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Plevin bound/unbound

KEY POINTS

- The Financial Conduct Authority has proposed in its recent consultation paper that there is only an unfair relationship under s 140 of the Consumer Credit Act 1974 where the commission on a sale of payment protection insurance is 50% or more.
- Although this is rebuttable, this approach radically cuts down a complainant's recoverable damages.
- The fine balance struck can be seen to favour lenders despite seeking to achieve an equitable outcome for both parties.

In this article, Nazeer Chowdhury explains the FCA's current proposed approach to *Plevin* and its decision not to follow the approach of the County Court.

On 26 November 2015, the FCA published CP15/39: Rules and guidance on payment protection insurance complaints. The areas of consultation included the FCA's:

- Rationale for a proposed deadline and consumer communications campaign.
- Details of their proposed deadline and consumer communications campaign.
- Proposed fee rule to pay for the consumer communications campaign.
- Proposed rules and guidance on PPI complaints and *Plevin v Paragon Personal Finance Limited* [2014] UKSC 61.

The period of consultation ended on 26 February 2016.

The Supreme Court determined amongst other things in *Plevin* that where a purchaser of payment protection insurance (PPI) had not been told prior to concluding the agreement that more than two-thirds of the premium would be used to pay commission to intermediaries, the agreement was unfair and could be reopened by the court pursuant to its powers under the Consumer Credit Act 1974 (CCA).

This decision provides a further basis for more PPI litigation because its focus is not on mis-selling, but on the relationship between borrower and lender. Lenders therefore face another round of further PPI claims.

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The purpose of this article is to explain the FCA's current proposed approach to *Plevin*. First, the author sets out the broad facts of *Plevin*.[1] Second, he will consider what the Manchester County Court did when the Supreme Court remitted the case to the County Court. Third, he will then consider the redress rules proposed by the FCA where a relationship is considered to be unfair and fourth he will explain the FCA's decision not to follow the approach of the County Court.

PLEVIN V PARAGON PERSONAL FINANCE LIMITED [2014] UKSC 61

Mrs Plevin was a widowed college lecturer of fifty-nine living in her own house, with a mortgage and various unsecured personal debts. She responded to an unsolicited leaflet put through her letter box by an independent credit broker called LLP Processing (UK) Ltd (LLP), which long ago went into liquidation. They offered to arrange the refinancing of her existing liabilities at a competitive rate of interest over a long term, secured on her home. She telephoned LLP and told them that she was interested in borrowing money to pay off her existing debts and fund some home improvements. They proposed that she should borrow £34,000 from Paragon Personal Finance Ltd (Paragon), repayable in instalments over ten years, and take out PPI for five years with Norwich Union. The PPI premium was £5,780, which was payable at the outset and added to the amount of the loan making a total borrowing of £39,780. Paragon was one of eleven lenders with whom LLP had arrangements to introduce clients. These arrangements allowed them to input details of the proposed loan into a Paragon computer system and obtain a preliminary indication of whether the transaction was likely to be acceptable. Each lender had an arrangement with a designated insurer who underwrote PPI policies associated with its loans. Norwich Union was the insurer designated by Paragon.

After the telephone conversation, LLP sent Mrs Plevin a letter recording their proposal, and quoting a premium for PPI cover at £5,780. It enclosed a "Key Facts" document describing the insurance cover, a "Borrower Information Guide" produced by the Finance Industry Standards Association (FISA) and an application form. The application form, which Mrs Plevin completed and dated 6 March 2006, recorded brief details of her income and outgoings, including her current mortgage, and that she wished to borrow £34,000 and buy a PPI policy. The form was returned to LLP.

Thereafter, Paragon sent her a copy of the credit agreement, the PPI certificate and four cheques, three of which were payable to her designated creditors and the fourth to her personally.

Of the £5,780 premium, 71.8% was taken in commissions from the premium before it was remitted by Paragon to Norwich Union. LLP received £1,870 and Paragon retained £2,280. The net sum of £1,630 was then remitted by Paragon to Norwich Union. The FISA borrowers' guide told Mrs Plevin that 'commission is paid by the lending company'. But neither the amount of the commission nor the identity of the recipients was disclosed.

As noted above, the Supreme Court determined that the agreement was unfair and could therefore be reopened by the court pursuant to its powers under the CCA.

PLEVIN V PARAGON PERSONAL FINANCE LIMITED (MANCHESTER COUNTY COURT) HHJ PLATTS 2 MARCH 2015

On 2 March 2015, the remitted case of *Plevin* was heard by HHJ Platts. The judgment is founded on the factual findings of the first instance decision before Recorder Yipp QC and the guidance provided by the Supreme Court (*Plevin v Paragon Finance* [2012] EW Misc 24 (CC) http://www.bailii.org/ew/cases/Misc/2012/24.html). The critical findings of the County Court (made by Recorder Yipp QC) were that:

- PPI was not represented as compulsory and she made a positive choice to purchase PPI.
- Had commission been disclosed to Mrs Plevin she would have 'certainly questioned this'. In her evidence, she did not go so far as to say that she would not have taken out the insurance had she known about the commission arrangements.

Even if Recorder Yipp QC was wrong about both the nature of the agreement and the issue of enforceability, she concluded that questions as to the consequences of non-enforceability and the remedy for Mrs Plevin would arise. She did not consider it would be right to order repayment of all payments made for the PPI in circumstances where the Mrs Plevin's evidence suggested she wanted, and perhaps specifically requested, the cover for her large loan. She has had the benefit of such cover over the term to which she agreed.

The particular Supreme Court guidance followed by HHJ Platts was para 18 of Lord Sumption's speech in which he highlights Mrs Plevin's knowledge that some commission would be payable:

> 'I turn therefore to the question whether the non-disclosure of the commissions payable out of Mrs Plevin's PPI premium made her relationship with Paragon unfair. In my opinion, it did. A sufficiently extreme inequality of knowledge and understanding is a classic source of unfairness in any relationship between a creditor and a non-commercial debtor. It is a question of degree. Mrs Plevin must be taken to have known that some commission would be payable to intermediaries out of the premium before it reached the insurer. The fact was stated in the FISA borrowers' guide and, given that she was not paying LLP for their services, there was no other way that they could have been remunerated. But 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 are a long way beyond it. …'

In her evidence, she did not go so far as to say that she would not have taken out the insurance had she known about the commission arrangements.

HHJ Platts considered there to be five factors of significance in the case. First, the commission was significant. Second, Mrs Plevin was found not to be saying that she would not have purchased the PPI had she been informed of the quantum of the commission. Third, she had a choice over whether to purchase PPI. Fourth, she had the benefit of the PPI for the duration of the loan and thus had the peace of mind that the cover brought. Fifth, she elected to purchase the PPI.

HHJ Platts concluded that Mrs Plevin was entitled to relief from paying commission, but not from the whole of the premium.

THE RULES PROPOSED BY THE FCA WHERE A RELATIONSHIP IS CONSIDERED TO BE UNFAIR

The FCA could have decided not to regulate unfair relationships arising out of PPI claims. However, as it observed at para 5.10 of the CP:

> 'We think that, on balance, the rationale for us exercising our regulatory judgement about appropriate assessment and, where appropriate, redress of relevant PPI complaints in light of s.140A-B, taking account of Plevin, and making rules and guidance now for firms to follow when handling PPI complaints, is stronger, because:
>
> - Firms will then take a fair and consistent approach to handling *Plevin* complaints. Otherwise, given the variety of industry views of *Plevin*'s significance, it is likely that individual firms will adopt different approaches to handling such complaints. This will create inconsistency in PPI complaints handling and likely increased demands on the Ombudsman service. Additionally, many consumers may not complain to the Ombudsman service.
> - Our ability to take future action is enhanced. By giving firms a clear idea of how we expect relevant complaints to be dealt with in light of *Plevin*, it will be easier for us to ensure that firms act fairly and consistently.
> - It is more appropriate for us, as a policy making body, to set out a framework approach in rules and guidance. The FCA has the power

to make rules and guidance to help ensure firms reach fair and consistent outcomes for complainants on cases with common issues and similar fact patterns. This helps to ensure the best outcomes for consumers when making complaints to firms at the earliest stage in the complaint process. The Ombudsman service must focus on individual cases and be careful not to prioritise standard approaches over individual case circumstances. The Ombudsman service is required to take our rules and guidance (amongst other things) into account when determining cases.'

The proposed rules and guidance apply only to PPI complaints where a claim could be made against a lender under s 140A and an order made to remedy any unfair relationship under s 140B of the CCA, so they will apply if the PPI states it covered or covers a credit agreement where sums are payable, or capable of becoming payable under it on or after 6 April 2008.

The existing rules and guidance in DISP App 3 (Handling Payment Protection Insurance Complaints) will be amended to reflect the following new two-step approach to PPI complaints. Where the credit agreement covered by the PPI policy is in the scope of s 140A-B, then:

- a lender that receives a complaint about the PPI does not have to assess the complaint against the proposed new rules and guidance (Step 2) if it sold the policy and has already concluded, under the existing rules and guidance (Step 1), that the complaint should be upheld (because the PPI was mis-sold) and paid redress of full return of premium and the interest paid on that premium;
- the lender should assess the PPI complaint under Step 2 if:
  - it sold the PPI and decides under Step 1 that it would reject the complaint because the PPI was not mis-sold or, in some single premium PPI cases, uphold it but pay only "alternative redress"; or
  - it did not sell the PPI to the consumer and so cannot consider whether it was mis-sold under Step 1.

The FCA observe that firms should take the following steps when assessing complaints at Step 2 (para 5.24):

- consider, in light of all the information provided by the complainant and otherwise already held by or available to the firm, whether there was non-disclosure of commission.
- seek to establish the true substance of the complaint, rather than taking a narrow interpretation of the issues raised, and not focus solely on the specific expression of the complaint.
- consider whether they need to contact the complainant directly to understand fully the issues raised.
- consider evidence that is uncovered during the assessment of the complaint as if it were part of the complaint (even if not raised in the complaint) and
- take into account information it already holds about the sale and consider other issues that may be relevant to the sale which the firm has identified through other means (eg root cause analysis).

The heart of Step 2 is set out under proposed rule Disp App 3.3A.2:

> 'Where the firm did not disclose to the complainant in advance of a payment protection contract being entered into (and is not aware that any other person did so at that time) either:
>
> i. the commission; or
> ii. an explanation of what the commission was likely to be in the future or the likely range in which it would fall or how it would be calculated;
>
> the firm should take steps to satisfy itself that this did not give rise to an unfair relationship under section 140A of the CCA. The firm's consideration of unfairness should take into account all relevant matters, including whether the non-disclosure prevented the complainant from making a properly informed judgment about the value of the payment protection contract.'

But the most striking deviation from the approach adopted by the Manchester County Court is to be found at DISP App 3.3A.4 where the presumption is that there is only an unfair relationship where the commission is 50% or more:

- The firm should presume that the failure to disclose gave rise to an unfair relationship under s 140A of the CCA if the commission was, or had the potential to be, 50% or more.
- The firm should presume that the failure to disclose did not give rise to an unfair relationship under s 140A of the CCA if the commission was less than 50% or did not have the potential to be 50% or more.

Although both presumptions are rebuttable, this approach radically cuts down a complainant's recoverable damages. The Guidance on rebuttable is as follows (DISP App 3.3A G and DISP App 3.3A.7 G):

50% or more:

Examples of factors which may contribute to rebuttal include:

- where the insurer provided the payment protection contract to an intermediary rather than the CCA lender and the CCA lender was not party to the commission agreement;
- the complainant could reasonably be expected to be aware of the level of commission (eg because they worked in a relevant role in the financial services industry);
- disclosure would have made no difference whatsoever to the complainant's judgment about the value of the payment protection contract.

Less than 50%

Examples of factors which may contribute to its rebuttal include:

- the complainant was in particularly difficult financial circumstances;
- the complainant can establish that they had a track record of showing a close

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interest in the commission payable on other purchases.

The FCA has clearly taken the view that 50% marks the tipping point referred to by Lord Sumption in *Plevin*. It observes at para 5.53 of the CP:

> 'We consider 50% to be appropriate in the context of our regulatory judgement concerning PPI complaints, based on what the Supreme Court said in Plevin about undisclosed commission of 71.8% being a 'long way beyond' the 'tipping point' for unfairness. Further, whilst we are aware that it is only one of a number of approaches that may have been taken in the county courts, we have also taken account of the approach adopted by Mr. Justice Platts (sitting in the Manchester County Court) in *Yates and Lorenzelli v Nemo Personal Finance* (14 May 2010) who considered that a commission of over 50% should be disclosed.'

So the proposed tipping point has now been established as 50%. What is the approach to redress then?

The proposal is that a firm will pay redress where it concludes that an unfair relationship under s 140A has arisen by virtue of undisclosed high commission. The proposed key elements of redress are:

- the difference between the commission the customer paid (eg 70% of the premium) and 50% of the premium paid (ie 20% of premium in this example); plus
- the historic interest the customer paid on that portion of the premium (where relevant) (ie the interest paid on the 20%); plus
- annual simple interest at 8% on the sum of bullets (1) and (2).

Where undisclosed commission of less than 50% (eg 45%) is assessed in a particular case to have created an unfair relationship under s 140A , then the redress element in bullet (1) should be altered accordingly, to reflect the difference between the commission the customer paid and, in this case, 45%. These rules are reflected in the proposed DISP App 3.7A.

THE FCA'S DECISION NOT TO FOLLOW THE APPROACH OF THE COUNTY COURT IN *PLEVIN*

The FCA is cognisant that it has deviated from the approach of HHJ Platts in *Plevin*. In particular, it observes (para 5.7):

> 'It may be argued that our proposed approach to redress is not correct, because it is less than the full return of commission which the Manchester County Court awarded to Mrs Plevin. However, we do not think that this is a significant objection, because the issue before that court was whether Mrs Plevin should be awarded only the commission element of the premium (which is what Paragon had offered in attempted settlement) or all the premium paid in relation to the PPI policy (as Mrs Plevin claimed). The question of whether any other award might be appropriate was not argued before the court.'

The FCA's approach very significantly departs from the notion that the entirety of the commission should be repaid because it has fundamentally compromised the relationship between lender and borrower. This guarded approach seeks to balance the interests of lenders and borrowers by seeking to achieve an equitable outcome for both parties. Its focus, perhaps rightly given the nature of s 140A, is upon remedying the unfairness. However, the fine balance struck by the FCA may be seen to have favoured the former rather than the latter when compared to the outcome potentially achieved by litigation under the law of bribery.

CONCLUSION

After having considered the comments on CP 15/39, with some minor amendments, the FCA is likely to endorse the proposed amendments to DISP App. Although a failure to pursue alternative means of redress could lead a court to conclude that a party has been unreasonable in pursuing a case before a court and therefore might result in a reduction in a claimant's costs, if it is possible to recover the entirety of the commission by alternative causes of action, then a court might be reluctant to reduce such costs on the basis of a failure to make a s 140A complaint to the lender.

Whatever the approach of borrowers, the FCA's proposals are to be welcomed by lenders; whether *Plevin* can now be seen as bound or unbound, time will tell. ■

1 Full analysis of *Plevin v Paragon Personal Finance Limited* [2014] UKSC 61 can be found in 'Caveat creditor – Difficulties in unfair relationship claims' by Paul Skinner of Henderson Chambers at [2015] 9 JIBFL 555.

Further reading

- Caveat creditor: Difficulties in unfair relationship claims [2015] 9 JIBFL 555
- Fiduciary duties of brokers to disclose commissions [2015] 4 JIBFL 227
- LexisNexis Financial Services blog: Scope of fiduciary duties extended to cover credit brokers