Michaelmas Term
[2014] UKSC 61
On appeal from: 2013 EWCA Civ 1658

JUDGMENT

Plevin (Respondent)
v
Paragon Personal Finance Limited (Appellant)

before

Lady Hale, Deputy President
Lord Clarke
Lord Sumption
Lord Carnwath
Lord Hodge

JUDGMENT GIVEN ON

12 November 2014

Heard on 11 and 12 June 2014

Appellant	*Respondent*
Jonathan Crow QC	Hodge Malek QC
Ian Wilson	James Strachan QC
Sandy Phipps	John Campbell
(Instructed by Irwin Mitchell LLP)	(Instructed by Miller Gardner Solicitors)

LORD SUMPTION: (with whom Lady Hale, Lord Clarke, Lord Carnwath and Lord Hodge agree)

Introduction

1. Payment Protection Insurance (or "PPI") is sold to borrowers to cover the repayment of specified borrowings upon the occurrence of an insured event, generally sickness, accidental injury, or unemployment. In its report, *Market Investigation into Payment Protection Insurance* (29 January 2009), the Competition Commission recorded that PPI was commonly sold as part of a package with the loan itself, and in those cases usually provided for a single premium to be paid upfront at the time of the transaction and added to the amount borrowed. Commissions payable to intermediaries were high, typically between 50 and 80 per cent of gross written premium for policies sold in connection with a personal loan. These levels of commission were much higher than those payable for introducing the loan itself, which meant that a large proportion of the profits of loan brokers was derived from selling PPI policies. The Commission found that the market for PPI sold as a package with loans was characterised by limited competition and low levels of substitutability, and that these factors resulted in high premiums relative to what would be expected in a well-functioning market. They made a number of recommendations, including a prohibition of selling PPI in a package with the loan and a prohibition on single premium policies. These recommendations have since been adopted.

2. Sections 140A to 140D of the Consumer Credit Act 1974 confer wide powers on the court to reopen unfair credit transactions. This appeal is about the application of those provisions to a PPI policy issued in 2006 to Mrs Susan Plevin.

3. Mrs Plevin was then a widowed college lecturer of fifty-nine living in her own house, with a mortgage and various unsecured personal debts. She responded to an unsolicited leaflet put through her letter box by an independent credit broker called LLP Processing (UK) Ltd, which has since gone into liquidation. They offered to arrange the refinancing of her existing liabilities at a competitive rate of interest over a long term, secured on her home. She telephoned LLP and told them that she was interested in borrowing money to pay off her existing debts and fund some home improvements. During the call, LLP completed an internal form called a "Demands and Needs Statement" on the basis of information provided by

her. They then proposed that she should borrow £34,000 from Paragon Personal Finance Ltd, repayable in instalments over ten years, and take out PPI for five years with Norwich Union. The PPI premium was £5,780, which was payable at the outset and added to the amount of the loan making a total borrowing of £39,780. Paragon was one of eleven lenders with whom LLP had arrangements to introduce clients. These arrangements allowed them to input details of the proposed loan into a Paragon computer system and obtain a preliminary indication of whether the transaction was likely to be acceptable. Each lender had an arrangement with a designated insurer who underwrote PPI policies associated with its loans. Norwich Union was the insurer designated by Paragon.

4. After the telephone conversation, LLP sent Mrs Plevin a letter recording their proposal, and quoting a premium for PPI cover at £5,780. It enclosed a "Key Facts" document describing the insurance cover, a "Borrower Information Guide" produced by the Finance Industry Standards Association ("FISA") and an application form. The application form, which Mrs Plevin completed and dated 6 March 2006, recorded brief details of her income and outgoings, including her current mortgage, and that she wished to borrow £34,000 and buy a PPI policy. The form was returned to LLP.

5. Subsequently, she was telephoned by an employee of Paragon. This call was made in accordance with a standard internal procedure and was known as a "speak with". It resulted in the generation within Paragon of a computerised form headed "Money Laundering Details". The body of the form confirms what the title would lead one to expect, namely that it is concerned with satisfying Paragon's obligations under the money-laundering legislation and regulations. It established Mrs Plevin's identity, that she had applied for the loan in the amount stated in the application form, the purpose for which she required it and the amount and date of the first payment. It also confirmed that no upfront application fee had been charged by LLP, which would have been contrary to the FISA code of practice. The "speak with" was not intended to appraise the suitability of the transaction for Mrs Plevin's purposes. On 21 March 2006, Paragon sent her a copy of the credit agreement, the PPI certificate and four cheques, three of which were payable to her designated creditors and the fourth to her personally. These were the only instances of direct contact between Mrs Plevin and Paragon.

6. Of the £5,780 premium, 71.8% was taken in commissions from the premium before it was remitted by Paragon to Norwich Union. LLP received £1,870 and Paragon retained £2,280. The net sum of £1,630 was then remitted by Paragon to Norwich Union. The FISA borrowers' guide told Mrs Plevin that "commission is paid by the lending company". But neither the amount of the commission nor the identity of the recipients was disclosed.

Sections 140A to 140C: General considerations

7. These provisions were added to the Consumer Credit Act 1974 by sections 19-22 of the Consumer Credit Act 2006. They replaced provisions which had conferred a limited power to reopen "extortionate credit bargains" (sections 137-140 of the 1974 Act) but set too high a bar to debtors and sureties wishing to challenge the terms of their agreements. The new provisions came into force on 6 April 2007, after the agreement with Mrs Plevin was made, but they apply by virtue of the transitional provisions of Schedule 3 of the Act.

8. Section 140A provides, so far as relevant, as follows:

> "140A Unfair relationships between creditors and debtors
>
> (1) 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 agreement;
>
> (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).
>
> (2) 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).
>
> (3) For the purposes of this section the court shall (except to the extent that it is not appropriate to do so) treat anything done (or not done) by, or on behalf of, or in relation to, an associate

or a former associate of the creditor as if done (or not done) by, or on behalf of, or in relation to, the creditor."

9. Section 140B(9) provides that where the debtor (or a surety) alleges that the relationship is unfair, it is for the creditor to prove that it is not. Section 140B lists the orders which a court may make if it finds the debtor-creditor relationship to be unfair including, under subsection (1)(a) an order requiring "the creditor… to repay (in whole or in part) any sum paid by the debtor ... by virtue of the agreement or any related agreement…".

10. Section 140A is deliberately framed in wide terms with very little in the way of guidance about the criteria for its application, such as is to be found in other provisions of the Act conferring discretionary powers on the courts. It is not possible to state a precise or universal test for its application, which must depend on the court's judgment of all the relevant facts. Some general points may, however, be made. First, what must be unfair is the relationship between the debtor and the creditor. In a case like the present one, where the terms themselves are not intrinsically unfair, this will often be because the relationship is so one-sided as substantially to limit the debtor's ability to choose. Secondly, although the court is concerned with hardship to the debtor, subsection 140A(2) envisages that matters relating to the creditor or the debtor may also be relevant. There may be features of the transaction which operate harshly against the debtor but it does not necessarily follow that the relationship is unfair. These features may be required in order to protect what the court regards as a legitimate interest of the creditor. Thirdly, the alleged unfairness must arise from one of the three categories of cause listed at sub paras (a) to (c). Fourthly, the great majority of relationships between commercial lenders and private borrowers are probably characterised by large differences of financial knowledge and expertise. It is an inherently unequal relationship. But it cannot have been Parliament's intention that the generality of such relationships should be liable to be reopened for that reason alone.

The proceedings

11. In January 2009, Mrs Plevin brought proceedings against LLP and Paragon. As against LLP, she claimed damages or equitable compensation on the basis that they were in breach of their duties as her fiduciary agents. Nothing more needs to be said about that. The claim against LLP was settled in 2010 for £3,000, which was ultimately paid from the Financial Services Compensation Scheme. As against Paragon, the pleaded case was described by Recorder Yip QC as "grossly over-complicated" (para 11), but the issues were narrowed in the course of the trial and some of them fell away in the light of

the Recorder's findings of fact. The main point taken on Mrs Plevin's behalf, and the only one still in issue, is that so far as it related to the PPI policy Mrs Plevin's relationship with Paragon was unfair within the meaning of section 140A(1)(c) of the Consumer Credit Act, because of something "done (or not done) by, or on behalf of, the creditor". The unfairness was said to arise from (i) the non-disclosure of the amount of the commissions, (ii) the failure of any of those involved to assess and advise upon the suitability of the PPI for her needs, given that it covered only half the term of the loan, that she had no dependents, that she already had life insurance and that her terms of employment included generous sickness and redundancy benefits. So far as these two matters represented defaults on the part of LLP, Mrs Plevin's case was that LLP committed the defaults "on behalf of" Paragon.

The regulatory framework

12. The sale and administration of general insurance and non-investment life business is now a heavily regulated field. The conduct of insurance intermediaries is governed by a statutory scheme which implements the Directive 2002/92/EC on Insurance Mediation. The relevant parts of the scheme were at the time of this transaction contained in the Insurance Conduct of Business Rules ("ICOB") made by the Financial Services Authority under powers conferred by the Financial Services and Markets Act 2000. These rules created duties owed directly by the provider of the service to the insured, actionable under what was then section 150 of the Act. I shall refer to them in the form in which they stood at the time of Mrs Plevin's transaction.

13. For the purpose of the rules an "insurance intermediary" means "any natural or legal person who, for remuneration, takes up or pursues insurance mediation". Insurance mediation includes "the activities of introducing, proposing or carrying out other work preparatory to the conclusion of contracts of insurance, or of concluding such contracts" (article 2 of the Directive). In this case, both LLP and Paragon acted as insurance intermediaries, LLP because it proposed the PPI policy to Mrs Plevin and carried out work preparatory to its conclusion, and Paragon because it arranged the contract with Norwich Union pursuant to its existing arrangements with them. However, the rules do not necessarily apply to all insurance intermediaries involved in a particular transaction. ICOB 1.2.3(2) provides:

> "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 question who is “in contact with the customer” may admit of more than one answer, depending on what the relevant ICOB obligation is and who performed the corresponding function. For most purposes, the intermediary in contact with Mrs Plevin in this case was LLP. The only direct contact that she had with Paragon before the contract was concluded consisted in the “speak with”.

Non-disclosure of the commission arrangements

14. Article 12 of the Insurance Mediation Directive requires the disclosure by an insurance intermediary of certain minimum categories of information, which do not include commissions. The disclosure requirements under the ICOB rules are more extensive. ICOB 4.6.1 requires the disclosure by an insurance intermediary which is not itself an insurer of commissions receivable by it or its associates, but only to commercial customers and then only if the customer asks for the information. The ICOB rules do not require an insurance intermediary to volunteer the amount or even the existence of commissions, or to disclose this information even on request to a non-commercial customer. The only disclosure obligations owed to non-commercial customers are those arising under the general law. ICOB 4.6.2 points out that where the insurance intermediary is the agent of the insured, he may have an obligation under the general law to tell a customer of whatever description about commissions if asked, but it imposes no corresponding statutory obligation.

15. It is clear that the absence of a statutory obligation to disclose commissions to a non-commercial customer resulted from a considered policy of the Financial Services Authority. The Authority’s Consultation Paper No 160, published in December 2002, at para 11.7 gave two reasons why it thought that commission disclosure “may not be necessary”. The first was that the purchase of insurance was different from the purchase of investments, because when the customer is laying out money for investment he needs to know how much of his money is being invested, whereas when he is buying an insurance contract he knows what he is getting because the premium and the cover are disclosed. In effect, the Authority was saying that commissions in an insurance transaction are simply a marketing cost of the supplier, like the cost of advertising or employing a sales force, and are no more relevant than any other part of its costs. The Authority’s second reason was that customers tend to shop around for insurance and can compare policies and spot poor value products. Where (as in this case) insurance was sold as part of a package with other services, the scope for shopping around is diminished, but consumers would be sufficiently protected by requiring the premium to be separately disclosed. It added that commissions were not always straightforward to calculate, especially when there was a number of intermediaries involved, and that their disclosure might cause confusion or

"information overload". In its Consultation Paper No 187 (June 2003) reporting on the outcome of the consultation, the Authority maintained its position.

16. The current leading case on the relationship between section 140A and the ICOB rules is the decision of the Court of Appeal in *Harrison v Black Horse Ltd* [2012] Lloyd's Rep IR 521. The Court of Appeal considered an application by a borrower under section 140A to recover the single premium paid on a PPI policy sold with a loan. There was no credit broker involved. The borrower dealt directly with the lender, who acted as an intermediary with the insurer. The commission taken by the lender was 87%. Tomlinson LJ, delivering the only reasoned judgment, described this level of commission as "quite startling", adding that there would be "many who would regard it as unacceptable conduct on the part of lending institutions to have profited in this way". But he declined to find that the relationship was thereby rendered unfair, because the lender had committed no breach of the ICOB rules either in charging the commission or in failing to disclose it. At para 58, he said:

> "…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 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."

The result of this decision was that in the present case both the Recorder and the Court of Appeal were bound to dismiss Mrs Plevin's claim so far as it was based on non-disclosure of the commission. The Court of Appeal expressed dismay at this outcome. In my opinion, the dismay was justified. I think that *Harrison* was wrongly decided.

17. The view which a 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. But they cannot be determinative of the question posed by section 140A, because they are doing different things. The fundamental difference is that the ICOB rules impose obligations on insurers

and insurance intermediaries. Section 140A, by comparison, 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. There are other differences, which flow from this. The ICOB rules impose a minimum standard of conduct applicable in a wide range of situations, enforceable by action and sounding in damages. Section 140A introduces a broader test of fairness applied to the particular debtor-creditor relationship, which may lead to the transaction being reopened as a matter of judicial discretion. The standard of conduct required of practitioners by the ICOB rules is laid down in advance by the Financial Services Authority (now the Financial Conduct Authority), whereas the standard of fairness in a debtor-creditor relationship is a matter for the court, on which it must make its own assessment. Most of the ICOB rules, including those relating to the disclosure of commission, impose hard-edged requirements, whereas the question of fairness involves a large element of forensic judgment. 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.

18. I turn therefore to the question whether the non-disclosure of the commissions payable out of Mrs Plevin's PPI premium made her relationship with Paragon unfair. In my opinion, it did. 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. It is a question of degree. Mrs Plevin must be taken to have known that some commission would be payable to intermediaries out of the premium before it reached the insurer. The fact was stated in the FISA borrowers' guide and, given that she was not paying LLP for their services, there was no other way that they could have been remunerated. But at some point commissions may become so large that the relationship cannot be regarded as fair if the customer is kept in ignorance. At what point is difficult to say, but wherever the tipping point may lie the commissions paid in this case are a long way beyond it. Mrs Plevin's evidence, as recorded by the Recorder, was that if she had known that 71.8% of the premium would be paid out in commissions, she would have "certainly questioned this." I do not find that evidence surprising. The information was of critical relevance. Of course, had she shopped around, she would not necessarily have got better terms. As the Competition

Commission's report suggests, this was not a competitive market. But Mrs Plevin did not have to take PPI at all. Any reasonable person in her position who was told that more than two thirds of the premium was going to intermediaries, would be bound to question whether the insurance represented value for money, and whether it was a sensible transaction to enter into. The fact that she was left in ignorance in my opinion made the relationship unfair.

19. The next question is whether that state of affairs arose from something done or not done by or on behalf of Paragon. For this purpose it is enough to consider the acts or omissions of Paragon itself, without exploring the conduct of others acting on its behalf. Paragon owed no legal duty to Mrs Plevin under the ICOB rules to disclose the commissions and, not being her agent or adviser, they owed no such duty under the general law either. However, as I have already pointed out, the question which arises under section 140A(1)(c) is not whether there was a legal duty to disclose the commissions. It is whether the unfairness arising from their non-disclosure was due to something done or not done by Paragon. Where the creditor has done a positive act which makes the relationship unfair, this gives rise to no particular conceptual difficulty. But the concept of causing a relationship to be unfair by not doing something is more problematical. It necessarily implies that the Act treats the creditor as being responsible for the unfairness which results from his inaction, even if that responsibility falls short of a legal duty. What is it that engages that responsibility? Bearing in mind the breadth of section 140A and the incidence of the burden of proof according to section 140B(9), the creditor must normally be regarded as responsible for an omission making his relationship with the debtor unfair if he fails to take such steps as (i) it would be reasonable to expect the creditor or someone acting on his behalf to take in the interests of fairness, and (ii) would have removed the source of that unfairness or mitigated its consequences so that the relationship as a whole can no longer be regarded as unfair.

20. On that footing, I think it clear that the unfairness which arose from the non-disclosure of the amount of the commissions was the responsibility of Paragon. Paragon were the only party who must necessarily have known the size of both commissions. They could have disclosed them to Mrs Plevin. Given its significance for her decision, I consider that in the interests of fairness it would have been reasonable to expect them to do so. Had they done so this particular source of unfairness would have been removed because Mrs Plevin would then have been able to make a properly informed judgment about the value of the PPI policy. This is sufficiently demonstrated by her evidence that she would have questioned the commissions if she had known about them, even if the evidence does not establish what decision she would ultimately have made.

Failure to assess the suitability of PPI for Mrs Plevin's needs

21. ICOB 4.3.1 provides:

> "Requirements for suitability
>
> (1) An insurance intermediary must take reasonable steps to ensure that, if in the course of insurance mediation activities it makes any personal recommendation to a customer to buy or sell a non-investment insurance contract, the personal recommendation is suitable for the customer's demands and needs at the time the personal recommendation is made.
>
> (2) The personal recommendation in (1) must be based on the scope of the service disclosed in accordance with ICOB 4.2.8 R(6).
>
> (3) An insurance intermediary may make a personal recommendation of a non-investment insurance contract that does not meet all of the customer's demands and needs, provided that:
>
> there is no non-investment insurance contract within the insurance intermediary's scope, as determined by ICOB 4.2.8 R(6), that meets all of the customer's demands and needs; and
>
> the insurance intermediary identifies to the customer, at the point at which the personal recommendation is made, the demands and needs that are not met by the contract that it personally recommends."

22. ICOB 4.3.2 provides:

> "Information about the customer's demands and needs
>
> In assessing the customer's demands and needs, the insurance intermediary must:

> (1) seek such information about the customer's circumstances and objectives as might reasonably be expected to be relevant in enabling the insurance intermediary to identify the customer's requirements. This must include any facts that would affect the type of insurance recommended, such as any relevant existing insurance;
>
> (2) have regard to any relevant details about the customer that are readily available and accessible to the insurance intermediary, for example, in respect of other contracts of insurance on which the insurance intermediary has provided advice or information; and
>
> (3) explain to the customer his duty to disclose all circumstances material to the insurance and the consequences of any failure to make such a disclosure, both before the non-investment insurance contract commences and throughout the duration of the contract; and take account of the information that the customer discloses".

23. The obligation under ICOB 4.3.1 and 4.3.2 arises where a "personal recommendation" to buy an insurance contract is made by an insurance intermediary. For that purpose, the relevant intermediary in Mrs Plevin's case was LLP, which was the only party that made a personal recommendation to her. Moreover, LLP was the only intermediary in the chain in contact with her for this purpose. It follows that ICOB 4.3.1 applied in this transaction only to LLP. It did not apply to Paragon. Nor did Paragon owe any other legal duty to assess Mrs Plevin's needs and advise her on the suitability of PPI for her.

24. The Recorder thought that that was the end of the matter and dismissed this part of Mrs Plevin's claim along with the rest of it. I think that that was an error. Two further questions arose. The first was whether it was reasonable in the interests of fairness to expect Paragon to assess Mrs Plevin's needs themselves, notwithstanding the absence of any legal obligation to do so. Neither the Recorder nor the Court of Appeal addressed that question because they were bound by *Harrison* to treat the absence of a regulatory duty as conclusive. The second question, which arose whether or not *Harrison* was rightly decided, was whether in the relevant respects LLP, who undoubtedly did have a regulatory duty to assess Mrs Plevin's needs, were acting on behalf of Paragon for the purpose of section 140A(1)(c).

25. I approach both questions on the footing that beyond a point, inequality of financial expertise as between the debtor and the creditor is capable of making their relationship unfair. The provision to a financially unsophisticated debtor of bad advice or no advice about the suitability of a relatively complex product like PPI will commonly result in a one-sided relationship substantially limiting the debtor's ability to choose. I shall assume for present purposes that that was true of Mrs Plevin's case, although the Recorder made no findings of fact about it.

26. Even on that assumption, however, I consider that Paragon could not reasonably have been expected in the interests of fairness to conduct their own needs assessment and give Mrs Plevin advice about it. Although the absence of a regulatory duty is not conclusive, in this particular context it is highly relevant. In relation to the disclosure of commissions, the ICOB rules impose no duty on any one. By comparison it does impose a duty to assess and advise upon the suitability of the product, but assigns that duty to LLP as the party dealing directly with the customer. I do not think that Paragon could reasonably have been expected to perform a function which the relevant statutory code of regulation expressly assigned to someone else.

27. The real question is therefore the second one, namely whether the acts or omissions of LLP were done (or not done) "on behalf of" Paragon. The Court of Appeal [2014] Bus LR 553 considered that they were. Briggs LJ, in a judgment with which Moses and Beatson LJJ agreed, accepted an argument advanced on behalf of Mrs Plevin which he summarised as follows:

> "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) …"

28. Briggs LJ's reason for preferring Mr Strachan's argument was, in summary, that any limitation of section 140A(1)(c) to acts or omissions for which the creditor was personally or vicariously responsible would imply that the subsection extended only to breaches of duty under the ICOB rules or the general law. Since the creditor would be legally liable for those anyway, even without section 140A, Mr Elliott's argument would give section 140A very little additional effect. Briggs LJ considered that unfairness did not have to arise from a breach of duty. He therefore rejected what he called the "narrower" view of the words "by or behalf of the creditor" advanced on behalf of Paragon. I am afraid that I do not understand this. What limited section 140A(1)(c) to cases of breach of duty was not Mr Elliott's argument, but the decision of the Court of Appeal in *Harrison* that the ICOB rules were the "touchstone" of unfairness. It will be apparent from what I have already said that I agree with Briggs LJ that unfairness in section 140A does not have to involve a breach of duty. But I do not follow why it should be thought inconsistent with that to limit section 140A(1)(c) to cases where the relevant act or omission engages the responsibility of the creditor. If the section is limited in that way, the creditor is still responsible for acts or omissions making the relationship unfair, whether or not it is also a breach of duty.

29. This particular misconception on the part of the Court of Appeal seems to me to have distracted them from the language of the section and its place in the broader scheme of the Act. These seem to me to be very clear. Section 140A was undoubtedly intended to introduce a broad definition of unfairness, in place of the narrowly framed provisions which had previously governed extortionate credit bargains. That much is clear from section 140A(1)(c), whose effect is to extend the concept of unfairness beyond cases where the terms or the way that the creditor applied them makes the relationship unfair. Under that subsection, it extends to any case whatever in which human action (or inaction) produces unfairness. The only limitation on the extreme breadth of sub-paragraph (c) is that the action or inaction in question must be "by or on behalf of the creditor". Putting the matter at its very lowest, those words

envisage a relationship between the creditor and the person whose acts or omissions have made the relationship unfair. If it had been intended to extend the sub-paragraph to any conduct beneficial to the creditor or contributing to bringing about the transaction, irrespective of that person's relationship with the creditor, it would have been easy enough to say so, and very strange to use the language which the legislator actually employed.

30. In their ordinary and natural meaning the words "on behalf of" import agency, which is how the courts have ordinarily construed them: see *Gaspet Ltd v Elliss (Inspector of Taxes)* [1985] 1 WLR 1214, 1220 (Peter Gibson J); *Clixby v Pountney (Inspector of Taxes)* [1968] Ch 719, at paras 728-729 (Cross J). I would accept that a special statutory or contractual context may require the phrase "on behalf of" to be read more widely as meaning "in the place of", or "for the benefit of" or "in the interests of": see *R (Cherwell District Council) v First Secretary of State* [2005] 1 WLR 1128 at para. 56 (Chadwick LJ); *R(S) v Social Security Commissioner* [2010] PTSR 1785, at paras 27-28; *Rochdale Metropolitan Borough Council v Dixon* [2012] PTSR 1336, at paras 49-50 (Rix J). But there is nothing in the present statutory context to suggest any of these wider meanings, and much that is inconsistent with them. In the first place, the full phrase is "by or on behalf of the creditor". In other words, acts or omissions "on behalf of" the creditor are treated as equivalent to acts or omissions "by" the creditor. They refer to things done or not done either by the creditor itself, or by someone else whose acts or omissions engaged the creditor's responsibility as if the creditor had done or not done it itself. They indicate as clearly as language can do that sub-paragraph (c) applies only where the "thing" is done or not done by someone whose acts or omissions engage the responsibility of the creditor. They are used in the same sense throughout the Consumer Credit Act whenever it refers to some act such as the execution of a document or the receipt of a notice or the occurrence of any other act which the legislator intends to engage the responsibility of the creditor.

31. Secondly, the Consumer Credit Act makes extensive use of the technique of imputing responsibility to the creditor for the acts or omissions of other parties who are not (or not necessarily) the creditor's agents. But when it does this it invariably does it in express and clear terms. A notable example appears in section 140A itself. Subsection (3) is ancillary to subsection (1)(c). It provides that things done or not done by an associate or former associate of the creditor are to be treated as if they were done or not done "by, or on behalf of, or in relation to, the creditor". An "associate" includes certain categories of relative or, in relation to a body corporate, its controller or another body corporate under common control: see section 184. This provision is pointless except on the footing that otherwise subsection (1)(c) would have been confined to the acts of the creditor or his agents. More

generally, section 56 provides that where antecedent negotiations for a debtor-creditor-supplier agreement are conducted by a credit-broker or the supplier, the negotiations are "deemed to be conducted by the negotiator in the capacity of agent of the creditor as well as in his actual capacity". The result is that the debtor's statutory rights of withdrawal from prospective agreements, cancellation and rescission may arise on account of the conduct of the negotiator whether or not he was the creditor's agent: see sections 57, 67, 69, 73 and 102. Sections 56 and 140A(3) provide for a deemed agency, even in a case where there is no actual one. Section 75 does not provide for a deemed agency, but it imposes liability under a debtor-creditor-supplier agreement for the misrepresentations and breaches of contract of the supplier. These provisions are there because without them the creditor's responsibility would be engaged only by its own acts or omissions or those of its agents. None of them is applicable to the present case. Sections 56 and 75 apply only to debtor-creditor-supplier agreements, and not to agreements for unrestricted use credit like the one that Mrs Plevin entered into. Nor has any remotely comparable legislative technique been adopted in section 140A, except for the acts or omissions of "associates" or agents of associates, a category which does not include LLP.

32. Finally, if the simple words "by, or on behalf of, the creditor" in section 140A(1)(c) extend beyond agency relationships and deemed agency relationships, there are no coherent criteria, statutory or otherwise, by which to determine what if any connection is required between the creditor and acts or omissions causing the unfairness. This may be illustrated by the difficulty which Briggs LJ had in formulating his test. At paragraph 49 of his judgment, he appears to say that no connection is required between the creditor and the person whose acts or omission cause the unfairness, provided that the latter's conduct "played some material part in bringing about of the transaction." At paragraph 48 it is suggested that that person must have played some part in bringing about the transaction "for the creditor". If that is the test, it is quite unclear what relationship short of agency constitutes doing or not doing something "for" him. In both paragraphs, it is suggested that this would be established by the intermediary's receipt of a commission "from, or via, the creditor". If it is enough that the intermediary must have contributed to the conclusion of the transaction "for the creditor", it is unclear what relationship with the creditor short of agency that implies.

33. The difficulty of applying these formulae can be seen when Briggs LJ comes to explain why his test is satisfied in the present case. He appears to have regarded LLP as having become "closely involved in the transaction on the creditor's side" (para 59). This is not correct. LLP was not only not the agent of Paragon. It was the agent of Mrs Plevin, as her pleadings correctly assert. LLP was not "on the creditor's side" and could not have been consistently

with its status as the debtor's agent. LLP's only relationship with Paragon consisted in the facility that they must have arranged with Paragon (and ten other lenders) to introduce its principals 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. It is, moreover, important not to lose sight of the particular function of LLP which is relevant for present purposes, namely assessing Mrs Plevin's needs and advising on the suitability of the product. That was what was said to have been done "on behalf of" of Paragon for the purpose of the section. But it 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 only basis on which the contrary is asserted by Briggs LJ is that LLP received a commission "from (or via) the creditor." But even that is not correct. LLP received their commission on the PPI policy from Norwich Union, arguably at the expense of Mrs Plevin if one assumes that it increased the premium. Paragon merely accounted for the commission out of Mrs Plevin's loan moneys before remitting the net sum to Norwich Union. The practice by which the agent of a consumer of financial services is remunerated by the supplier of those services has often been criticised. It is, however, an almost universal feature of the business, and it is of the utmost legal and commercial importance to maintain the principle that the source of the commission has no bearing on the identity of the person for whom the intermediary is acting or the nature of his functions.

34. I conclude that the Court of Appeal was wrong to say that the acts or omissions of LLP were capable of making Mrs Plevin's relationship with Paragon unfair. Nor do I accept that this conclusion frustrates the purpose of section 140A, even in part. The fact that section 140A is intended to protect the debtor does not dispense the court from considering what degree of protection was intended; nor does it mean that the legislator cannot have intended to protect the interests of the creditor in a situation for which he was not responsible. Once the decision in *Harrison* is discarded, the section can be seen to give extensive protection to the debtor extending beyond the right to enforce the creditor's legal duties, in any situation where the creditor or his associates (or their agents) have made the relationship unfair.

The voluntary codes

35. I should, finally, refer to two voluntary codes of conduct which assumed some importance in the judgment of the Court of Appeal. Paragon and LLP were both members of FISA, and Paragon was also a member of the Finance & Leasing Association ("FLA"). Both associations publish voluntary codes. They are the FLA Lending Code (2004) and the FISA Codes and Disciplinary

Procedures (as at March 2006). The Court of Appeal considered that the effect of these codes was to create a "shared responsibility" for assessing Mrs Plevin's needs and the suitability of the PPI policy, and remitted the case to the County Court for a trial of the question whether that responsibility was engaged.

36. The FLA and FISA codes are lending codes. They are primarily concerned with responsible lending standards, i.e. with ensuring that borrowers do not borrow beyond their means, with avoiding high pressure salesmanship and with the provision of proper documentation, and so on, although they also contain provisions relating to the sale of associated insurance products, to which I shall return. The main significance of the codes in the present context is that they envisage some responsibility on the part of the creditor for the conduct of at least some intermediaries. Section 5.3 of the FLA code provides that the creditor will monitor the activities of any credit broker that it deals with and that in particular it will require them to follow either the FLA Code or the FISA code and refuse to deal with any who fail do so or are dishonest or incompetent. This focuses attention on the FISA code, which was the one to which LLP subscribed. Unfortunately the FISA code is at critical points rather obscure. It defines intermediaries in the widest terms as including "any person or firm involved in the procurement of business". But the substantive provisions of the FISA code refer not to intermediaries *tout court*, but to "supporting or subordinate" intermediaries, or "Members and their Intermediaries", without defining what makes an intermediary a "Member's intermediary" or a "supporting or subordinate" intermediary. It is therefore far from clear whether these provisions extend to the conduct of an intermediary such as LLP which was not the agent of the creditor or in some way tied to the creditor.

37. I will assume, without deciding, that they do. On that footing, the relevant provisions of the FISA code are sections 2 and 19. Section 2 provides that where a member accepts business from a "supporting or subordinate Intermediary" it will ensure that the intermediary complies with the code. The particular obligations spelled out in the following sections are generally imposed on "Members and their Intermediaries". These include section 19, which provides:

> "Members and their Intermediaries will not 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. In complying with this requirement, Members and their Intermediaries shall have regard to the consumer's

> circumstances and have particular regard to restrictions or exclusions contained within the relevant insurance policy."

38. The difficulty about the Court of Appeal's approach to the codes is that they were proceeding on the footing of a broad construction of the words "by or on behalf of the creditor", which required little if any connection between the creditor and the source of the unfairness. But it follows from the construction of section 140A which I have proposed in the preceding parts of this judgment that the codes are relevant to the operation of that section only if their effect is to make an intermediary in the position of LLP the agent of the creditor. That is plainly not their effect.

39. In the first place, the codes have no legal status except as between the associations and their members. They have no statutory force. They formed no part of the contractual distribution of responsibilities. In its covering letter of 21 March 2006 to Mrs Plevin, Paragon informed her that they were members of FLA and FISA and followed their lending codes, but the codes themselves were not communicated to Mrs Plevin and there is no evidence that she was aware of their contents. The most that can be said about them is that they may be some evidence of what constitutes reasonable standards of commercial conduct in this field. This was in fact the sole purpose for which Mrs Plevin's counsel relied upon them before the Recorder. Secondly, the terms of the codes do not in my view justify the Court of Appeal's conclusion that they envisaged a shared responsibility for dealings with the customer. Not all lending transactions governed by the codes are introduced by intermediaries. In many cases the lender deals directly with the debtor. Where the FISA code imposes an obligation on "Members and their Intermediaries", it is not requiring both of them to comply in every case thereby duplicating every function covered in the code. A more natural reading, more consonant with the regulatory background (in particular ICOB 1.2.3) is that the obligation is imposed on whichever of them performs the relevant function. In the case of the obligation under section 19 of the FISA code to tailor the sales technique used to sell optional insurance products to the customer's circumstances, the relevant function was performed by LLP as the intermediary who was dealing directly with Mrs Plevin at the relevant stage of the transaction. Where it is the intermediary who performs the relevant function, the creditor's obligation under the FISA code is to satisfy itself that the intermediary complies with the code. This does not mean that the creditor has to verify compliance in each individual transaction. It means, as is clear from section 5 of the FLA code, that the creditor will satisfy itself about the general standard to which the intermediary conducts its business.

"Any related agreement"

40. I record for completeness that Mrs Plevin did not rely on the reference to "any related agreement" in section 140A(1)(c) either in the courts below or (after some initial hesitation) before us. We have not therefore heard argument on whether the PPI policy was a "related agreement" for the purpose of sections 19 and 140C(4), or in what if any respects its terms were themselves the cause of unfairness.

Conclusion

41. My conclusion that the non-disclosure of the amount of the commissions made Paragon's relationship with Mrs Plevin unfair is enough to justify the reopening of the transaction under section 140A. It is, however, the only basis on which the transaction can be reopened. It follows that the appeal must be dismissed, although for reasons different from those given by the Court of Appeal, but that the case must be remitted to the Manchester County Court to decide what if any relief under section 140B should be ordered unless that can be agreed. Paragraph 2 of the Court of Appeal's order of 17 March 2014, which remitted the case for rehearing generally, will be varied accordingly.