Gough Square Chambers' consumer credit column: December 2024

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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 December 2024 column, Ann-Marie O'Neil considers the Court of Appeal's judgment in *Self v Santander Cards UK Ltd [2024] EWCA Civ 1106*. Among other things, it contains important guidance on the finality of settlement agreements in payment protection insurance (PPI) claims and the application of section 140A of the Consumer Credit Act 1974 (CCA) to settlement agreements.

Re-opening settled unfair relationship claims under section 140A of the CCA

Introduction

The Court of Appeal's judgment in Self v Santander Cards UK Ltd [2024] EWCA Civ 1106 contains important guidance on the finality of settlement agreements in payment protection insurance (PPI) claims and the application of section 140A of the Consumer Credit Act 1974 (CCA) to settlement agreements. It also provides useful obiter relating to the assessment of section 140A of the CCA more generally.

This month's column provides an overview and analysis of the judgment.

Background

The facts of each complaint are those of a classic PPI claim. Namely, both claimants had complained about high levels of undisclosed commission charged on their PPI policies. They alleged an unfair relationship had been created under section 140A of the CCA as a result.

Both claimants had issued letters before claim that complained of these issues among a myriad of other legal allegations. Both asked for repayment of all the PPI sums that they had paid plus compensation.

In response to their letters of claim, the lenders offered redress under the FCA's DISP App 3 redress scheme for PPI claims. The scheme was established in response to the Supreme Court's 2014 decision in *Plevin v Paragon Personal Finance [2014] 1 WLR 4222*. It was a type of alternative dispute resolution that provided a systemic response to individual claims of section 140A unfairness.

The FCA designed the scheme to marry best practice with the objective of reducing pressure on the Financial Ombudsman Service (FOS) and the likelihood of litigation. It laid down a detailed process and evidential provisions guiding financial institutions on how to respond to consumers' undisclosed commission complaints arising from their PPI policies. It also set out a basic redress methodology. The provisions are lengthy but, in summary, suggest that any commission received above 50% of a PPI premium should be paid back to the customer.

The lenders offered Mr Harrop and Mrs Self redress calculated by the FCA methodology. This was less than both claimants had asked for in their letters of claim. Both claimants were required to sign an acceptance form confirming that they were accepting the offer "in full and final settlement of my complaint against Santander/Skipton".

Both claimants signed and returned the forms following which they received their redress.

First instance and first appeal

Several years later, both claimants commenced a claim under section 140A of the CCA and sought to re-open the settlements they had reached. The courts at first instance and on first appeal found that the offers of redress, acceptance and then payments were in full and final settlement and were sufficient to compromise these claims.

Both claimants appealed to the Court of Appeal where the cases were joined and heard before Lady Justice Asplin and Lord Justice Stuart Smith.

Further appeal

Mr Harrop argued two main grounds [95-99]:

- His claim was not compromised. This was on the basis that Skipton was obliged to pay the sums outlined by the FCA redress scheme and, as such, had failed to give any consideration for a compromise.
- The relationship remained unfair despite the redress payment. There were a host of reasons put forward for this argument, but the following three stand out:
  - the lower courts were wrong to place weight on the fact that he had received advice from his claims management company (CMC) on whether or not to accept;
  - the redress received fell considerably short of what he had asked for (repayment of all premiums and compensation); and
  - an assessment of Skipton's costs in administrating the PPI policy should have been undertaken. If undertaken, the court would have found that a return of commission above 50% when Skipton incurred costs of only 16% of the premiums did not cure the unfairness in the relationship.

Mrs Self argued three points:

- Similary to Mr Harrop, there was no valid consideration for the compromise because Santander was already under an obligation to pay the redress under the FCA redress scheme.
- Santander's redress offer and the waiver were limited to claims under the FCA redress scheme and had not compromised any civil claim.
- If she failed on her first two grounds and there was a binding settlement, it should be re-opened because it did not extinguish the unfairness to her in the relationship between the parties. This was effectively asking the court to make a fresh determination of the section 140A CCA claim.

Court of Appeal decision

Both appeals were dismissed. Three important principles arise from the judgment:

- How the courts deal with settlements relating to section 140 CCA claims (see Settlements for section 140 CCA claims).
- The court's view of the FCA's PPI redress scheme and whether binding settlements can be made in tandem with this redress (see FCA redress scheme and settlements).
- Whether a claim of section 140A unfairness can be dealt with through group litigation (see Section 140A and group litigation).

Settlements for section 140 CCA claims

The Court of Appeal broadly accepted the lower courts' approach, which was consistent with the principles in *Holyoake v Candy [2017] EWHC 3397 (Ch), [2017] 12 WLUK 608*.

Holyoake says that the court retains jurisdiction under sections 140A and 140B of the CCA even when there is a settlement of a section 140A claim but that "if the court is satisfied that the terms are fair and reasonable, then the compromise should be held binding".

This means that even when there is a settlement in relation to section 140 of the CCA, courts can still assess the relationship and weigh the settlement agreement in the balance. In this instance, the Court of Appeal emphasised that where factors such as clear wording, an understanding from the consumer of the consequences of accepting redress, and if legal advice has been obtained, the court is highly unlikely to intervene and find unfairness.

Significantly for other PPI claims, the court held both that:

- The FCA redress scheme did not impose on an institution an enforceable obligation to make a payment of redress.
- There was nothing within the FCA redress scheme that prevented a respondent from making an offer of redress conditional on the waiver of past or potential future claims.

The court noted that there is nothing in DISP, or elsewhere, that either says or implies that a person may not attempt to achieve a binding settlement.

In relation to both compromise arguments, the Court of Appeal noted that the judges of the lower courts were:

> "Doing no more than reflecting properly the balance between the obligations of those providing regulated financial services to provide a level of care that is appropriate, on the one hand, and the general principle that consumers should take responsibility for their decisions."

Once again, the court is saying that assessing unfair relationships is primarily about balance and, crucially, that consumers must take responsibility for their decisions when considering settlement.

FCA redress scheme and settlements

The court emphasised that looking at the matter broadly, courts should be very slow to go behind settlement. The Court of Appeal in this instance found that both sets of lower courts had rightly concluded that there were no real prospects of concluding that the terms of the settlement were not fair and reasonable or, taking all relevant matters into account, that relief should be granted under section 140B of the CCA.

In dismissing both appeals, the Court of Appeal held that in any instances of compromise, the finding of what was fair and reasonable depended on the terms of the correspondence. In *Self* and *Harrop*, the construction of the waivers entered into as being related to redress for non-disclosure of commission was "unarguable". They reiterated established case law that the courts should be "slow" to go behind bona-fide compromises such as these.

The Court of Appeal made some useful comments for lenders in relation to the FCA redress scheme itself. It found that the lower courts were correct in saying that "the FCA methodology is not an absolute" and that the FCA scheme "provides a broad brush method for addressing a built in presumption of unfairness". It also pointed out that there was nothing to prevent financial institutions from offering more or rebutting the presumptions of unfairness. Nor is there anything to prevent claimants from rejecting the FCA scheme approach if they believed it to provide inadequate or inequitable redress.

Although the FCA scheme had built-in flexibility, it did not pretend to replicate the more detailed, time-consuming and expensive procedures and approach of litigation. Also, the appellant was informed clearly of how the offer had been calculated, that he did not have to accept it, that there was the availability of the FOS or indeed litigation if they wished to pursue that route, and that accepting the offer would be "in full and final settlement of [his] complaint".

The fact that he was advised by a CMC was not determinative, but was relevant to whether the settlement was fair and reasonable. The appellant knew how the offer had been calculated and that he was not obliged to accept it.

Section 140A and group litigation

The Court of Appeal made a useful comment in relation to section 140 of the CCA more generally. It stated [56]:

> "It follows that application of sections 140A and 140B is bound to be fact-sensitive: even in a world of widespread misselling and unfairness, this is not a jurisdiction where, on its proper analysis and application, a single pre-determined criterion will always determine the question of unfairness; nor will one size of remedy fit all cases where the relationship is found to be unfair."

The obiter, in summary, says that a "one size fits all" approach cannot be taken to matters concerning sections 140A and 140B of the CCA.

The corollary of this is positive in two ways. First, it bodes well for the lenders in any applications for PPI matters to be dealt with by group litigation. Secondly, it is a useful confirmation of how courts should approach section 140A CCA claims in what is undeniably an increasing appetite of CMCs to pursue group litigation more generally (for example, the ongoing *Angel v Black Horse* group motor dealer commission appeal, which is due to be heard in February 2025).

There are additional issued and threatened omnibus claims from CMCs in PPI, motor commission and mortgage misselling matters among other claims. For the lender sphere, the most useful element of the judgment is the [56] obiter, which confirms that sections 140A and 140B CCA claims must be assessed on their own individual merits and this applies more widely than PPI claims.

The court usefully reiterated parts of *Plevin* reminding us that while most relationships between commercial lenders and private borrowers are likely to be characterised by large differences of financial knowledge and expertise, inequality of bargaining power is unlikely of itself to be sufficient for a finding of unfairness. This is useful for motor commission matters where often the only element that claimants say caused unfairness is the commission arrangements between the dealer and lender which simply created an inequality of bargaining power.

Conclusion

In summary:

- Courts still have the ability to find unfairness even when a settlement has been reached, but will be slow to do so.
- The FCA redress scheme is accepted as not obligatory and binding settlements can be made in tandem with this redress.
- Assessment of unfair relationships under the CCA are unlikely to be suitable for group litigation.

Gough Square Chambers' consumer credit columns

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