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Gough Square Chambers' consumer credit column: October 2020

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In the October 2020 column, Lee Finch considers the resurgence of payment protection insurance (PPI) litigation since August 2019, including claims for further redress under the unfair relationship provisions of the Consumer Credit Act 1974 (CCA) following redress being paid in accordance with the FCA's methodology.

Top-up PPI claims

Introduction

When I joined Chambers in 2011, payment protection insurance (PPI) litigation was in full swing and I spent the first years of my practice travelling between various county courts around the country arguing about alleged misrepresentations, a purported lack of suitability and, occasionally, undisclosed commissions. However, following a number of authoritative decisions from the higher courts and the Jackson Cost Reforms to the Civil Procedure Rules, which made success fees and after the event (ATE) premiums irrecoverable from the other party, this litigation gradually subsided. Instead, an ever-growing number of cases were made to the Financial Ombudsman Service (FOS).

Fast forward five years and the deadline for bringing FOS claims for mis-sold PPI passed on 29 August 2019. However, this deadline only applied to FOS claims and debtors are free to continue bringing legal claims subject to the usual position on limitation. Consequently, since 29 August 2019, there has been a significant resurgence of PPI litigation.

The vast majority of this litigation is brought under the unfair relationship provisions of the Consumer Credit Act 1974 (CCA). This is on the basis that the lender did not disclose the commission it would receive on the PPI policy, with the debtors relying on the Supreme Court decision in *Plevin v Paragon Personal Finance Ltd and another [2014] UKSC 61*. Interestingly, a significant portion of these claims are being brought by consumers who have already received redress for undisclosed commission in accordance with the FCA's methodology having complained to their lender or brought a claim to the FOS.

FCA redress methodology

The FCA redress methodology involves the lender paying the debtor the difference between the commission it received and a nominal 50% commission, together with charges and contractual interest incurred and compensatory interest at 8%.

Basis of top-up PPI claims

Top-up claims are now being brought on the basis that redress provided in accordance with the FCA's rules is insufficient to remedy the unfairness between the parties as a result of the lender's non-disclosure of PPI commission and, consequently, the court ought to order further redress under section 140B of the CCA. These claims have received not insignificant media interest with many outlets referring to a "second wave of PPI claims". However, contrary to much of the reporting, which gave the incorrect impression that selective County Court decisions were authoritative and binding and debtors were automatically entitled to a refund of all of their PPI premiums, many of these claims have insurmountable legal issues and those that do not may fail anyway because a court may find that the redress already paid was sufficient.

Key issues in top-up PPI claims

Limitation

A variety of limitation issues can arise depending on the facts of the specific case; this is unsurprising given

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the historic nature of the allegations. Given the fact dependant nature of these issues, this column will not dwell on the potential limitation arguments. For present purposes, it is sufficient to note that the limitation period to bring an unfair relationship claim is favourable to debtors (at least until such time as the decision in *Patel v Patel [2009] EWHC 3264 (QB)* is revisited or distinguished) but still has its limits. The application of section 32 of the Limitation Act 1980 (to extend limitation in cases of fraud, concealment or mistake) to unfair relationship claims based on undisclosed PPI commission is due to be considered by the Court of Appeal in January 2021 (in the appeal from *Canada Square Operations Ltd v Potter [2020] EWHC 672 (QB)*).

Whether the PPI policy is "in scope"

Another consequence of the historic nature of the claims is that consideration needs to be given to whether the PPI policy is "out of scope" of the unfair relationship provisions. The transitional provisions contained in Schedule 3 to the Consumer Credit Act 2006 provide that orders under section 140B of the CCA will not be made in relation to related agreements (presumably including PPI policies) which were entered into before 6 April 2007 and ceased to have any operation by 6 April 2008. Consequently, if the PPI policy was entered into before 6 April 2007 and was cancelled before 6 April 2008, the lender can argue that the court does not have jurisdiction to make any order under section 140B of the CCA in relation to it, even if the claim is still brought within limitation.

Compromise

A significant, yet unsurprising, issue between the parties is whether the claim has been compromised by payment of redress in accordance with the FCA's redress methodology. The exact nature of the arguments will, again, depend on the specific facts of each case and the specific wording contained in communications between the parties.

Certainly, where the debtor has specifically accepted the FCA redress in "full and final settlement" of claims arising from the PPI policy, there is a very strong argument that the claim has been compromised and the subsequent "second bite at the cherry" is an abuse of the court's process (see, by way of example, *Taylor v GE Money Consumer Lending Ltd (Leeds County Court, 20 July 2020, unreported*), where HHJ Belcher upheld the district judge's decision that the claim had been compromised).

How to remedy the unfairness

The central issue in these top up claims is whether, on the assumption that there was an unfair relationship in the first place, the redress paid in accordance with the FCA methodology was sufficient to remedy the unfairness between the parties.

The debtors argue that they would not have purchased PPI had they been told about the commission and, consequently, they should be refunded all of the PPI charges, together with associated interest and charges and compensatory interest. They say that the FCA's methodology essentially under compensates the debtors and further redress is required to remedy the unfairness. In contrast, the lenders argue that, to the extent that there was any unfairness, it has been remedied because the FCA methodology properly focuses on the unfairness in question - namely the non-disclosure of a high commission and addresses this in an appropriate way by returning commission above 50% (the nominal "tipping point") and associated charges and interest to the debtor.

If you were to read the national press or the submissions prepared by many debtors' representatives, you would erroneously but understandably assume that courts are exclusively agreeing with the debtors and making further, top-up, awards. However, that is not the case. There are a wide variety of decisions being made in the County Court, which range from ordering the return of all the PPI and associated charges and interest (less the redress already paid) to no further award, on the grounds that the FCA redress was sufficient.

So, which approach is to be preferred? No single approach will be appropriate for every case; the unfair relationship provisions require the court to consider all factors it considers relevant. Further, judges in the County Court are unlikely to be assisted by the citation of various other County Court decisions which go either way: firstly, County Court decisions have no authoritative weight; secondly, their citation would arguably be a breach of Lord Woolf's 2001 Practice Note on the Citation of Authority [2001] 2 All ER 510; thirdly, as set out above, there is no unanimity in approach across the County Court. This is unsurprising given the case dependant nature of the assessment and the discretion granted to the court under section 140B of the CCA.

However, when one turns to authorities from the higher courts, one can identify reasons to favour the lender's approach. In *Kerrigan v Elevate Credit International Ltd [2020] EWHC 2169 (Comm)*, the High Court, when dealing with a different consumer credit issue, said at paragraph 190:

"The court is not bound to adopt the line drawn by the FCA... in this sort of case, but where the rules take account of the need to balance relevant matters of policy, at the lowest it provides a starting point for the consideration of fairness, and at the highest it is a powerful factor in deciding whether the individual relationship is fair or not."

There is no reason why this should not also apply to redress in unfair relationship claims for non-disclosure

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of commission. The FCA's rules represent the specialist regulator's considered view, which was reached after full consultation and are designed to secure an appropriate degree of consumer protection. (The FCA published its final rules on PPI complaints in a policy statement (PS17/3) in March 2017.)

Also in *Kerrigan*, it was confirmed that the granting of relief in unfair relationship claims is "not to be analysed in the sort of linear terms which arise when considering causation proper" (at paragraph 214). The remedy granted in an unfair relationship claim should attempt to remedy any unfairness identified, not place the debtor in the position they would have been in "but for" the action taken by the creditor.

The FCA redress methodology attempts to achieve this, whereas the approach advocated by claims management companies and other debtor representatives is a direct attempt to impose a lineal causative approach on unfair relationship claims.

Quantum calculation

A number of issues can also arise when it comes to calculating quantum. Notably, some debtor's representatives are taking a somewhat inventive approach to calculating the compensatory interest: from assuming the premiums were incurred and paid years before they were, to awarding contractual and compensatory interest on the same principle sum for the same period. These nuances are case specific and must be considered on a case by case basis.

There is, however, one point on which virtually all claimants agree: compensatory interest should be awarded at 8%. In support of this they, ironically, rely on the FCA redress methodology which calls for 8% compensatory interest. Given the purpose of this interest award is to compensate debtors for being out of pocket, it is difficult to justify an award at 8% when base rate over the past decade has been no more than 0.75% and is currently 0.10%. Compensatory interest at 8% would provide the debtor with a windfall and it is clear that a significantly lower rate would be more appropriate.

Conclusion

Whilst it may have been hoped that there would be no need to write about new PPI claims in 2020, especially with so many customers having received redress under the FCA regime, unfortunately that is not the case. However, despite the impression given by some of the reporting, this is not a "second wave" with all consumers in line for further pay outs: some claims will be time barred, out of scope or compromised and, in others, the judge may decide that the redress already paid has remedied the unfairness.

Ultimately, each claim will turn on its own specific facts and, as in 2011, different decisions will be reached in different cases.

Gough Square Chambers' consumer credit columns

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