Smith v RBS [2021] EWCA Civ 1832:

New Guidance on unfair relationships and PPI non-disclosure litigation

Context

1. With the banking industry said to have set aside £50bn for compensation and a further 30,000 claims to come, the PPI saga remains as relevant as ever. We are now in the middle of a third wave of claims. The first wave concerned mis-selling. The second concerned FCA redress for the non-disclosure of commission received by lenders. Now, in the third wave of claims, consumers are arguing that the FCA redress for undisclosed commission did not go far enough and that they should be refunded all the amount of the premiums plus interest. These claims – occasionally called 'Plevin Plus' claims – are brought under the unfair relationships provisions (ss.140A-C CCA 1974) and are predicated on a central allegation that had the amount and fact of commission been disclosed the consumer would never have entered into the policy at all.

Factual Background

2. *Smith v RBS PLC* [2021] EWCA Civ 1832 concerns a pair of fairly typical 'Plevin Plus' claims. Both claimants had entered voluntary insurance policies with third-party insurers at the same time as entering into credit agreements with RBS. The insurers paid RBS commission that exceeded 50% of the premiums paid. Both claimants were paid redress in accordance with the FCA's DISP App 3 guidance (i.e. a refund of commission paid over 50% and related fees, plus statutory interest). They then sued for the full rescission value of the policy (i.e. all sums paid plus interest). The claims were brought more than 6 years after the claimants' PPI policies ended.

3. The Court of Appeal was asked to consider whether the unfair relationship provisions applied in cases in which the PPI policy was cancelled before those provisions came into force in April 2007. RBS argued that they did not, on the basis that either: (a) ss.140A-140C CCA could not apply where the PPI policy was cancelled before those provisions came into force; or (b) in any event, the claims were time-barred.

Decision

4. The Court of Appeal held that: (a) time for limitation purposes runs from the termination of the PPI policy, rather than from the end of the credit agreement; (b) where a PPI policy was cancelled before the unfair relationship provisions came into force then those provisions could not be relied on to bring a claim (this was a 'provisional' view); (c) a relationship that was unfair could be made fair, and *vice versa*; (c) the Court could consider all matters in its fairness assessment, regardless of when they occurred (i.e. the Court was not precluded from considering a policy that was cancelled over six years ago and/or before April 2007). As the claims in the appeal had been brought more than 6 years after the PPI policies had ended, they were time barred. The claims were dismissed. The judgment is available here.

Key Points Explained

5. Scope of Assessment: The Court found that, when making an assessment of fairness under ss.140A-C, it is entitled it to take all relevant matters into account, including events that would otherwise be time-barred (at para. 45).

6. Scope of Transitional Provisions: The cancellation of a PPI policy before the transitional provisions does not prevent the Court from considering the unfairness of the relationship arising out of the continuing credit agreement

that financed that policy. The Court stated clearly that "*the transitional provisions make no difference at all to the fairness assessment conducted under s140A*" (para. 46).

7. Unfairness can be remedied: The Court also explicitly found that an unfair relationship can be made fair by subsequent changes to that relationship. It acknowledged that, a "*relationship can change over time*" (para. 59) and that "*the fact that a relationship was unfair in the past does not mean that things cannot change*" (para. 65). This conclusion is perhaps not surprising as it was (tacitly) noted by Lord Sumption in *Plevin* (see para. 19).

8. Limitation: Time starts to run from the date of the last payment towards the PPI Policy. The Court's analysis was that if a credit agreement was unfair due to a related PPI policy, that 'unfairness' ends when the PPI policy is cancelled. However, if a customer still owed sums under the credit agreement which had arisen from the related PPI policy and remain outstanding even after the policy ended, then in such a case the unfairness would still exist at that later stage. (para. 68). In other words, the 'unfairness' would not end – and therefore time would not start to run for limitation purposes – until all sums owed in relation to the policy had been repaid.

9. Scope of ss.140A-C: The Court's "*provisional view*" was that where an unfair relationship has ended – for example because the policy was cancelled – before the unfair relationships provisions came into force, an action for what was an unfair relationship in 2006 does not come within the 1974 Act at all (the point was not argued; hence the Court only proffered a provisional view). This may mean that claims concerning policies that were cancelled before April 2008 are beyond the jurisdiction of the Court altogether, removing a claimant's cause of action entirely.

10. S.32 Limitation Act 1980: Finally, the Court of Appeal noted that "*the continued non-disclosure of the commissions might (or might not) have been relevant to the application of s32 of the Limitation Act, but that point does not arise in either case in this appeal.*" Claimants are therefore likely to still be able to rely on s.32 to postpone the running of time to the point at which the commission was discovered: see *Canada Square Operations Ltd v Potter* [2021] EWCA Civ 339.

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