

Gough Square Chambers' consumer credit column: December 2021

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Ruth Bala, Lee Finch, Sabrina Goodchild and Thomas Samuels are all specialist consumer credit counsel at Gough Square Chambers. On a regular basis, they share their views with Practical Law Financial Services subscribers on topical developments or key issues relating to consumer credit.

In the December 2021 column, Sabrina Goodchild considers the recent judgment in *Smith v Royal Bank of Scotland plc [2021] EWCA Civ 1832*. The case concerns the limitation period applicable to unfair relationship claims under the Consumer Credit Act 1974 (CCA) and the effect of the transitional provisions governing the same.

Unfair relationships: limitation period and applicability of transitional provisions

Introduction

In *Smith and Burrell v Royal Bank of Scotland plc [2021] EWCA Civ 1832*, the Court of Appeal considered the limitation period applicable to unfair relationship claims under sections 140A to 140C of the Consumer Credit Act 1974 (CCA 1974) and the effect of the transitional provisions governing the same. Whilst decided in the context of the long-lasting and so-called "PPI 2" litigation, the impact of the decision will be felt far more widely across all types of unfair relationship claims.

Background to the litigation

Part of the growing body of appellate decisions on PPI "top-up" claims, these claims arose as the respondents claimed that their relationships with RBS were unfair under section 140A of the CCA 1974 as a result of undisclosed commission received by RBS in relation to PPI policies. Full repayment of all PPI policy premiums, plus interest, was sought.

Ms Smith had entered into a credit card agreement and PPI policy in January 2000. The PPI policy was terminated before the end of the transitional period applicable to the unfair relationship provisions and identified in Schedule 3 to the Consumer Credit Act 2006 (CCA 2006), whereas the credit card agreement was terminated after the end of the transitional period in 2015. The relevant facts of Mr Burrell's case were materially identical.

DJ Stone upheld Ms Smith's claim and ordered the full repayment of all PPI policy premiums with interest, less the sums already awarded to Ms Smith under the FCA's redress scheme. RBS' first appeal was dismissed by HHJ Gore QC. Mr Burrell's claim had been treated similarly.

By way of a second appeal, the issues for the Court of Appeal were two-fold:

- Did the transitional provisions in the CCA 2006 mean that Ms Smith/Mr Burrell had no cause of action?
- Were Ms Smith's/Mr Burrell's claims time-barred by section 9 of the Limitation Act 1980 (LA 1980)?

Court of Appeal's analysis

Birss LJ gave the leading judgment, with which Macur LJ and Coulson LJ agreed.

Transitional provisions

The Court of Appeal held that the transitional provisions in paragraph 16 of Schedule 3 to the CCA 2006 were not applicable to the fairness assessment conducted under section 140A of the CCA 1974. Accordingly, the assessment of fairness could include consideration of a related agreement which had been concluded before the end of the transitional period. This meant that the PPI policy could be taken into account when considering the fairness of the credit relationship.

However, the court went on to find that, having found the relationship to be unfair under section 140A, if the relevant payments had only been paid by virtue of the related agreement alone (that is, by virtue of the PPI policy alone), then as a result of the transitional provisions, the court could not order their repayment under section 140B

of the CCA 1974. Given the factual findings, which were unchallenged on appeal, that the PPI policy payments were made by virtue of both the PPI policies and the credit card agreements, the court found that their repayment could be ordered under section 140B.

Applicable limitation period

The court considered that the relevant date for the assessment of unfairness did not always and necessarily have to be the date when the relationship ended (assuming that the relationship had ended by the time the court considered the matter). A relationship could change over time, so it could have periods of fairness and periods of unfairness. As such, a period of unfairness may not mean that the relationship is unfair at a later date.

Applying those principles to the case before it, Birss LJ held that the relationship up until the date of the last PPI policy repayment was unfair (that is, until April 2006). However, once those sums had been repaid and no liability remained, the fact that RBS continued to leave Ms Smith/Mr Burrell in ignorance of the commission, did not justify a finding that the unfairness continued, particularly where the credit agreements alone, absent the PPI policies, were not unfair. The court held that Ms Smith/Mr Burrell had failed to allege or prove that any economic effect or consequence of the PPI agreement persisted after April 2006. Accordingly, the unfair relationship came to an end in April 2006. Time therefore started to run for the purposes of limitation on that date and the claim was statute barred.

As such, RBS' appeals were allowed on limitations grounds and the respondents' claims were dismissed as they were time barred.

Comment

Following the decision on the applicability of the transitional provisions, there remains the possibility of "out-of-scope" defences being successfully raised on, inter alia, the following grounds:

- A court lacks jurisdiction to consider an unfair relationship claim where the last debit in respect of the PPI policy was before the enactment of the unfair relationship provisions on 6 April 2007. This is on the basis of the Court of Appeal's "provisional view" that "since the unfair relationship ended before the coming into force of sections 140A-C, an action for what was an unfair relationship in 2006 does not come within

the 1974 Act at all. That is what the Act means in section 140A by asking if the relationship "is" unfair" (paragraph 70).

- Noting that the factual findings that the PPI policy premiums were paid by virtue of the PPI policies and the credit card agreements were unchallenged in the appeal, by arguing that the sums paid in relation to the PPI policy were paid "by virtue" of the PPI policy alone.
- Arguing that the unfair relationship provisions have no application where the underlying credit agreement was terminated before the end of the transitional period.

The decision on limitation, which seemingly leaves the *Patel v Patel* [2009] EWHC 3264 (QB) accrual longstop of the end of the relationship (where the relationship has ended) or the date of trial (where the relationship is ongoing) untouched, provides an opportunity for creditors to argue that the cause of action accrued at a potentially much earlier date than previously thought possible by relying on "compartmentalised" allegations of unfairness.

In the context of the PPI 2 litigation, this judgment may be seen as counter-balancing the recent decision on section 32 of the LA 1980 in *Canada Square Operations Ltd v Potter* [2021] EWCA Civ 339 (see [Article, Gough Square Chambers' consumer credit column: April 2021](#)).

However, the judgment is not without practical difficulties. Where a direct comparison with *Smith* can be drawn, limitation can be pleaded to accrue when the finance relating to the related agreement has been paid off, provided there is no continuing financial detriment as a result of the unfairness. However, where the allegations of unfairness differ, it may be difficult to establish precisely when the unfairness ended and therefore when the last date of accrual was. Indeed, a full exploration and comprehensive analysis of all facts relevant to the fairness of the relationship may be required before a decision on limitation can be reached. Whether these practical challenges eventuate remains to be seen as a permission to appeal application to the Supreme Court is expected.

Gough Square Chambers' consumer credit columns

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