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Gough Square Chambers' consumer credit column: January 2024

by Ann-Marie O'Neil, Gough Square Chambers

Status: **Published on 29-Jan-2024** | Jurisdiction: **United Kingdom**

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Lee Finch, Sabrina Goodchild, Ann-Marie O'Neil and George Spence-Jones 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 January 2024 column, Ann-Marie O'Neil considers the judgment in *Smith and Burrell v Royal Bank of Scotland plc [2023] UKSC 34*.

Supreme Court judgment on unfair relationships and PPI claims

In October 2023, the judgment in *Smith and another v Royal Bank of Scotland plc [2023] UKSC 34* was handed down. The case concerns the limitation period applicable to unfair relationship claims under sections 140A to C of the Consumer Credit Act 1974 (CCA).

This column considers the arguments advanced by the defendant (Bank) and the potential wider implications of the judgment.

Background

Two claimants had separately entered into credit card agreements with the Bank. Each had elected to add a payment protection insurance (PPI) product to their agreements. The Bank retained a significant level of commission from the PPI premiums paid. The claimants alleged that their relationships with the Bank were unfair under section 140A of the CCA because the high levels of commission were undisclosed. The Bank conceded that the levels of undisclosed commission made the relationships unfair but argued that the claims had been brought out of time and, as such, were statute-barred.

Primary limitation for the purposes of section 140A of the CCA is six years under section 9 of the Limitation Act 1980 (LA 1980). In this case, the PPI policies had been cancelled over ten years before the claims were brought. However, the claimants had continued using their credit cards after the PPI policies had been cancelled. The claimants ceased using their credit cards with the Bank fewer than six years before bringing the claim.

The cases were determined against the Bank at first instance and on first appeal. Before the Court of Appeal, the Bank advanced two arguments:

- First, on a proper application of the transitional provisions in relation to section 140A, the claimants had no cause of action. It was held that this was out of scope because the section 140A provisions only came into force as of 1 April 2007 (*section 16, Schedule 3, CCA*).
- Secondly, in any event, the claim was time-barred by section 9 of the LA 1980 (that is, six years).

The challenge for the Supreme Court was to determine when time starts running for the purposes of limitation where a claim is brought under section 140A of the CCA.

The provisions in relation to unfair relationships operate uniquely. They deliberately give the courts a wide discretion in both assessment and remedy and are not analogous to a contract or tort claim, in which the right of action crystallises upon the breach of contract or commission of the tortious wrong (or, in the case of certain torts, upon damage).

Completed cause of action argument

The claimants argued that the correct trigger point for the purposes of limitation was the end of the relationship between the Bank and the claimants. The relationships in these cases remained ongoing for several years after the PPI policies were cancelled. Both relationships had ended less than six years before the claims were brought and so the claimants argued that the claims had been brought in time.

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The Bank argued that time for the purposes of limitation should start running from the point at which a consumer had a cause of action. This could be determined by assessing at what point the consumer could have pleaded the material facts to bring the unfair relationship claim.

The Supreme Court rejected the Bank's argument stating (paragraph 42, judgment):

> "The central flaw in the completed cause of action argument is that, for as long as the credit relationship is continuing, the debtor cannot have a completed cause of action before the time at which a determination of unfairness is made. Proof of facts which made the relationship unfair to the debtor at some earlier point in time is never sufficient to give the debtor an entitlement to a remedy. That is because, as noted at paras 19-21 above, unless the relationship has ended, section 140A makes the power of the court to make an order under section 140B conditional on a determination that the relationship 'is' (ie at the time when the determination is made) unfair to the debtor. Necessarily, a right to obtain a remedy for unfairness existing on that day cannot arise before that day comes."

At paragraphs 43 to 45, Lord Leggatt clarified, citing *Patel v Patel [2009] EWHC 3264 (QB)*, that, where a relationship is continuing, section 140A of the CCA demands an assessment of whether a relationship is unfair; assessing unfairness at any earlier date would be in contravention of the clear requirement of that provision. It is only when a relationship has ended, and the facts relevant to the determination become fixed, that the court should ask whether the relationship was unfair as at the date the relationship ended.

Absurdity argument

The Bank also argued that only allowing limitation to start running at the end of the relevant agreement would result in an absurd operation of section 140A of the CCA. An example was provided by the Supreme Court of a 25-year loan which attracted an unfairly high interest rate in the first year. The unfairness that occurred in the first year of the loan could be litigated 30 years later, even though the interest rate for the last 24 years of the loan was fair.

In addition, the Bank argued that allowing time to run for limitation only at the end of a relationship would permit a consumer who consistently defaults on their loan or credit card repayments an unfairly extended limitation period, because of their own breach of contract, over a consumer who has always discharged their debts on time.

Lord Leggatt provided a solution to this issue. At paragraph 56:

> "Apart from the rate of interest, other matters capable of affecting the assessment would include what complaint, if any, about the interest charged in the first year or attempt to seek redress the debtor had made during the 25-year history of the relationship. In the absence of some extraordinary explanation, inaction by the debtor over such a length of time is likely to be regarded as an overwhelming factor pointing to the relationship not being unfair when it ended."

And at paragraph 57:

> "Second, even if the court were to find that the relationship was unfair to the debtor when it ended, it is in the court's discretion whether to make an order under section 140B. If the debtor, with knowledge of the relevant facts, had waited for 30 years after the contested payments of interest were made before making a claim for repayment, it seems inconceivable that the court would think it just to make such an order."

Lord Hodge gave a concurring decision. In particular, he agreed with the response to the absurdity argument, stating (at paragraph 89):

> "If a debtor sits on his or her hands in knowledge of the relevant facts, it would be, as Lord Leggatt states, inconceivable that a court would think it just to make an order under section 140B of the 1974 Act. This is so, both during the currency of the relationship and in the six years after that relationship has ended."

The Supreme Court's answer to the absurdity argument was, therefore, not that the claim fails because it is time barred, but because of the inaction of the debtor making the claim stale.

Court's core conclusions

A claim to remedy an unfair relationship in respect of an ongoing relationship will not fail because of limitation. It is no longer possible to argue that time starts to run when the economic consequence of the initial unfairness ceases (for example, because the debtor had paid for the PPI). The Supreme Court entirely rejected the Court of Appeal's analysis which had made this argument possible.

Although the Court of Appeal decision has been overturned, the Supreme Court's decision does raise the possibility that, while a limitation defence is unavailable, the debtor's inaction is something that the court should have regard to in both the assessment of unfairness and when deciding whether to grant a remedy.

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Further, the Supreme Court confirmed the High Court decision of *Promontoria (Henrico) Ltd v Samra [2019] EWHC 2327 (Ch)* in relation to the question of who bears the burden in an unfair relationship claim: section 140B(9) of the CCA specifically provides that the creditor shall bear the burden of proving that the relationship was not unfair, but there has been much argument as to exactly what this means. Lord Leggatt confirmed that the burden placed on the defendant by section 140B(9) (at paragraph 40):

> "...does not, however, mean that the claimant is absolved from pleading particulars of claim which identify concisely the facts on which the claimant relies. Nor does it mean that the claimant can make allegations of fact which the court is bound to accept unless the creditor disproves them; it is still the debtor who has the onus of proving facts on which he or she positively relies."

Potential impact of judgment on wider unfair relationship claims

At first glance, this decision seemed to be a blow for the credit industry. However, once analysed more closely, this decision is likely to be useful to lenders defending unfair relationship claims in the future.

Take, for example, the new wave of motor commission claims. Many claims involve agreements taken out more than six years ago but were settled less than six years ago. It is nearly always the case though that customers were told at the outset that commission may be paid. The Supreme Court's judgment facilitates an argument that such claims, while not statute-barred, are stale by virtue of the customer having the information in relation to commission but having sat on their hands for many years.

Gough Square Chambers' consumer credit columns

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