Neutral Citation Number: [2015] EWHC 1343 (QB)

Case No: 0LE04638

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Liverpool Civil Justice Centre
35 Vernon Street, Liverpool L2 2BX

Date: 22/05/2015

Before :

THE HON. MRS JUSTICE SWIFT DBE

- -

Between :

Paul Anthony Axton & Christine Axton	**Claimants/ Appellants**
- and -	
GE Money Mortgages Limited	**First Defendant/ Respondent**
The Money Group (Cornwall) Limited	**Second Defendant**

- -
- -

Mr Andrew Clark (instructed by Miller Gardner Limited) for the **Claimants/Appellants**
Mr Henry Warwick (instructed by Eversheds LLP) for the **First Defendant/Respondent**

Hearing date: 19 March 2015

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Approved Judgment

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

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THE HON. MRS JUSTICE SWIFT DBE

The Honourable Mrs Justice Swift :

Introduction

1. This is an appeal by the Appellants, Mr and Mrs Axton, against an Order of His Honour Judge Armitage QC, sitting at Manchester Crown Court, dated 14 November 2014 by which summary judgment was entered for the Respondent pursuant to CPR 24.2 in respect of the whole of the Appellants' claim against the Respondent.

Background

2. The Appellants are the owners of a residential property at Coalville, Leicestershire. On 27 October 2010, they commenced proceedings in Leicester County Court against two companies. The first company, GE Money Mortgages Limited (the First Defendant to the Appellants' claim and Respondent to this appeal), was a company which provided personal, secured and unsecured loans to consumers. The second company, The Money Group (Cornwall) Limited (the Second Defendant to the claim, but not involved in this appeal) provided credit and brokerage services.

3. The two companies were not unrelated. It is a matter of public record that, between October 2004 and March 2006, an individual named Mr Anthony Murtagh was Director and Chief Executive of a company called GE Money Home Lending Limited, which was an Associate of the Respondent. In addition, Mr Murtagh was and remains Managing Director of the Second Defendant. In September 2004, another associate of the Respondent acquired effectively the whole of the Second Defendant. As a broker, the Second Defendant placed a large amount of business with the Respondent.

The loan agreements

4. In November 2000, the Appellants entered into a written fixed sum credit agreement with the Respondent whereby the Respondent agreed to provide them with a loan in the total sum of £37,138, which was secured by way of first charge on the Appellants' property. The total sum comprised a cash loan of £34,998 and fees amounting to £2,140. The written Agreement (the First Agreement) was signed by the Appellants on 30 November 2000 and by the Respondent on 12 December 2000. It provided for repayment of the loan and interest thereon by way of monthly payments over a period of 240 months.

5. On 14 May 2002, the Appellants signed a further written fixed sum credit agreement (the Second Agreement). The Respondent signed the agreement on 27 February 2002. On this occasion, the Appellants agreed to borrow the total sum of £45,333, comprising a loan of £43,833 and fees totalling £1,500. The Second Agreement provided for repayment of the loan and interest thereon by way of monthly repayments over a period of 240 months. The amount of the loan in the Second Agreement included the amount outstanding under the First Agreement. The loan was once again secured against the Appellants' property.

6. By a written fixed sum credit agreement signed by the Appellants on 1 September 2003 and by the Respondent on 23 September 2003 (the Third Agreement), the Respondent agreed to provide a loan to the Appellant in the total sum of £95,890,

consisting of a cash loan in the sum of £92,390 and fees of £3,500. The Third Agreement again included the amount outstanding under the Second Agreement. It provided for repayment of the loan and interest thereon by way of monthly payments over a term of 300 months. Again, the loan was secured over the Appellants' property.

7. On 22 September 2004, the Appellants signed a further written fixed sum credit agreement (the Fourth Agreement). The Respondent signed the Agreement on 4 October 2004. The Respondent agreed to provide a loan in the total sum of £108,724, consisting of a cash loan of £107,224 and fees of £1,500. The loan included the amount outstanding under the Third Agreement and was secured over the Appellants' property. It remains live with a balance of approximately £95,000 still owing.

8. Each of the four Agreements was sold to the Appellants by the Second Defendant, acting as broker. There was no face-to-face contact or other direct communication between the Appellants and the Respondent. All such contact and/or communication took place between the Appellants and the Second Defendant. A brokerage fee was paid by the Appellants to the Second Defendant being transferred to the Second Defendant out of the monies loaned to the Appellants by the Respondent.

The Personal Protection Insurance policies

9. None of the four Agreements provided for Payment Protection Insurance (PPI). PPI is a type of insurance which will cover loan repayments in the event that the borrower becomes ill or loses his/her job or in the event of the borrower's death. The Second Defendant offered PPI policies and the Appellants arranged with the Second Defendant to purchase such policies in respect of their payment obligations under the First, Second and Third Agreements, but not the Fourth Agreement.

10. The relevant PPI policies were not provided by the Respondent. The first two policies were provided by a company named Marketing and Management Services Limited (MMS). MMS was one of the UK's leading providers of PPI policies. It did not sell such policies directly to the public, but supplied them indirectly through a number of business partners, including the Second Defendant. As from May 2003, the Second Defendant began to obtain its PPI policies from a different company, CIGNA, and the PPI policy to protect the Appellants in relation to the Third Agreement was purchased from CIGNA, rather than MMS.

The Appellants' claim

11. The Appellants' claim against both the Respondent and the Second Defendant was based on the factual premise that the premiums paid by them for the three PPI policies were grossly in excess of the cost of comparable policies obtainable on the open insurance market. Amongst other things, they alleged that, unknown to them, the true cost of the PPI insurance was only a small proportion of the premiums charged to them, with the balance being paid by way of commission or monetary compensation to those responsible for selling the policies. They alleged also that they had not been properly informed or advised about the duration of the insurance cover or the extent of the cover provided and that they should not have been offered single premium policies. In other words, the claim is one of the alleged mis-selling of PPI to the Appellants.

12. In their Particulars of Claim, the Appellants relied on multiple causes of action against the Respondent and the Second Defendant. They claimed that the Respondent and the Second Defendant had acted in breach of contract and in breach of fiduciary duty and of other duties of care which the Appellants alleged were owed to them. Both the Respondent and the Second Defendant filed Defences, denying liability. In addition, the Respondent filed an application to strike out the claim against it, or specified parts thereof, on the grounds that the Particulars of Claim disclosed no reasonable grounds for bringing the claim. The Respondent also applied for judgment to be entered in its favour summarily on the ground that the claim had no real prospect of success. The application came before District Judge Whitehurst on 22 March 2011. He adjourned the applications generally, pending disclosure of documents. Disclosure duly took place. Meanwhile, judgment was entered against the Second Defendant. That judgment was later set aside, but the Order setting aside the judgment was then appealed. That appeal was unsuccessful, so the case against the Second Defendant proceeded.

13. District Judge Whitehurst had given liberty to restore the Respondent's applications for summary judgment and strike out and the Respondent availed itself of that liberty by applying on 6 February 2013 to restore. The hearing of the applications came before HHJ Armitage QC later in 2013, but the hearing was adjourned for lack of time. It eventually took place on 13 August 2014. The Judge reserved his judgment, which was handed down on 14 November 2014. It is that judgment which forms the subject matter of this appeal.

14. The application for permission to appeal was considered by Kenneth Parker J on paper on 19 December 2014. He granted permission to appeal and the oral hearing of the appeal came before me on 19 March 2015, when I heard submissions from Mr Andrew Clark, Counsel for the Appellants, and Mr Henry Warwick, Counsel representing the Respondent. At the conclusion of the hearing, I informed Counsel that, for reasons of time, I would reserve my judgment which I now hand down.

15. At the hearing in the County Court, the Judge had before him statements from a number of witnesses. Mr Rodney Gardner, director of Mills Gardner Ltd, the Appellants' solicitors, provided witness statements dated 12 April 2013 and 31 July 2014. The Respondent relied on a witness statement dated 7 March 2011 from Ms Claire Vila, who is employed by the Respondent as Case Manager in their specialist Litigation Department, and a further statement dated 6 February 2013 from Mr Tom Simpson, Manager of the same Department. There was also a witness statement dated 15 April 2013 from Mr Anthony McClay, Director of MMS, and a further statement dated 22 April 2013 from Mr Anthony Murtagh, Managing Director of the Second Defendant.

The provisions relating to summary judgment

16. CPR 24.2 sets out the circumstances in which the court can give summary judgment. It provides that:

> The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if -
>
> (a) it considers that -

> i) that claimant has no real prospect of succeeding on the claim; … and
>
> (b) there is no other compelling reason why the case or issue should be disposed of at trial.

17. In order to defeat an application for summary judgment, it is sufficient for the relevant party (the Appellants in this case) to show some "prospect", i.e. some chance, of success. That prospect must be "real", not false, fanciful or imaginary. It follows therefore that the relevant party does not have to prove on a balance of probabilities that its case will succeed at trial. When determining an application for summary judgment, the court must not conduct a mini-trial. Where the application is based on a short point of law or construction, the court may, indeed should, decide the point if it has before it all the evidence necessary for a proper determination of the point. The overall burden of proof rests on the party applying for summary judgment to establish that there are grounds for believing that the opposing party has no real prospect of success and that there is no other reason for a trial. If the party applying adduces credible evidence in support of its application, the other party then becomes subject to an evidential burden of proving some real prospect of success or some other reason for a trial.

The Appellants' claim under the Consumer Credit Act 1974

18. By the time of the hearing of the Respondent's applications before the His Honour Judge Armitage QC, the Appellants had abandoned most of the causes of action previously relied upon in their Particulars of Claim. Somewhat surprisingly, no application had been made to amend the Particulars of Claim and no draft Amended Particulars of Claim had been prepared to reflect the changes to the Appellants' case. However, it was made clear at the hearing before the Judge that the only cause of action then relied upon by the Appellants was their claim for an Order pursuant to section 140A-C of the Consumer Credit Act 1974 (the 1974 Act).

The relevant provisions of the Consumer Credit Act 1974

19. Section 140B of the 1974 Act gives the court a wide range of powers to redress the consequences of an unfair relationship between a debtor and a creditor in connection with a credit agreement. Those powers include the power to make an order requiring the creditor, or an associate or former associate of his, to repay in whole or in part any sum paid by the debtor by virtue of the agreement or any related agreement.

20. Section 140B places the burden of proving the fairness of the relevant agreement on the creditor. Section 140B(9) provides that, if the debtor alleges that the relationship between the creditor and the debtor is unfair to the debtor, it is for the creditor to prove to the contrary.

21. Section 140A sets out the three separate circumstances in which the court can exercise its power to make an order pursuant to section 140B. The provisions relevant for these purposes are:

> "(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) *(not relevant for these purposes)*
>
> (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)."

22. The provisions of section 140A-C of the 1974 Act came into force on 6 April 2007, having been introduced by section 19 of the Consumer Credit Act 2006. The First, Second and Third Agreements had been redeemed before that date and were therefore no longer in operation. Accordingly, it was not open to the Appellants to seek an order under the provisions of section 140B on the basis of any of those three Agreements alone. Moreover, it was not open to the Appellants to seek an order on the basis of the Fourth Agreement alone. The "unfair relationship" upon which they were seeking to rely related solely to the provision of PPI and the Appellants had not taken out PPI in respect of the Fourth Agreement. No other complaint was made about the fairness of the terms of their Agreements with the Respondent.

The parties' cases at the hearing of the Respondent's application

23. The Appellants' case at the hearing of the application was that the First, Second and Third Agreements were "related" to the Fourth Agreement for the purposes of section 140A. Thus, it was argued, an order pursuant to section 140B could be made by the court in respect of the Fourth Agreement (which was still in operation when section 140A-C of the 1974 Act came into force), if it were "taken with" the three earlier Agreements.

24. Before the Judge, Counsel for the Appellants, Mr Clark, advanced a number of grounds upon which the First, Second and Third Agreements could be regarded as "related" to the Fourth Agreement for the purposes of section 140A(1) of the 1974 Act. He relied in particular on section 140C(4) which provides:

> "(4) References in sections 140A and 140B to an agreement related to a credit agreement (the "main agreement") are references to –
>
> (a) a credit agreement consolidated by the main agreement;
>
> (b) a linked transaction in relation to the main agreement or to a credit agreement within paragraph (a);"

25. Mr Clark pointed out that the amount of the loans which were the subject of each of the Second, Third and Fourth Agreements had included the outstanding part of the

loan still owing from the previous Agreement. Each successive Agreement had therefore "consolidated" the later Agreement. He submitted that, applying section 140C(4)(a), the Fourth Agreement should therefore be regarded as "related to" the three previous Agreements for the purpose of section 140A. He argued that the court was therefore entitled to consider whether the relationship between the Appellants and the Respondent arising from the Fourth Agreement, when taken together with the previous Agreements, had been "unfair" to the Appellants.

26. Mr Clark also pointed out that, pursuant to section 140C(4)(b) of the 1974 Act, a "linked transaction" in relation to the main agreement or to a credit agreement consolidated by that agreement is itself an agreement "related to" the main agreement. He acknowledged that the Fourth Agreement was not a regulated consumer credit agreement, but was an exempt agreement within section 16 of the 1974 Act. However, section 140C(5) of the 1974 Act provides that:

> "In the case of a credit agreement which is not a regulated consumer credit agreement, for the purposes of subsection (4) a transaction shall be treated as being a linked transaction in relation to that agreement if it would have been such a transaction had that agreement been a regulated consumer credit agreement."

27. The meaning of a "linked transaction" in relation to a regulated agreement is set out at section 19 of the 1974 Act. By section 19:

> "(1) A transaction entered into by the debtor or hirer or a relative of his with any other person ("the other party") except one for the provision of security, is a linked transaction in relation to an actual or prospective regulated agreement (the "principal agreement") of which it does not form part if –
>
> (a) *not relevant for these purposes;*
>
> (b) the principal agreement is a debtor-creditor-supplier agreement and the transaction is financed, or to be financed, by the principal agreement; or
>
> (c) the other party is a person mentioned in subsection (2), and a person so mentioned initiated the transaction by suggesting it to the debtor … who enters into it".

28. The Appellants' case was that it was arguable that each of the PPI policies that was sold to them was a "linked transaction" in relation to the relevant credit Agreement with the Respondent, pursuant to either section 19(1)(b) or (c). In respect of (b), the Appellants argued that the Respondent had entered into each of its Agreements with the Appellants under pre-existing arrangements between itself and the Second Defendant and in the knowledge that the credit provided by it would be in part used to finance the purchase of PPI as between the Appellants and the Second Defendant. Alternatively, they argued that the Second Defendant had acted as the agent of the third party insurer who provided the PPI. The Second Defendant had also negotiated the terms of the Agreements in respect of which the PPI policies were purchased.

Accordingly, the Appellants contended, the PPI policies were all "linked transactions" and therefore agreements "related to" the Fourth Agreement.

The Judge's findings

29. For the purposes of the application for summary judgment, the Judge accepted that the Appellants had a real prospect of proving as a matter of fact and law that the successive loan agreements made between them and the Respondent were "related" within the meaning of Section 140A. He also accepted that the Appellants had a real prospect of proving that the First, Second and Third Agreements were "linked" to the PPI policies which had been purchased to protect the Appellants' ability to make repayments in respect of their Agreements with the Respondent .

30. In the context of those assumptions, the Judge then went on to consider the issue of whether the relationship between the creditor and the debtor (i.e. the Respondent and the Appellants) had been "unfair" to the Appellants. He questioned whether it could reasonably be argued that the Respondent's conduct had been causative of unfairness in its relationship with the Appellants. For those purposes, he indicated that he was prepared to assume that the terms of the PPI policies sold to the Appellants were unfavourable to them.

31. The Judge reminded himself, correctly, that it was not appropriate for him to carry out a mini-trial or to make findings of fact on matters that were controversial. However, as he observed, many of the facts were not in dispute. He proceeded to set out the factual background. He noted that the Respondent, as the lender, did not provide the PPI policies to the Appellants. There was no requirement in the terms of the Agreements that the Appellants should take out PPI at all, let alone from the Respondent. Moreover, the PPI premiums were not added to the amount of the loan which the Respondent had initially agreed to provide to the Appellants. The premiums were paid using part of the sums which the Respondent had agreed to provide and in response to a written request made to the Respondent on the Appellants' behalf by the Second Defendant.

32. The Judge referred also to the business relationship between the Respondent and the Second Defendant. He noted that the Second Defendant had entered into an Introducer Accreditation Agreement (IAA) with the Respondent, which had placed on the Second Defendant the responsibility for providing information to borrowers about any PPI policies arranged by the Second Defendant on the borrowers' behalf. The IAA required the Second Defendant, *inter alia*, to explain fully to a borrower the terms and conditions of any PPI policy arranged in connection with a loan, including any limitations of policy cover, and to inform the borrower that the taking of PPI cover was entirely optional, not obligatory. The IAA also required that, if fees were to be deducted from the loan advanced by the Respondent in order to pay the insurance policy premiums, the Second Defendant should ensure that the borrower was in full agreement to that course, had signed an appropriate authority and fully understood the nature and purpose of the fees to be deducted. No individual provider of PPI was specified in the IAA and there was no requirement by the Respondent that PPI should be purchased. The Judge found that, although the Respondent had required the Second Defendant to enter into its IAA, the obvious inference to be drawn was that it was the Second Defendant, not the Respondent, which influenced the Appellants' choice of PPI provider and the terms on which PPI was obtained – for

instance the duration of the cover and the fact that the policies were single premium, rather than, for instance, annual sums – which the Appellants now claimed were unfair.

33. The Judge also noted that the Respondent's loan application forms in respect of the First and Second Agreements strongly recommended that borrowers should take out PPI and mentioned an enclosed leaflet giving relevant information. However, whilst recommending that PPI be taken out, all four of the written Agreements made between the Appellants and the Respondent made clear that PPI was optional. On each occasion, the Appellants had ticked the "None" button, indicating that they had chosen not to take the option offered. There is no suggestion that the Respondent had any personal discussions with the Appellants in relation to the sale of PPI. Nor did it give the Appellants any advice on that topic or any other.

34. The Judge observed that the Respondent's principal argument appeared to be that the Appellants would not be able to demonstrate that the Respondent had done or failed to do anything which gave rise to an unfair relationship between the Appellants and the Respondent. He set out his conclusion in these terms:

> "My conclusion is that the mere promotion of PPI, without more, is not sufficient to amount to a causative act, even if the claimants then, through TMG (*the Second Defendant*) or any other provider, entered into a particular PPI contract on (assumed) unfavourable terms. Similarly, although TMG introduced their clients to GE (*the Respondent*) for the purpose of obtaining each loan, and PPI was promoted in GE's application forms, the provision of PPI was by or through TMG. GE did not require PPI as a condition of making a loan. In my judgment the Appellants will not prove that TMG acted on behalf of GE even in the broad sense of "playing a material part" in bringing about the transaction (PPI provided by or through TMG) giving rise to the allegedly unfair relationship."

It was for those reasons that the Judge concluded that the Appellants' claim did not have a real prospect of success.

The Appellants' case on the appeal

35. For the Appellants, Mr Clark argued first of all that the Judge should not have attempted to determine the issue of unfairness in the context of the hearing of an application for summary judgment. He relied on the observation made by Peter Smith J in *Bevin v Datum Finance Limited* [2011] EWHC 3542, when he stated (at paragraph 53 of his judgment) that it was difficult at an application for summary judgment to resolve the issue of unfairness one way or the other. In making this comment, Peter Smith J drew attention to the provisions of section 140A(9) of the 1974 Act, which places the burden of proving fairness on the creditor, without the need for the debtor even to show a *prima facie* case of unfairness.

36. Mr Clark argued also that the Judge had erred in basing his conclusion that the Appellants had no real prospect of proving unfairness on the issue of whether the Respondent's conduct had been causative of any unfairness that arose. He contended

that it was at least arguable that there was an unfair relationship under section 140A(1)(a) of the 1974 Act by reason only of the terms of the PPI policies. He pointed out that the Judge had assumed for the purposes of the application for summary judgment that the policies were "related agreements" within the meaning of section 140A and had also assumed that the terms of those policies were "unfavourable" to the Appellants. Mr Clark argued that, having made those assumptions, the terms of section 140A(1)(a) made clear that the PPI policies might be found to have given rise to an unfair relationship. He contended that, once the Judge had made the assumptions he did, it was not open to him to proceed to make a decision based on the fact that the unfair relationship, if proved, could not be said to have been caused by the Respondent. He argued that the terms of the PPI agreements amounted to a "cause" of unfairness in their own right, without the necessity for any causal act on the part of the Respondent. Thus, he argued, it would have been wrong to conclude that the Appellants' case under section 140A(1)(a) could not succeed by reason of a failure to prove causation. However, Mr Clark suggested that, in fact, the Judge had misunderstood a passage of the witness statement of the Appellants' solicitor, Mr Gardner, and had wrongly believed that, at the hearing of the applications, the Appellants were relying solely on section 140A(1)(c), and not on section 140A(1)(a) as well. As a result, he said, the Judge had not properly considered the Appellants' case pursuant to section 140A(1)(a).

37. Because of the decision of the Supreme Court in the case of *Plevin v Paragon Personal Finance Ltd and another* [2014] UKSC 61, which was handed down after the hearing before the Judge, the Appellants did not pursue in the appeal what had been their primary case at the hearing. They had argued that the actions and omissions of the Second Defendant had amounted to things "done (or not done) on behalf of the creditor (*i.e. the Respondent*)" and therefore came within section 140A(1)(c) of the 1974 Act. The Judge had dismissed that argument, saying at paragraph 21 of his judgment:

> "In my judgment the Appellants will not prove that TMG acted on behalf of GE even in the broad sense of "playing a material part" in bringing about the transaction (PPI provided by or through TMG) giving rise to the allegedly unfair relationship."

At the appeal hearing, Mr Clark accepted that, following the Supreme Court's decision in *Plevin*, it was no longer open to the Appellants to rely on their Ground of Appeal that the Judge's finding as to the relationship between the Respondent and the Second Defendant had been wrong.

38. *Plevin* involved a claimant who had entered into a credit agreement with a lender under which she had borrowed a sum of money to be repaid by monthly instalments. The agreement had been arranged by a broker and the claimant had had only one episode of direct contact with the lender: a telephone call for anti-money laundering compliance purposes. As part of the agreement, the broker had arranged for the claimant to take out PPI from a third party who was the lender's designated PPI provider. The claimant paid a single upfront premium which was added to the loan. The lender paid commission to the broker in respect of both the loan and the PPI and the lender itself received commission from the PPI provider. Some 71% of the PPI premium was made up of the commission shared by the broker and the lender. That fact was not disclosed to the claimant. The claimant brought proceedings against both

the broker and the lender contending that the agreement, so far as it related to PPI, had arisen from an unfair creditor/debtor relationship within section 140A of the 1974 Act and sought relief under section 140B of the Act. The case against the broker was settled. The case against the lender proceeded. The unfairness was said to arise from the failure of the lender to disclose to the claimant the amount of PPI commission and/or to assess the suitability of the PPI policy for the claimant's needs.

39. At first instance, the Recorder dismissed the claim on the basis that there was no obligation on the lender to assess the suitability of the policy for the claimant and that there was no relationship of agency such as to make the lender responsible for any failure of disclosure by the broker within the meaning of section 140A(1)(c). The Court of Appeal dismissed the appeal in relation to the non-disclosure of commission, but held that the ambit of section 140A(1) extended to all conduct beneficial to a lender/creditor in that it played a material part in bringing about the transaction giving rise to the allegedly unfair relationship. Thus, even the acts and omissions of a broker without an agency relationship with the lender could constitute things done "on behalf of" a creditor within section 140A(1)(c). The Court of Appeal therefore remitted to the County Court the issue of whether the broker (on behalf of the lender) had failed to assess the suitability of the PPI for the claimant's purposes.

40. The Supreme Court affirmed the decision of the Court of Appeal, but on different grounds. Giving the judgment of the Court, Lord Sumption JSC stressed that the unfairness with which the Court was concerned was to be found in the relationship between the creditor and debtor. He observed at paragraph 10 of his judgment that "what must be unfair is the relationship between the debtor and the creditor". He observed also that, where the terms themselves were not intrinsically unfair, the unfairness may be caused because the relationship between creditor and debtor is "so one-sided as substantially to limit the debtor's right to choose". However, he said also that there may be features of a transaction which operate harshly against the debtor, but it does not necessarily follow that the relationship is unfair since the features "may be required in order to protect what the court regards as a legitimate interest of the creditor". He observed also that, whilst many relationships between commercial lenders and private borrowers are inherently unequal, "it cannot have been Parliament's intention that the generality of such relationships should be liable to be reopened for that reason alone". The Supreme Court disagreed with the Court of Appeal's dismissal of the claim in respect of the lender's non-disclosure of the information about PPI commission. Lord Sumption said at paragraph 19H-20D:

> "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.
>
> 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 was 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."

41. The Supreme Court did not agree with the Court of Appeal's finding that the claimant had a claim against the lender in respect of a failure on the part of the broker, as the lender's agent, to assess the suitability of the PPI policy for her needs. They found that "the ordinary and natural meaning of the term "on behalf of" imported agency and there was nothing in the context of the 1974 Act to import a wider interpretation. They found that there was no basis for a finding that any relevant acts or omissions of the broker had been done or not done 'on behalf of' the lender and that the lender itself was not obliged to carry out an assessment of the suitability of the PPI for the claimant's needs.

42. Mr Clark contended that, despite the decision in *Plevin*, the issue of whether there had been an unfair relationship because of things done or not done by or on behalf of the Respondent was not limited to the question of whether the Respondent was responsible for the acts or omissions of the Second Defendant. Mr Clark pointed out that, in *Plevin*, the Supreme Court decided that non-disclosure of the commissions payable to the broker and lender from the premium of a PPI policy purchased by the claimant made her relationship with the lender unfair because of the "extreme inequality of knowledge and understanding" between the two. Further, the Court determined that the lender must be regarded as responsible for the non-disclosure, making it unfair if it failed to take such steps as would be reasonable to expect it to take in the interest of fairness. The lender was found responsible for the unfairness arising from non-disclosure of the commissions because it was the only party "who must necessarily have known the size of both commissions".

43. In their Particulars of Claim, the Appellants based their case on the factual assumption that both the Respondent and the Second Defendant in the present case had received commissions in respect of the sale of the PPI policies and, in particular, that the Respondent had paid commission to the Second Defendant. However, both the Respondent and the Second Defendant had provided evidence to the effect that no such commission was paid. Nevertheless, Mr Clark submitted that, even if the

Respondent had not paid commission to the Second Defendant, it did not follow that - given the close relationship between the Respondent and the Second Defendant - the Respondent would not have known the amount of commission received by the Second Defendant from the third party insurers (i.e. MMS in the case of the First and Second Agreements and CIGNA in the case of the Third Agreement). He suggested that the Appellants had a real prospect of succeeding in their claim and that the Judge had been wrong to conclude that they had no such prospect.

The Respondent's case on the appeal

44. For the Respondent, Mr Warwick emphasised that the case was not what might be termed a "classic" broker sale PPI claim, whereby complaint is made about the circumstances in which a broker sold a lender's policy (or one obtained through the lender) which had been funded under the terms of a credit agreement with the lender. Instead, the PPI policies in the present case had been purchased from third party insurers by the Appellants through the Second Defendant. It is true that the Second Defendant had also introduced the Appellants to the Respondent for the purpose of the provision of credit. However, the PPI policies were separate from the credit Agreements. They were purchased using part of the sums advanced under the Agreements, but the Agreements did not impose a requirement on the Appellants to purchase PPI policies, still less policies provided by the Respondent. Mr Warwick submitted that the decision to take out PPI provided by a third party insurer had been a matter of choice for the Appellants in which, apart from paying out the money for the premiums when requested to do so, the Respondent had played no part. Moreover, save for the fact that some of the money loaned under the Agreements had been used to fund the PPI premiums, the Appellants had made no complaint that the terms of the Agreements between themselves and the Respondent had been in any way disadvantageous to them.

45. The Respondent also relied on the terms of the contracts for the purchase of PPI. Mr Warwick pointed out that the application forms for PPI made clear that they were the Second Defendant's own policies. The forms requested that payment for premiums should be made direct to the Second Defendant and requested also that, in the event of any queries, the Appellants should contact the Second Defendant. In the case of the application form in respect of the Third Agreement, it stated specifically that the PPI plan was "a separate agreement from the relevant mortgage or loan agreement". The disclosed documents also included a letter from the Second Defendant providing a refund to the Appellants of part of the premium in respect of the first PPI policy. That document made clear that the Second Defendant had been responsible for arranging the sale of the policy and that the Respondent had had no involvement in the sale.

46. Mr Warwick referred to the provisions of section 140A of the 1974 Act which states that, in order for an order to be made under section 140B, what is unfair must be "the relationship between the creditor and the debtor". He cited the judgment of Lord Sumption in *Plevin* in which the Supreme Court made clear that this relationship was critical. Mr Warwick also referred to the fact that, in the judgment of Briggs LJ in *Plevin*, the Court of Appeal had made clear that the three categories set out in section 140A(a) (b) and (c) of the 1974 Act must be "in some sense causative of the perceived unfairness of the relationship to the debtor": [2014] Bus LR 557 (CA) at 566D-F. He noted also that, in the Supreme Court, Lord Sumption had observed that the standard

of conduct by which fairness would fall to be assessed at trial is the "standard of conduct reasonably to be expected of the creditor".

47. The Respondent also relied upon the evidence of Mr McClay of MMS and of Mr Murtagh of the Second Defendant, which was to the effect that MMS, the provider of the PPI policies for the first two Agreements, did not pay any commission to the Second Defendant. Instead, MMS sold large numbers of policies to the Second Defendant at the wholesale net premium rate, plus the applicable insurance premium tax. The Second Defendant then charged its customers (in this case, the Appellants) a retail premium rate. The Second Defendant was responsible for setting that rate. The Second Defendant did not act as agent for MMS. The PPI policy in respect of the Third Agreement was purchased by the Second Defendant from CIGNA; the mode of payment for the premium remained the same. The evidence of the Second Defendant is also that it received no commission from the Respondent in respect of the sale of the PPI policies. Its case is that the only commission received was in relation to the provision of the loans made by the Respondent to the Appellants.

48. Mr Warwick accepted that it is very difficult at a summary stage to resolve an issue as to unfairness, largely on account of the reverse burden of proof. Nevertheless, he argued that there were in this case incontrovertible facts which demonstrated that there was no realistic prospect of the Respondent failing to discharge the burden of proving that its relationship with the Appellants had been fair.

Conclusions

49. The Judge's judgment made clear that he had in mind the burden of proof and the observation of Peter Smith J in *Bevin*. However, as he recognised, there were before him a background of uncontroversial facts and a number of contemporaneous documents. It cannot be that the burden of proof imposed by section 140B(9) of the 1974 Act was intended to mean that, in a case where an unfair relationship is alleged, no summary disposal should ever take place. The Judge was not being asked to carry out a "mini-trial" and did not attempt to do so. His decision was based on the facts and documents before him, on the three assumptions he had made for the purposes of the applications (all of which were favourable to the Appellants) and on his interpretation of the relevant statutory provisions.

50. At paragraph 4 of his judgment, the Judge said that Mr Gardner's witness statement had made clear that "the claim against *the Respondent* was limited to that founded on s.140A and more particularly s.140A(1)(c) of the Act." I do not accept that the Judge's observation indicated that he erred in misunderstanding the nature of the Appellants' case at the hearing before him. He did not limit his reference solely to section 140A(1)(c), but merely laid emphasis on that aspect of the claim by using the phrase "more particularly". In the next paragraph, he specifically quoted both section 140A(1)(a) and (c), but not section 140A(1)(b). Had he believed that the Appellants had abandoned their case on section 140A(1)(a), it is difficult to see why he would have quoted that sub-section. The reality is that, at the time of the hearing of the application for summary judgment, the Appellants were laying significantly more emphasis on section 140A(1)(c) than on section 140A(1)(a). That is clear from Mr Gardner's witness statement. After the hand down of the decision in *Plevin*, the claim under section 140A(1)(a) assumed more significance for the purposes of the appeal.

However, I am satisfied that the Judge paid proper regard to the claim under section 140A(1)(a) and the issues relating thereto.

51. It is clear that, in this case, the circumstances were not the usual arrangement, whereby a broker sells to a borrower a PPI policy provided by or through the lender and funded under the terms of the credit agreement. The factual background is therefore very different from the case of *Plevin*. In that case, the claimant entered into a credit agreement arranged by a broker who also arranged PPI from the lender's designated PPI provider. The PPI premium was added to the loan and the lender paid commission to the broker in respect of both the loan and the PPI. The lender also received commission from the PPI provider. Therefore, as the Supreme Court found, the lender was the only party which must necessarily have known the size of the commissions received by all parties and the fact that the commissions represented no less than 71% of the premium paid by the claimant.

52. By contrast, in this case, the Second Defendant and the third party insurers (MMS, then CIGNA) had an agreement whereby the third party insurers provided PPI policies to the Second Defendant. The Respondent was not a party to that agreement. In the present case, the premium was not added to the amount of the loan to be provided by the Respondent, as happened in *Plevin*. Rather, the amount of the agreed loan remained the same and the Respondent merely responded to a request made by the Second Defendant on the Appellants' behalf to pay the premium out of the sum to be loaned. Furthermore, there was compelling evidence from the Respondent, the Second Defendant and MMS to the effect that no commission was paid by or to the Respondent in respect of the PPI policies provided to the Appellants.

53. The Judge made clear in his judgment that he was accepting for the purposes of the application for summary judgment that the PPI policies might be found to be "related agreements" and that their terms might be found to be "unfavourable" to the Appellants. However, section 140A(1) provides that the court may make an order under section 140B in connection with a credit agreement only 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 of the circumstances set out at section 140A(1)(a)-(c). One difficulty faced by the Appellants in making a successful claim under both section 140A(1) (a) and (c) was in establishing that any unfairness that might have occurred could be said to have arisen in a "relationship between" them and the Respondent, or that, given the lack of any real "relationship" between them, that there could have been any unfairness at all. It seems to me that it was this issue to which the Judge was referring when he spoke of "causation". The importance of the relationship between creditor and debtor was certainly emphasised by the Supreme Court in *Plevin* and that of causation was referred to by the Court of Appeal. As His Honour Judge Armitage QC pointed out, it was an undisputed fact that the Respondent had taken no part in the provision of PPI to the Appellants save that, when requested to do so, it paid the premiums to the Second Defendant out of the loans provided to the Appellants. It appears to have offered PPI as part of the "package" of its loan agreements, but the Appellants did not take up the offer. Instead, they negotiated directly with the Second Defendant, as their broker, in order to secure their PPI. The Appellants sought to rely on the contention that, since the Respondent paid the PPI premiums to the Second Defendant, and the fact that the Appellants required part of the loans for that purpose

was evident from the Third Agreement, there was the necessary relationship between the parties. In the circumstances, I find it difficult to see how that very limited involvement by the Respondent could be sufficient to found a successful claim based on the existence of a "relationship between the Respondent and the Appellants". Moreover, even if the Judge's assumptions were correct, and the PPI policies were found to be "related agreements" and their terms were found to be unfavourable to the Appellants, I doubt whether a Court would find that an unfair relationship between the Appellants and the Respondent would have been caused by the Respondent's limited involvement in the transaction. It is difficult to see how the imposition of a duty on the Respondent could meet "the standard of conduct reasonably to be expected of the creditor" referred to by Lord Sumption in *Plevin*.

54. So far as the claim based on the Respondent's failure to disclose to the Appellants information about commissions paid in respect of the PPI policies is concerned, reliance on *Plevin* is difficult for the Appellants because of the different factual circumstances between that case and the present case to which I have already alluded. In the IAA, the Respondent made specific requirements of the Second Defendant in an attempt to ensure that the proper procedures were followed in relation to the provision of PPI and the giving of appropriate information to borrowers. Those requirements made it clear that responsibility for compliance with those requirements lay with the Second Defendant. The relevant statutory regulations also placed responsibility for compliance on the Second Defendant.

55. Furthermore, there was compelling evidence from all the parties concerned to the effect that no commission was paid or received by the Respondent in respect of the PPI policies. If that was correct, no question of disclosure would occur. The Appellants' suggestion that, even if the Respondent had not received commission, it would have known the amount of the commission (if any) received by the Second Defendant from the third party PPI insurers and should have disclosed that information, did not seem to me to be compelling. Again, the factual circumstances were different from *Plevin* (where the lender was the only party with full knowledge of the commission paid). Furthermore, the duty to disclose such information plainly lay with the Second Defendant, rather than the Respondent.

56. In the circumstances, I consider that it was fully open to the Judge to find that the test in CPR 24.2 was satisfied and to give summary judgment for the Respondent. I am satisfied that his decision cannot be regarded as wrong or unjust because of any serious procedural or other irregularity. I therefore dismiss the appeal and uphold the Judge's Order.

Costs

57. As to the costs of the appeal, the Appellants accept that, in accordance with the general rule, they, as the unsuccessful parties, should pay the Respondent's costs. However, they have evinced their intention to seek permission from the Court of Appeal for a second appeal. They have also indicated that they will apply for a stay of any costs order made against them, pending determination of that second appeal. In the circumstances, they submit that, rather than this Court undertaking a summary assessment that "might ultimately be futile", it would be a more efficient and proportionate use of the Court's resources to adjourn the assessment of the appeal costs until the second appeal has been determined. An adjournment would also, it is

suggested, have the advantage of allowing the parties to agree the amount of costs, if such agreement was necessary. The Respondent contends that there is no reason why summary assessment should not take place in the usual way.

58. CPR44 PD9.2 provides that the general rule is that the court should make a summary assessment of the costs at the conclusion of a hearing which has lasted not more than one day unless there is good reason not to do so. I do not consider that the fact that the unsuccessful party is intending to mount an appeal and to seek a stay of any order for costs pending the outcome of that appeal can of itself amount to a "good reason" for not following the general rule. If it were, then it would be open to every unsuccessful party to use it as a reason for avoiding summary assessment and to delay the payment of costs. Moreover, a major advantage of summary assessment is that the assessment is made by the Judge who dealt with the hearing at the time when the circumstances are clearly in his/her mind. If, however, the assessment was adjourned and the appeal proved unsuccessful, the assessment would take place long after the event and might be carried out by a different Judge.

59. A decision to delay summary assessment would, in effect, amount to a stay of the assessment of costs. CPR52.7 provides that "Unless – the appeal court or the lower court orders otherwise … an appeal shall not operate as a stay of any order or decision of the lower court". The relevant authorities make clear that the grant of a stay is an exceptional remedy. If an appellant desires a stay, it must make a formal application and put forward solid grounds why a stay should be granted. There is no such application before me and no grounds (other than the convenience of the Court) have been put forward. In any event, it is far more appropriate that the decision as to whether or not a stay is granted in this case should be taken by the Court of Appeal. It would be for that Court to consider any grounds put forward by the Appellants and to balance the risks and likely prejudice to the parties. It would be wrong for me to make an assumption that the Court of Appeal will grant a stay and, on that basis, to decline to carry out a summary assessment. Furthermore, the assessment of the costs is a very straightforward exercise which, even if it does indeed "ultimately prove futile", will not have resulted in a significant waste of Court resources. I therefore intend to proceed to summarily assess the costs of the appeal.

60. The Appellants challenge the costs claimed by the Respondent in their Statement of Costs dated 18 March 2015 on four grounds. The first ground relates to the costs incurred by Optima Legal, the legal practice initially instructed by the Respondent to act in the proceedings on its behalf. The Statement of Costs states that profit costs of £585 were incurred in respect of correspondence, telephone calls, emails and meetings. No other details (such as rates per hour or time taken) are given. In their written submissions, the Appellants argued that it was impossible to know from the documents provided what the figures represented and therefore the whole claim should be disallowed.

61. The Respondent has now produced a further signed Statement of Costs dated 28 January 2015 which sets out the relevant information. The costs amount to 4½ hours at a Grade B fee earner's rate of £130 per hour. The work involved instructing Counsel on the appeal and considering the necessary documents. In the circumstances, neither the work nor the costs appear to me to be excessive or disproportionate.

62. The second ground of challenge is the sum of £2,847 claimed for work on documents. The claim is for 14.1 hours' work done by four different fee earners and includes internal discussions between fee earners. The Appellants argue that the claim for the time of two fee earners in respect of the same discussions is not reasonable. The Respondent submits that discussions between members of its legal team are a normal occurrence in a case such as this which involves complex legal issues.

63. I accept that discussions between different solicitors, especially between the Principal Associate and a Grade B Solicitor, were reasonable in the circumstances of this case. However, I am not satisfied that the involvement of a second Grade B solicitor (Dorian Morris) was warranted. I therefore discount his (very modest) fee of £39 and the VAT on that sum which amounts to £7.80. By my calculation, the total of the Part 2 costs (inclusive of VAT) is thereby reduced to £5,409.60.

64. The Appellants also challenge Counsel's fees. The Respondent's Counsel's fees are claimed at a total of £5,200 (plus VAT), comprising £1,700 for work done before the appeal hearing and £3500 for the hearing itself. The fees of the Appellants' Counsel, as claimed in their Statement of Costs, totals £2,750 (plus VAT), made up of £1,250 for advice, conference and the preparation of documents and £1,500 for the hearing. There is, therefore, a difference of £2,450 between the two fee levels. The Appellants contend that the difference amounts to a discrepancy and suggests that the fees of the Respondent's Counsel are unreasonable and should be reduced. The Respondent argues that it was entitled to instruct Counsel of its choice and that the fees claimed are not unreasonable or excessive, given the complexity of the issues in the case.

65. I accept that discrepancy alone is not the appropriate test and recognise also that the case may well have had a wider importance for the Respondent and was not straightforward. A considerable amount of work was required in preparing for and conducting the hearing. However, the fee of £3,500 for the hearing does seem to me to be somewhat excessive. I consider that a reasonable fee for conducting the hearing would have been £2,500. I therefore reduce the total fee to £4,200, plus VAT on that sum which amounts to £500. By my calculation, the total of the Part 3 costs (inclusive of VAT) is thereby reduced to £4,248.

66. Finally, the Appellants challenge the total costs claimed, which, with my reductions, amount to £10,359.60, on the basis of lack of proportionality. They rely in particular on CPR 44.4(3)(b), which requires the court to have regard to the amount or value of the money involved in the claim. They point out that the amount of costs claimed by the Respondent represents a very significant proportion of the value of the claim which was stated in the Appellants' Claim Form to be less than £15,000. They submit that, for reasons of proportionality, I should reduce the total amount of the Respondent's costs claim.

67. It does not appear to me that this argument has any merit. It is true that, when compared with the stated value of the claim, the Respondent's costs of the appeal are very high. However, the Appellants chose to bring a claim of this modest size and, when summary judgment was given against them, to appeal that decision. No doubt the claim, and the subsequent appeal, has proved to be a great deal more complex than they or their legal advisers at first anticipated. However, I consider that it would be unfair to penalise the Respondent on the grounds of proportionality for successfully

fighting the claim and the appeal. The case no doubt has a wider significance for them and they are entitled to defend their position as they have done.

68. In the circumstances, therefore, I summarily assess the costs payable by the Appellants to the Respondent in the sum of £10,359.60.

69. The Appellant ask me to consider staying enforcement of these costs pending the determination of the proposed application for permission for a second appeal. However, for the reasons set out at paragraph 59 of this judgment, I do not consider it appropriate to do so. The application for a stay, if made, will have to be directed to the Court of Appeal.

70. The Respondent, in its written submissions, requests me to consider making an order for interim payment on account of costs of the hearing before His Honour Judge Armitage QC. However, I do not consider it appropriate to make such an order without hearing from the Appellants.