Analysis: *Scotland & Reast v British Credit Trust Ltd* [1]

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PAYMENT PROTECTION INSURANCE : UNFAIR RELATIONSHIPS : CONSUMER CREDIT ACT 1974 : AGENCY

Summary: *An analysis of the Court of Appeal's decision on the interpretation of the deemed agency and unfair relationship provisions of the Consumer Credit Act 1974 in Scotland & Reast v British Credit Trust Ltd.*

From the death throes of payment protection insurance ("PPI") litigation, emerged the decision in *Scotland & Reast v British Credit Trust Ltd*[2]. The decision, handed down by the Court of Appeal on 10 June 2014, was an appeal from Her Honour Judge Hampton sitting in the Leicester County Court. Although it arose in the context of a PPI claim, the sole issue was one of interpretation of the unfair relationship provisions at sections 140A – D of the Consumer Credit Act 1974 ("CCA"). Subject to the forthcoming decision of the Supreme Court in *Plevin v Paragon Finance Ltd*[3], it may therefore be of some wider import to consumers and lenders whose relationship falls within the scope of the CCA.

Background

In 2005 the Claimants purchased double-glazing financed by credit of £7430 provided by British Credit Trust Ltd ("BCT"). In addition, BCT also advanced the sum of £1330.08 for the purchase of a PPI policy. The term of the loan agreement was 10 years. Including interest charged over the term, the credit agreement required the Claimants to pay £2165.52 for the PPI. The sale of the double-glazing and the arrangement of the credit agreement were concluded by a broker, in

[1] This is an amended version of this article, replacing the draft originally uploaded in September 2014. Changes have been made to the "Analysis" section, below, following additional information received from counsel for the Claimants in the appeal.

[2] [2014] EWCA Civ 790.

[3] Expected early Michaelmas Term 2014.

this case the supplier of the double-glazing, Bowater Windows Limited t/a "Zenith Staybrite" ("Zenith"), during a visit by its salesmen to the Claimants' home. As is common, Zenith was paid a commission by BCT for its part in arranging the credit agreement.

The Claimants sued BCT in 2011, some six years later, under three heads of claim: that the credit agreement was improperly executed pursuant to the requirements of the CCA; that BCT was liable for misrepresentations made by Zenith to the Claimants; and that there was an unfair relationship between the parties. The first two heads of claim were abandoned for various reasons prior to trial, leaving only the unfair relationship for consideration at trial.

Findings at trial

At trial it was found as a fact that Zenith's salesmen mis-led the Claimants. They were informed that the PPI was a requirement of obtaining the double-glazing loan. Further it was not made clear that the PPI provided protection only for half of the 10 year term of the agreement and the salesmen failed to ascertain that both Claimants were employed by Asda with entitlement to comprehensive benefits in the event of being unable to work through illness.

It was accepted that BCT took no part in those discussions and in no way sanctioned or encouraged the mis-leading information provided by Zenith's employees. Further, it was accepted that Zenith was not BCT's agent at common law.

Consequently, HHJ Hampton concluded that Zenith had breached its obligations under the Insurance Conduct of Business ("ICOB") rules, (as then in force) to communicate in a manner that was "fair, clear and not misleading" (ICOB 2.2.3R) and to take reasonable steps to ensure the suitability of any product recommended (ICOB 4.3.1R, 4.3.2R and 4.3.6R). The Judge also found that, but for Zenith's misrepresentations, the Claimants would not have purchased the PPI.

Following on from those conclusions, it was found that there existed a statutory agency relationship between Zenith and BCT, as imposed by section 56 of the CCA. Accordingly HHJ Hampton decided that Zenith's misfeasance was relevant to BCT under section 140A as a "thing done (or not done) by, or on behalf of, the creditor". The result was an unfair relationship between the parties. Relief was granted to the Claimants pursuant to the Court's powers under section 140B by way of and order for repayment of such of the PPI premiums and contractual interest as had already been paid by them, along with an order excusing the Claimants from further payments towards the PPI element of the loan.

Conclusions of Court of Appeal

On appeal to the Court of Appeal a number of issues fell for the consideration. Most prominent amongst them was the correct interpretation of section 56(2) of the CCA and some general consideration of the proper approach to an unfair relationship claim.

The section 56 question arose as a result of the wording of section 56(1)(c) which, in conjunction with sub-section (2), has the effect of fixing a creditor with liability for antecedent negotiations "conducted by the supplier in relation to a transaction financed or proposed to the be financed…". Thus, in *Reast*, the question was whether Zenith, as the supplier of the double-glazing, were acting as the Defendant's statutory agent in respect of the PPI element of the agreement if they were not also the supplier thereof.

The Court of Appeal's answer was "yes" because, given the nature of the misrepresentations – i.e. that PPI was required to obtain the double-glazing loan – discussions regarding PPI formed part of the negotiations in respect of the transaction for which Zenith were undoubtedly the supplier. The Court of Appeal found support for that approach in *Forthright Finance Ltd v Ingate*[4]. That was a case in which discussions with a credit broker about a trade-in of Mrs Ingate's old vehicle, although arguably a separate transaction, were held to constitute part of the antecedent negotiations about the wider transaction of obtaining the new vehicle on finance. In short the purchase of the new car and/or double-glazing could not occur without discussion of the trade-in and/or PPI, such that both discussions were part of a single transaction. Although *Ingate* related to section 56(1)(b), the Court of Appeal concluded that similar considerations applied to sub-section (c) also.

In relation to the general interpretation of sections 140A – 140D, the Defendant raised a number of points arguing for a narrow reading. In the first instance it was argued that since section 75 provides a specific remedy against a creditor for misrepresentations by a supplier, it ousts such matters from the consideration under section 140A. Perhaps not unsurprisingly, the Court rejected the argument. A similar point was made in relation to the interplay between sections 56 and 140A: namely, that since section 140A(3) specifically provides for attribution to the creditor of responsibility for the acts of others through the concept of "an associate", accordingly deemed agency under section 56(2) ought not to be taken into account. Again the Court of Appeal dismissed the argument. Kitchin L.J. concluded that the words "by or on behalf of" in section 140A are

> 'entirely apposite to include antecedent negotiations falling within section 56(1)(c) and which have been conducted by the supplier as an agent of the creditor."[5]

A limitation argument was also raised on behalf of BCT that where a misrepresentation claim was statute barred it should not be made through the back door as part of an assessment of fairness. The Defendant's counsel drew a comparison with connected lender liability under

[4] [1997] 4 All ER 90.

[5] Paragraph 74.

section 75 of the CCA, where a creditor can avail itself of any defence which would also have been available to the supplier (including limitation). However, the Court of Appeal rejected the submission on the basis that, under section 140A, the relevant focus of enquiry was the parties' ongoing relationship, which may require consideration of matters that occurred outside the relevant limitation period. The Court cited with approval the well-established decision of Mr. George Leggatt QC (as he then was) in *Patel v Patel*[6].

However, perhaps the most interesting aspects of the decision relate to the relationship between the ICOB rules and the unfair relationship provisions, and the assessment of fairness more broadly.

In relation to ICOB versus section 140A it was argued for the Defendant that, since ICOB imposed no obligation on it, Zenith's breaches thereof should not go towards the court's consideration of whether there was an unfair relationship. Echoing the words of His Honour Judge Waksman QC in *Harrison v Black Horse Ltd*[7] that an unfair relationship is "classically an exercise for the Judge at first instance"[8], the Court of Appeal accepted that ICOB had no application to the Defendant but considered that HHJ Hampton could not be criticised for taking into account Zenith's failures. That was particularly so where there existed a statutory agency relationship between them and section 140A expressly empowered the court to consider things done "by (or on behalf of) the creditor".

As to the general approach, Kitchin L.J. commented that section 140A

> 'necessarily involves a consideration of the position of the debtor and that of the creditor. Further, if there are matters relied upon by the debtor which point to the relationship being unfair the court must clearly take into account any countervailing factors or other matters which put those matters relied upon by the debtor into perspective and so may affect the assessment… In my judgment, it is not incumbent upon the court carried out the assessment to identify all those matters which do not affect the assessment one way or the other, and yet that, it seems to me, is what [counsel for BCT] is criticising the Judge for failing to do.'

Accordingly, BCT's appeal was dismissed in what, on any view, must be considered fairly strident terms.

[6] [2009] EWHC 3264.

[7] [2011] CTLC 1.

[8] At paragraph 50.

Analysis of the decision

What then is the consequence of the *Reast* decision? In relation to the unfair relationship provisions of the CCA the answer is, for two reasons, likely to be very little. In the first instance, *Reast* was, first and foremost, a PPI claim, most of which have now disappeared as quickly as they arrived. Secondly, in the County Court, where the vast majority of unfair relationship claims are heard, the forthcoming Supreme Court decision in *Plevin v Paragon Finance* is likely to provide the single most authoritative interpretation of sections 140A to 140D of the CCA.

Nevertheless the judgment does provide some salutary lessons, as well as clarifying previously ambiguous points of interpretation.

Perhaps the first point – if it were not already obvious – is that CCA litigation is very much a specialist art littered with potential pitfalls. That much is demonstrated by the slightly piecemeal fashion in which the case appears to have been argued, in particular on behalf of BCT. At paragraphs [19] to [22] the Court summarised the slightly convoluted course of the appeal:

> '19. Following the hearing but before judgment we drew to the attention of the parties the decision of this court in *Jarrett v Barclays Bank plc* [1999] QB 1 to which we had not been referred at the hearing but which we considered had a bearing on Mr Tolley's submissions. For their part, the parties themselves filed further written submissions, dealing not only with the decision in *Jarrett* but also with two other potentially relevant decisions to which, once again, neither party had made reference at the hearing, one being the decision of this court in *Forthright Finance Ltd v Ingate (Carlyle Finance Ltd, third party)* [1997] 4 All ER 99 and the other that of Gray J in *Black Horse Ltd v Langford* [2007] EWHC 907, [2007] RTR 38.
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> 20. These further cases prompted Mr Tolley to review the underlying statutory basis for the asserted application of s.56(2) and to argue that careful analysis of s.56 together with ss.11 and 12 of the Act made clear that there was never a debtor-creditor-supplier agreement within the meaning of s.12(b) in respect of the PPI, and that the only relevant negotiations for the purposes of s.56(2) were those conducted by Zenith in relation to the supply of the windows and doors. Accordingly, he continued, there could be no question of attributing any misrepresentation concerning the PPI to BCT.
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> 21. Then, on 16 December 2013, a different constitution of this court gave judgment in the case of *Plevin v Paragon Finance* [2013] EWCA Civ 1658. This is of direct relevance to the present appeal…
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> 22. In light of these developments we invited the parties to file further comprehensive written submissions dealing with all of these new issues together with those addressed in their original skeleton arguments…'

In particular the *Ingate* decision proved highly influential on the section 56 point, and is a case which has often proved an obstacle for lenders when defending similar claims. However, the most obvious basis on which to avoid the effect of that authority – seemingly not raised on behalf of BCT in *Reast* – is a "multiple agreement" argument relying upon section 18 of the CCA. (For its successful application see *Murray v Black Horse Ltd & Brownhills Motorhomes (Newark) Ltd*[9]).

In effect, the argument runs that the primary credit (in this case for the double-glazing) and the credit for the ancillary product (in this case the PPI), should be viewed as separate agreements under the CCA because, pursuant to section 18(1), the terms of the agreement "are such as – (a) to place part of it within one category of agreement mentioned in this Act, and another part of it within a different category of agreements so mentioned, or within a category of agreement not so mentioned…".

The argument best operates in relation to hire-purchase agreements where it is obvious that a loan agreement in respect of some ancillary product/service must be categorised differently to the hire-purchase of goods. However, the argument may also be available – subject to its terms – in respect of any given regulated credit agreement.

The consequence of a successful multiple agreement argument is that there is no room for deemed agency under section 56(1)(c) since the concept of "supplier" under the CCA is linked to a specific agreement (see section 11(1)(b)).

Furthermore, *Reast* provides clarification on the interplay between limitation and a claim under section 140A of the CCA. At County Court level, an argument that the unfair relationship provisions should not be used to avoid the effect of limitation on tortious or contractual claims, has largely been judge-dependent. Some district judges have taken the view such a claim would be abusive and inappropriate and therefore struck out at an early juncture, while others have taken an approach similar to that taken by the Court of Appeal. Now, however, the argument – at least at an interlocutory stage – is not available.

However, the failure of such an argument does not prevent a different trial judge from considering limitation as a circumstance mitigating against an unfair relationship finding. BCT's argument in *Reast* was simply that matters which could otherwise form the basis for a statute-barred claim should not be taken into account in an unfair relationship claim, i.e. that HHJ Hampton's approach was wrong per se. The Court of Appeal's dismissal of that general proposition cannot and should not be taken to somehow overrule the general approach laid out by HHJ Waksman QC in *Harrison* (see above). For example, limitation may be relevant to an unfair relationship claim on the basis that since the customer had not bothered raising

[9] [2012] EW Misc 10 (CC).

misrepresentation within the applicable six year period, it does not now become them to claim the misrepresentation gives rise to unfairness in the parties' relationship.

Finally, the Court of Appeal also clarified the approach under section 140A generally. In particular, the reminder (set out above) that a trial judge is not obliged to identify every possible issue and to categorise it as "for", "against" or "irrelevant to" an unfair relationship. The scope of the court's enquiry is limited to considering points raised as giving rise to unfairness and any countervailing considerations raised on behalf of the creditor. Nevertheless, that guidance cannot be taken to supersede a court's general obligation pursuant to section 140A(2) to "have regard to all matters it thinks relevant…", which potentially empowers it to raise any matter of its own volition as being relevant to the fairness or otherwise of the parties' relationship.