voluntary self-regulation.

38. The important features of the transaction for present purposes may be summarised as follows:

    (a) Mrs. Plevin received a PPI policy which included life cover. It was, as I have already described, a five year policy partly covering a ten year loan.

    (b) Of the PPI premium of £5,780, the underwriter Norwich Union received only £1,630. LLP was paid £1,870, and Paragon itself received commission of £2,280. Neither the existence nor the amount of these commissions was disclosed to Mrs. Plevin. She may be forgiven for having thought that a

Paragon company, rather than Norwich Union, was the insurer. In reality, the commission element of the premium was 71.8%. Viewed separately, each of Paragon and LLP received commission substantially in excess of the real cost of the PPI.

(c) It was alleged by Mrs. Plevin that, at the time of the transaction, she already had both sickness and redundancy cover by reason of the terms of her employment, and life insurance. The judge made no specific findings about this but, if true, it was a very material fact relevant to the question whether there had been a proper demands and needs assessment, or appraisal of the suitability of the transaction which was recommended to her. So is the apparent fact that Mrs Plevin had no dependants living with her. In the absence of any need to protect dependants from eviction by enforcement of Paragon's security, the question arises why it was suitable for her to take out life cover at all.

(d) Mrs. Plevin received on completion a "cashback certificate" promising repayment of the whole of the PPI premium to her if, for the whole of the ten year period of the loan, she punctually paid every instalment due.

<u>The proceedings</u>

39. Mrs. Plevin brought proceedings against both Paragon and LLP. In its final (re-amended) form, her Particulars of Claim alleged that LLP was her fiduciary agent, so that the commission which it received was an undisclosed secret profit. She alleged that LLP had failed to carry out a proper assessment of her demands and needs, or of the suitability of the recommended transaction, contrary to its regulatory obligations. Fiduciary duties, a duty of care, and duties arising under the FISA and FLA codes were alleged as against Paragon, although the long and complex pleading is deficient in setting out any clear allegations of the respects in which those codes were breached by Paragon. It was alleged that Paragon had constructive knowledge of LLP's unlawful receipt of a secret profit. Finally, and this is the only material allegation for the purposes of this appeal, it was alleged that "by reason of all the matters aforesaid" an unfair relationship existed between Plevin and Paragon, within the meaning of section 140A of the Act.

40. Mrs. Plevin's claim against LLP was compromised in February 2010, on the basis of a payment to her of £3,000 in full and final settlement. Since LLP was by then insolvent, she received that sum from the Financial Services Compensation Scheme.

41. The aggregate cost of the PPI (i.e. including interest payable to Paragon over ten years for lending the PPI premium) was £8,090.40. Giving credit for her receipt from the Compensation Fund on behalf of LLP, the net value of her continuing claim against Paragon was approximately £5,000. At the trial in early October 2013, the Recorder was understandably horrified that Mrs. Plevin's costs estimate (inclusive of 100% CFA mark-up and an ATE premium) was £320,000, and that far from the issues having been narrowed by the pleadings, her case was being presented on a multi-faceted basis in a long and complex pleading which obscured rather than identified the real issues.

42. The judge described how an overnight adjournment enabled Mr. Campbell (counsel for Mrs. Plevin) to identify and confine the legal issues to two major areas. The first was her claim under section 140A , based on conduct by LLP "on behalf of" Paragon. The second was a claim of non-compliant execution under the Act which the judge dismissed and from which there is no appeal.

The judgment

43. In a clear and concise judgment, delivered a day after the end of the hearing, the Recorder dismissed the section 140A unfair relationship claim upon, in summary, the following grounds, derived mainly from this court's decision in the *Harrison* case:

(a) As between Paragon and LLP, both regulated by ICOB, paragraph 1.2.3 clearly allocated the entire responsibility for assessment of demands, needs and suitability to LLP because, although both were intermediaries in relation to the PPI, LLP was the intermediary in contact with the customer.

(b) There was no relationship of agency between LLP and Paragon to create an alternative route for holding Paragon responsible for LLP's conduct.

(c) She therefore found it unnecessary to decide whether the allegations based upon LLP's failure to carry out a proper assessment of demands, needs or suitability were made out because, even if they had been, Paragon would have incurred no responsibility for them, as acts done or not done on its behalf within the meaning of section 140A(1)(c).

(d) As for the non-disclosure of the existence and amount of the commission, she regarded Mrs. Plevin's case as being indistinguishable from the *Harrison* case, in which, as she noted, the commission had been even larger.

(e) She dismissed a separate claim that there had been a misrepresentation to the effect that the PPI was compulsory rather than voluntary, as to which there is no appeal.

44. Finally, the judge reflected her strong disapprobation of the manner in which Mrs. Plevin's claim had been presented by making an order for indemnity costs in favour of Paragon. This is the subject of a separate ground of appeal, but we have decided to defer it until all other aspects of the appeal have been resolved.

Analysis

45. It is convenient to begin with the Recorder's approach to the commission issue. Counsel for Mrs. Plevin did not suggest that she should be regarded as being, on that issue, in any better position than Mrs. Conlon. I agree. In my judgment the *Harrison* case is indistinguishable in that respect, as the Recorder correctly held.

46. The real and important issue arising from Mrs. Plevin's appeal is whether the judge correctly interpreted the "on behalf of" part of section 140A(1)(c). It is a much more

difficult and entirely new question, at least at the Court of Appeal level, and was not directly addressed in the *Harrison* appeal, which Tomlinson LJ described (at paragraph 4) as having a very narrow ambit. It is convenient at the outset to try and distil the essence of the competing arguments, from the admirable vigour and detail with which they were presented.

47. For Paragon, Mr. Nicholas Elliott QC submitted that the general purpose of section 140A(1)(c) was to confine the examination of conduct to that of the creditor, and to extend it to that of others only where some regulatory or other responsibility of the creditor had been delegated to another or, if not, where the existence of legal liability for that other's conduct arose by reason of agency or something akin to agency. The phrase "on behalf of" was a convenient way of expressing that concept.

48. For Mrs. Plevin, Mr. Strachan submitted that the phrase "on behalf of" was designed to bring within the purview of the court's consideration any relevant act or omission by a person who, in a non-technical sense, would be viewed by the man on the Clapham omnibus as having played some part in the bringing about of the credit agreement for the creditor. Thus it typically applied to any intermediary paid a commission for introducing the customer to the creditor, or (which may be the same thing) procuring the business represented by the credit agreement (and any related agreement) for the creditor. Thus it applied to the acts and omissions of any intermediary, whether acting as agent for the creditor or as a mere broker without an agency relationship with either party to the credit agreement, at least where the broker received commission from (or via) the creditor.

49. Put shortly, the difference between the rival submissions is that Mr. Elliott submitted that "on behalf of" is designed only to capture conduct (including omissions) for which the creditor can be said to bear or share some responsibility, whereas Mr. Strachan submits that it captures all conduct beneficial to the creditor, in the sense that it played some material part in the bringing about of the transaction giving rise to the allegedly unfair relationship. Proof that the person whose conduct is prayed in aid received a commission from, or via, the creditor brings on board the whole of that person's conduct, within section 140A(1)(c).

50. There is I think a subsidiary question, which arises even if Mr. Elliott is broadly correct in his narrower interpretation. That is whether, as he submitted and the Recorder decided, paragraph 1.2.3(2) of ICOB really does absolve Paragon from any responsibility for the alleged failures of LLP to conduct a proper analysis of needs, demands and suitability, in the context of a transaction which included both a credit agreement and the sale of related insurance. That requires a close analysis of the relationship between ICOB and the two self-regulatory codes promulgated by FISA and FLA, to both of which Paragon subscribed.

51. I confess that I have not found either of these issues at all straightforward, and that my mind has changed more than once during the excellent and spirited debate about them undertaken by counsel, with no small contribution from members of the court. Taking the question of interpretation first, I have on a narrow balance finally been persuaded that Mr. Strachan's broader approach is essentially correct. My reasons follow.

52. The starting point is to interpret "on behalf of" in section 140A(1)(c) purposively, and in its context. The Act exists for the protection of consumers. The unfair relationship

regime established by sections 140A and B replaced (by amendment in the Consumer Credit Act 2006) the earlier regime for the reopening of extortionate credit bargains, which the proposers of the 2006 Bill regarded as having been too technical, and as having set the bar for court intervention too high.

53. The jurisdiction created by the new provisions is designed to enable the court to intervene upon, and put right, an unfair relationship, by reference to causative factors, introduced by the phrase "because of one or more of the following" which are, taken together, very broadly defined. Sub-section (1)(a) enables the court to take account of any of the terms of the credit agreement or of any related agreement. Sub-section (1)(b) enables the court to have regard to any aspect of the exercise or enforcement of the agreement (or related agreement) by the creditor. Leaving aside "by or on behalf of" section (1)(c) enables the court to look at any aspect of the acts and omissions of the creditor, either before or after the making of the agreement or related agreement. Thus far, the net is being cast as widely as might be thought possible. Within that large net, the relevant fish are only those which are in some sense causative of the perceived unfairness of the relationship to the debtor. That is the effect of the "because" condition. Leaving aside the *Harrison* case for one moment, it is not obvious that the language of sub-section (1) imposes any additional requirement that relevant conduct of the creditor should either be unlawful, contrary to some regulatory regime, or even blameworthy in some wider sense, save only that the quality of the conduct of the creditor may of course, on a case-by-case basis, inform the court as to whether it has in fact caused a relationship which is unfair to the debtor.

54. Next, it seems to me plain that it was no part of the purpose behind section 140A(1) to limit the court's purview of conduct to that for which the creditor incurred some legal liability to the debtor, whether under the general law, or by means of statutory recourse under an enforceable regulatory code such as ICOB. In all those circumstances the debtor would have a prima facie remedy against the creditor without having to pray in aid section 140(A) and (B) at all. In the present case, that is precisely what Mrs. Plevin succeeded in doing, but against LLP.

55. That being so, it seems to me prima facie surprising that there should be read into the "on behalf of" extension of sub-section (1)(c) an implied condition that it should limit the court's enquiry, in relation to persons other than the creditor, to conduct for which the creditor is in any event liable itself under a regulatory code, or conduct for which it is vicariously liable because the other person is the creditor's agent at law.

56. Finally, looking at section 140A(1) in its context, the imposition of the reverse burden of proof in section 140B(9) is a powerful indication of a general parliamentary intention to confer a broad rather than narrow measure of protection upon debtors, albeit in a respect which is only tangential to the question of interpretation in issue.

57. I acknowledge at once that the *Harrison* case is at least persuasive authority supportive of Mr. Elliott's narrower interpretation. If one treats as a general principle applicable to all aspects of the interpretation and application of sections 140(A) and (B) that it would be anomalous to treat as causative of an unfair relationship conduct which did not offend any legal or regulatory prohibition upon the creditor, then plainly the narrower interpretation better serves that principle than the broad one. Indeed, as the Recorder thought, it would serve it precisely.

58. It is therefore necessary to look more closely at the legal principle for which the *Harrison* case is binding authority. On its facts, the only person under any legal or regulatory obligation in relation to the transaction was the creditor itself. There was no regulated (or other) intermediary involved at all. The Court of Appeal's decision was therefore that, since the regulators had decided not to impose a commission disclosure obligation upon anyone connected with an insurance transaction, it would be anomalous to conclude that an unfair relationship had been created by conduct, (there, an omission), which would have offended no regulatory code, regardless of the person whose conduct was in issue. Put shortly, if no-one on the creditor's side of the transaction had done anything wrong, then it would be anomalous to re-open the credit agreement on the ground that it had created an unfair relationship.

59. In the present case by contrast, it was alleged, and with apparently good cause, although the Recorder felt that she did not need to decide the point, that there had been a breach of the relevant regulatory codes by LLP, a person closely involved in the transaction on the creditor's side, a person whose conduct had brought the business to Paragon, for which LLP had been handsomely paid. LLP has of course paid (or had paid on its behalf) a substantial sum in settlement of allegations that it had misconducted itself. Let it be assumed that the case of regulatory misconduct against LLP was a good one. In those circumstances the precise anomaly for the avoidance of which the *Harrison* case stands as binding authority would not have arisen, because misconduct by someone on the creditor's side of the transaction would have been established.

60. Nor does a broad interpretation of the phrase "on behalf of" necessarily lead to a result that, where such misconduct by a third person is demonstrated, the creditor invariably carries the can, by having the credit agreement (or related agreement) reopened for the purpose of putting right the unfairness of the relationship to the debtor. There are in fact two escape routes from that outcome available on a straightforward interpretation of section 140A, taken as a whole. The first is that the court may conclude that conduct "on behalf of" the creditor by a person who procures a transaction, even if blameworthy, has not in fact rendered the relationship unfair. For example, a complete failure to conduct a demand and needs assessment or to consider suitability may nonetheless be followed by a transaction leading to a relationship which is perfectly fair to the debtor.

61. The second escape route arises from the fact that the court's powers to intervene upon an unfair relationship are plainly discretionary. Section 140A(1) provides that "the Court <u>may</u> make an order… if it determines that the relationship between the creditor and the debtor… is unfair to the debtor…". There may well be cases where the conduct of some third person, for whom the creditor had no responsibility of any kind, or in respect of whose conduct the creditor conducted diligent monitoring which failed to reveal the relevant misbehaviour, renders the relationship objectively unfair, but in a way which is so divorced from any responsibility of the creditor as to make it inappropriate to grant discretionary relief. This may be, for example, because the debtor knew about the misconduct, but the creditor did not. Another example would be a case where the debtor has a perfectly adequate remedy against the third person, either because that person has some legal liability or enforceable regulatory obligation to the debtor, together with the resources with which to discharge it, such that the

court may properly leave the debtor to enforce that remedy, rather than reopen the relationship with the blameless creditor.

62. The effect of the narrow interpretation of "on behalf of" is altogether to exclude conduct of that kind from the purview of the court because, however causative of unfairness to the debtor in the relationship, it falls outside the ambit of conduct for which the creditor is responsible. The effect of the broad construction is to bring that conduct within the purview of the court, but to leave the court free to consider its causative effect, and to exercise a just discretion as to the grant of any consequential relief.

63. Faced with those alternatives, in my judgement the broad interpretation better serves the statutory purpose of sections 140A and B. But for the *Harrison* case, I would not have found it difficult to choose it in preference to the narrow construction. If the *Harrison* case is binding authority for anything outside the narrow subject matter of non-disclosed commission, it is only that sections 140A and B are not aimed at reopening a creditor-debtor relationship where there has been no legal or regulatory misconduct of any kind by anyone on the creditor's side of the transaction. It is not authority for the proposition that the requisite misconduct must be that of the creditor, or even that for which the creditor is responsible. Issues as to the responsibility of the creditor for the legal or regulatory misconduct of another person engaged in the transaction on the creditor's side of it (for example by being paid commission by or via the creditor for bringing it about) may go to causation, and to discretion, but it is not excluded from the court's purview by the phrase "on behalf of" in section 140A(1)(c).

64. Subject to one point, that conclusion is sufficient to require Mrs. Plevin's case to be remitted for a re-hearing. This is because the Recorder adopted the narrow interpretation of "on behalf of", and therefore considered it unnecessary for her to decide whether LLP had indeed failed to conduct a proper needs, demands and suitability assessment as alleged, and did not make findings of fact which would serve as a satisfactory basis for this court to decide that question in her stead.

65. The outstanding point is Mr Elliott's submission that an insuperable obstacle to the successful application of either the broad or the narrow interpretation on the facts of this case was that, at the time when LLP allegedly misconducted the demands, needs and suitability assessment, Paragon had not even been identified as the lender to whom the transaction might be introduced. How, he asked, could those alleged acts or omissions be said to have been 'on behalf of' Paragon in any meaningful sense? I do not agree. It is common for a customer to be introduced to the provider of a financial product or service after the intermediary has carried out a fully compliant demands, needs and suitability assessment, where the provider's perusal of the broker's written summary of it persuades the provider that it need not repeat the process itself. In a situation where the regulatory regime (such as the FISA Code) imposes the relevant duty to assess on both of them, there is nothing inappropriate in regarding that task as having been carried out on behalf of the provider, applying the narrower interpretation, merely because it takes place before the intermediary introduces the transaction to the provider, or even chooses the particular provider from among a panel of competitors. Where on the broader interpretation the only question is whether the intermediary is to be regarded as being on the creditor's side of the transaction, then the payment of commission by the provider to the

intermediary for having procured it will usually be sufficient to lead to a positive answer, regardless whether the relevant conduct of the intermediary occurred before of after the introduction. I say 'usually' because there may be cases where the existence of a true fiduciary agency between the customer and the intermediary shows that the intermediary is on the customer's side of the transaction, even where the intermediary is paid by a (necessarily fully disclosed) commission from the provider.

66. On the particular facts of Mrs Plevin's case, it is not at all clear that the LLP's demands and needs assessment occurred before Paragon was identified as the intended provider, although it did take place before the actual presentation of her business to Paragon. The inclusion of Norwich Union as the intended insurer on LLP's note may show that both occurred during the same telephone conversation with her. In any event the onus would be on Paragon to show otherwise.

67. I shall nonetheless address the further question which would arise if a higher court were to conclude that the narrower interpretation of "on behalf of" was to be preferred. As noted earlier, the question then is whether paragraph 1.2.3(2) of ICOB sufficiently and completely absolves Paragon of any responsibility for LLP's alleged failures in relation to demands, needs and suitability assessment, on the basis that LLP was the intermediary in the chain in contact with the customer.

68. It was not in dispute between counsel that the composite transaction at the heart of Mrs. Plevin's case fell within the purview of all three of the regulatory regimes to which I have referred, namely ICOB, FISA and FLA. ICOB was a regime made under statutory authority in relation to insurance transactions. The FISA and FLA codes were voluntary forms of self-regulation applicable primarily to lending transactions. It was not seriously suggested by Mr. Elliott that their voluntary nature meant that they could be treated either as irrelevant, or necessarily overridden by ICOB.

69. The transaction between Paragon and Mrs. Plevin was, or included, an insurance transaction in respect of which both Paragon and LLP were intermediaries (and, indeed, both paid commission as such) and a lending transaction in which Paragon was the principal, as lender, and LLP the sole intermediary. Furthermore, Paragon lent the premium for the PPI, as a distinct element of its loan to Mrs. Plevin.

70. Section 5 of the FLA's 2004 lending code ("the FLA code"), headed 'Credit brokers', required its members to monitor the activities of credit brokers with which they deal, to demand that they the observe the FLA code or (where relevant) the FISA Code, and to refuse to deal with a credit broker who is either incompetent or dishonest or who acts inconsistently with the FLA Code. Section 6, headed "Lending", required members as "responsible lenders" to "make sure that all lending… will go through a sound and proper assessment". The required elements of that assessment plainly included needs, demands and suitability.

71. The FISA Code begins with a clear definition of 'intermediaries' as meaning:

> "any firm or person involved in the procurement of business (other than as the Lender in any particular case) and includes, but is not restricted to packaging agents, brokers, master brokers, sub brokers, agents and representatives."

Although LLP was a Member of FISA (as defined) it was plainly an Intermediary between Paragon and Mrs. Plevin for the purposes of the Code.

72. Paragraph 2 of the Code of Conduct provides that:

"Where a Member accepts business from a supporting or subordinate Intermediary or Intermediaries, it will ensure that the supporting or subordinate Intermediary or Intermediaries complies with the Association's Code of Conduct…"

A series of subsequent provisions impose obligations on "Members and their Intermediaries" without distinction between them and, strikingly without any provision equivalent or even similar to paragraph 1.2.3(2) of ICOB, allocating such responsibilities exclusively to the intermediary in contact with the customer.

73. Thus, paragraph 7 imposes on members and Intermediaries an obligation to comply at all times with the principles of responsible lending. Paragraph 8 requires members and their Intermediaries at all times to act in the interests of their consumers including full consideration being given to the consumer's ability to repay and other facts including job security and other relevant matters. Paragraph 13 requires members and their Intermediaries to provide their consumers with appropriate and accurate advice which must be neither false nor misleading. Paragraph 18 provides that members and their Intermediaries must be able to demonstrate that any consolidation of existing credit, either secured or unsecured, was in the consumer's interest or was in response to the consumer's specific request. Paragraph 19 requires members and their Intermediaries not to use sales techniques relating to optional insurance products such as payment protection policies which might encourage consumers to take out such cover in inappropriate circumstances. Paragraph 28 makes provision for members and their Intermediaries to provide prospective consumers, both verbally and in writing, with full and comprehensive details of all fees or costs to be paid by them prior to any commitment being entered into.

74. The general thrust of these provisions makes no allocation of responsibility between members and their Intermediaries in relation to lending transactions. Furthermore, the monitoring obligations, and the requirement in section 6.2 of the FLA code that lenders make sure that all lending will go through a sound and proper assessment, clearly indicates, again in contrast to ICOB, that lenders have continuing responsibilities which are not discharged simply by leaving the whole of any relevant assessment, or other regulatory compliance, to an intermediary broker, even if that broker is a member of FISA and regulated by ICOB.

75. Speaking generally, monitoring is a characteristic feature attendant upon the delegation of responsibility. Thus, where a board of directors delegates responsibility for the conduct of some aspect of a company's affairs to an executive, this imposes a monitoring obligation upon the board. I accept Mr. Elliott's submission that the converse is not always true, i.e. that the existence of a monitoring obligation does not invariably mean that there has been a delegation of responsibility. Nonetheless, the express imposition of a monitoring responsibility by the lender over its credit broker under section 5 of the FLA code does seem to me at least to be at least a pointer towards the unspoken assumption that responsibility for self-regulatory compliance in relation to lending is at least shared between lender and broker rather than placed solely on the broker in contact with the customer, as under ICOB. The same

conclusion seems to me to flow unmistakably from the provisions of the FISA Code which, as I have described, impose responsibility for numerous aspects of self-regulatory compliance upon lenders and their intermediaries, without distinction between them.

76. None of this means that, where it applies, paragraph 1.2.3(2) of ICOB is simply trumped or disapplied, or even blurred, in relation to those parts of this composite transaction which consisted solely of the sale of the PPI. Nor does the imposition upon lenders and intermediaries, without distinction, of various aspects of self-regulatory conduct towards borrowers mean that, for example, both the lender and the intermediary must always conduct separate, duplicative assessments of demands, needs and suitability. Plainly, they are entitled to distribute those shared responsibilities between each other, provided that they keep a proper lookout so as to satisfy themselves that such parts of those responsibilities as each does not personally discharge, is discharged by the other.

77. In the context of a composite transaction involving elements of loan and insurance sale, it seems to me that, contrary to Mr. Elliott's submission, paragraph 1.2.3(2) of ICOB simply does not wholly exonerate Paragon from any share of responsibility for the alleged failures on the part of LLP, so as to exclude the court from a conclusion that those failings rendered the resulting creditor-debtor relationship unfair to Mrs. Plevin. Rather, it seems to me that the effect of paragraph 1.2.3(2) in this context was to allocate the 'front-line' responsibility for dealing with those matters, insofar as they related purely to the PPI part of the transaction, to LLP, but to do so by way of distribution of an overall responsibility in relation to the composite transaction as a whole which was shared between them.

78. It follows that, even had I accepted Mr. Elliott's narrower interpretation of the meaning of the phrase "on behalf of", I would not have concluded that Paragon had discharged the burden of proving that the allegations of a serious failure to conduct a proper assessment of Mrs. Plevin's needs and demands, and as to the suitability of the composite transaction for her, fell wholly outside the purview of Paragon's and LLP's shared responsibility.

79. I would therefore allow Mrs. Plevin's appeal and remit the case for a rehearing on that ground as well. I share the hope of Moses LJ that, if this decision is not to be appealed to the Supreme Court, a settlement by mediation or some other form of ADR may be achievable, having regard to the modest amount at stake.

Lord Justice Beatson :

80. I agree with the conclusion of Briggs LJ in both cases. In Mrs Conlon's case, this follows from my agreement with my Lord and with Wilkie J that Recorder Atherton's conclusion was based only on the failure of Black Horse to disclose the commission it would receive. I share the discomfort expressed by both my Lords about the state of the law in the light of the principle laid down by this court in *Harrison's* case, and their hope that the Supreme Court will be able to consider the questions raised by it.

Lord Justice Moses :

81. I agree with the conclusion of Briggs LJ in both appeals. Both appeals demonstrate the importance of giving proper force to the provisions of Section 140A of the Consumer Credit Act 1974 and permitting it to fulfil its purpose in protecting consumers. In Mrs. Conlon's appeal I agree, with reluctance, that this court is bound by *Harrison v Black Horse Limited* to conclude that in the absence of any requirement in the Insurance Conduct of Business Rules to disclose the existence of commission it was not open to Recorder Atherton to conclude that the relationship between Black Horse Limited and Mrs Conlon was unfair.

82. This is a dispiriting conclusion. It means that, until the principle identified in *Harrison* is re-examined, compliance with those Rules excuses a deliberate decision not to disclose commission, taken in circumstances where the creditor appreciated that to do so would make it unlikely that the debtor would purchase a single premium PPI policy. That this was the reason for the decision taken is made clear in the internal documents to which the Recorder drew attention (Judgment [51] and [71]-[80]).

83. Briggs LJ, following Wilkie J, has taken the view that the sole basis of the Recorder's conclusion was the failure of Black Horse to disclose the commission. Had I not understood that that was the view of both of your lordships, I would not have agreed. The judge's careful and detailed findings cover a wealth of material all of which demonstrates, to my mind, the unfairness of the relationship. Mrs Conlon is an auxiliary nurse. The Respondent is part of a major financial institution. In order to obtain an additional loan of £1267.26 she purchased a single premium PPI policy for £3347.60. It should be recalled that the loan was secured on her home in any event. 40% of the amount described as "premium", that is £1340, was commission. The premium was part of the loan. Mrs Conlon was, accordingly, paying interest on the amount of the commission. Even if, as Briggs LJ says, motivation is irrelevant [24], the Respondents' concern, as a matter of policy, not to disclose the commission reveals its own appreciation that most customers would, had they known of it, not have regarded the agreement as 'fair'. The premium paid by Mrs Conlon was three times the amount of the additional loan. Black Horse never even tried to justify the agreement despite the burden of proof imposed on the creditor by section 140B(9). I do, however, wish to emphasise my agreement that the fact that Mrs Conlon answered the hypothetical question as to whether she would have looked elsewhere had she known of the commission in the affirmative makes no difference whatever. It would be a very odd claimant who answered otherwise once the question was posed.

84. I see no point, however, in dissenting in the light of my hope that the Supreme Court, if your lordships agree, will consider this court's decision in *Harrison*. My dissent is not going to make such consideration any more likely in light of the fact that when its reliance on ICOB last appeared under threat, following the Supreme Court's grant of permission in *Harrison*, Black Horse paid the amount at stake and costs in full. It seems a pity that a concession (recorded at [59]) which only appears to have been made "ultimately", deprives this court of the opportunity to express its support of the Recorder's judgment in answering the question which the statute poses: was the relationship arising out of the agreement unfair? The value judgment which the statute requires the court to make can hardly be described as visceral, even in

circumstances where the facts are in danger of arousing indignation. Even Mr Hodge Malek QC's measured and persuasive advocacy, on behalf of Mrs Conlon, was unable to restrain a certain sense of impotence at the inability of this court to support what appears to me to have been the Recorder's own unimpeachable conclusion based on all the facts.

85. Briggs LJ's broad construction of section 140A(1)(c), does, however, fulfil the protective purpose of the section. Those who have contributed to the unfairness from which the consumer has suffered ought to be brought within its ambit. Mrs Plevin's case was bedevilled by over-complication and it is a shame that the case, in fairness to the respondent, must be remitted. I hope that, unless the respondent wishes to challenge our construction of "on behalf of" further court time may be avoided by mediation or settlement.