GOUGH SQUARE CHAMBERS' CONSUMER CREDIT COLUMN: SEPTEMBER 2015

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In the September column, James Ross considers payment protection insurance (PPI) disputes following the decision in *Plevin v Paragon Personal Finance Ltd [2014] UKSC 61.*

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PPI DISPUTES FOLLOWING PLEVIN

The Supreme Court decision in *Plevin v Paragon Personal Finance Ltd [2014] UKSC 61* back in November 2014 was very significant for a number of reasons. It was the first time the Supreme Court considered the unfair relationship provisions in sections 140A to 140D of the Consumer Credit Act 1974 (CCA). The general guidance given by the court on the proper approach to the broad unfair relationship provisions is now regularly applied by county court judges. The court also confirmed that a credit broker will not be treated as acting "on behalf of" the creditor for the purposes of section 140A unless there is an agency relationship; a broker will not act "on behalf of" the creditor merely because a fee or other incentive has been paid.

However, the most important aspect of the *Plevin* decision was probably the ruling relating to payment protection insurance (PPI) commissions: the Supreme Court found that the failure by the creditor to disclose to Mrs Plevin the large commissions payable out of her PPI premium made its relationship with her unfair under section 140A. Given the historic prevalence of such PPI commissions in the industry, this ruling had wide-ranging consequences from both a litigation and a regulatory perspective.

This month's column considers how the effect of the Plevin decision is still being worked out by the courts and the FCA, in particular in its recent *consultation paper (http://uk.practicallaw.com/1-631-8105)* "Rules and guidance on payment protection insurance complaints: feedback on CP15/39 and further consultation" (CP16/20), which was published on 2 August 2016.

PPI litigation following Plevin decision

There has hardly been any PPI litigation following the *Plevin* decision, at least in comparison with the volume of litigation which preceded it. This is partly because many cases were stayed pending the Supreme Court decision and were subsequently settled. More generally, the decision appears to have been the final straw for creditors who were already struggling to justify defending claims arising from the PPI misselling "scandal" from both regulatory and reputational standpoints.

The difficulty for firms is that the failure to disclose PPI commission in itself caused unfairness in the *Plevin* case; the unfairness did not depend upon any other aspects of misselling alleged by Mrs Plevin. This means that even if firms successfully defend all other substantive allegations at trial, a debtor will probably still succeed in obtaining relief under section 140B of the CCA if a fairly large undisclosed PPI commission has been paid.

There are two key areas of uncertainty that remain after the Plevin decision:

- First, the threshold or "tipping point" at which a commission will be so large as to cause unfairness.

- Second, the relief that should be granted to debtors.

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Where is the tipping point?

In paragraph 18 of his judgment in *Plevin*, Lord Sumption JSC observed that, "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 [71.8% of the PPI premium] are a long way beyond it".

It follows that where the level of undisclosed PPI commission was anywhere near 71.8%, the creditor will face serious difficulties in distinguishing the Plevin case. However, it is probably not useful to consider this issue in terms of any fixed "tipping point" at which unfairness will arise: all will depend on the facts of each case.

In the case of *Brookman v Welcome Financial Services Limited (County Court at Cardiff, 06 November 2015)*, HHJ Keyser QC said, "The question in each case is not whether the amount of the commission has exceeded some general limit beyond which non-disclosure constitutes unfairness as a matter of law but whether, on the facts of the particular case and having regard to all relevant matters, the relationship between these parties is unfair." It is submitted that this is the correct way of approaching the issue following the *Plevin* decision.

The court in *Brookman* went on to find that an unfair relationship had arisen in that case, taking into account the circumstances of the debtors, the level of undisclosed PPI commission, and a profit share arrangement between the creditor and the insurer. An appeal in the *Brookman* case (which also included issues in relation to extortionate credit bargains under the CCA) is due to be heard by the Court of Appeal in October 2016.

What relief should be granted?

The Supreme Court in *Plevin* did not give any guidance as to the appropriate relief but remitted the case to the county court "to decide what if any relief under section 140B should be ordered". The use of the words "if any" emphasised the court's very broad discretion to grant relief under section 140B of the CCA if a determination of unfairness has been made under section 140A.

The county court in *Plevin* went on to order the creditor to return all of the undisclosed commission to Mrs Plevin, rejecting her submission that the full cost of the PPI should be refunded. The Court of Appeal refused Mrs Plevin's application for permission to appeal on 18 November 2015 on the basis that it was unarguable that the judge had been wrong in his approach to granting relief.

By contrast, the court in the *Brookman* case adopted a broad-brush approach to redress under section 140B, stating that the matter is "one of judgment rather than strict arithmetic". The judge took account of the cost of comparable PPI and the fact that the debtors had received some cover under the policy, ordering that they should be entitled to relief to the extent that their PPI liabilities exceeded £1,500.

It will evidently be very difficult to predict the relief awarded by courts under section 140B in these cases with any precision. Mindful of the difficulties faced by firms in assessing appropriate redress in relation to PPI complaints following *Plevin*, the FCA has proposed new rules and guidance to promote clarity and consistency in approach.

FCA proposals

In November 2015, the FCA issued a *consultation paper (https://www.fca.org.uk/publication/consultation/cp15-39.pdf)* (C15/39) proposing:

- A new rule that would set a deadline by which consumers would need to make their PPI complaints or lose their right to have them assessed by firms or by the Financial Ombudsman Service (FOS).
- An FCA-led communications campaign designed to inform consumers of the deadline.
- A new fee rule on 18 firms to fund this consumer communications campaign.
- New rules and guidance on the handling of PPI complaints in the light of the Plevin decision.

In particular, the FCA proposed that firms should presume that an unfair relationship has arisen where there was a failure to disclose a PPI commission exceeding 50%. Firms should presume that an unfair relationship has not arisen where the PPI commission was below 50%. The proposed 50% threshold is also important in relation to redress: the FCA has suggested that the appropriate redress for unfairness caused by undisclosed commissions should be the amount by which the commission exceeded the 50% threshold (rather than the full commission or even the full cost of the PPI).

In the light of feedback received relating to CP15/39, the FCA issued *CP16/20 (http://uk.practicallaw.com/1-631-8105)* in August 2016. The FCA's key proposals remain unchanged. Responses are requested by 11 October 2016 in relation to various minor issues, such as the proposal to include profit shares in addition to commission for the purposes of the 50% threshold.

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How should firms approach PPI redress until the new rules come into force?

The FCA anticipates that its final rules and guidance will be made by the end of December 2016, to come into force by the end of March 2017. The proposed deadline rule for bringing PPI claims will come into force in June 2017, with the PPI claim deadline falling two years thereafter in June 2019.

During the further FCA consultation, and until any final rules and guidance on PPI complaints and *Plevin* come into force, it will remain open to firms under existing FCA rules (see 1.6.2R(2) in the Dispute Resolution: Complaints sourcebook (DISP)) to explain to complainants that they cannot provide a final response for those complaints that could be affected by the proposed rules and guidance on *Plevin*. When the rules and guidance come into force, the FCA will expect firms to provide fair, swift final responses to complaints they put on hold.

If firms have ongoing litigation involving PPI commission issues, it would be prudent to invite debtors to agree a stay of proceedings pending publication of the final FCA rules and guidance in December 2016. In the event that debtors unreasonably refuse to consent to such a stay, there is a serious risk that they would be held liable to pay the costs of any application by the creditor to stay proceedings (see *Andrew v Barclays Bank plc [2012] CTLC 115*).

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