HENDERSON CHAMBERS

ALERTER

Smith v RBS [2023] UKSC 34

5 October 2023

Supreme Court Judgment on unfair relationships and PPI claims: *Smith v RBS* [2023] UKSC 34

Context

1. The Supreme Court has given judgment in *Smith and Burrell v Royal Bank of Scotland Plc* [2023] UKSC 34, overturning the Court of Appeal and disagreeing with the bank's limitation argument.

2. Lenders will no longer be able to rely on arguments that PPI actions are time barred where the claims are issued within 6 years of the end of the credit agreement but over 6 years after the policy was cancelled.

3. The Supreme Court also took the opportunity to clarify a number key factors relevant to unfair relationships more broadly. The decision is therefore crucial reading for all consumer finance lawyers.

Factual Background

4. The appeal concerned a pair of fairly typical 'Plevin Plus' claims seeking compensation under ss140A-C CCA 1974. Both claimants had agreed voluntary PPI policies with third-party insurers to support credit card 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 and *Plevin* (i.e. a refund of commission paid over 50% and related fees, plus statutory interest) but later 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 (well before the end of the credit card agreements), but less than 6 years after the

claimants' credit card agreements had ended. RBS argued that the claims were time barred.

5. The County Court in each case at first instance, and on the joined appeal, found in favour of the claimants: their claims were not time-barred by section 9 of the Limitation Act 1980. The Court of Appeal allowed the bank's appeal, finding that the claims were both time-barred, insofar as the "unfair relationship" ended when the PPI Policy ended, which was well before six years running back from the date of issue. We discuss the Court of Appeal's decision here.

Decision

6. The Supreme Court unanimously allowed the appeals, holding that both claims were brought before the relevant time limit expired. The judgment is available here.

Key Points Explained

7. Limitation: The Supreme Court held that time runs for limitation purposes from the end of the parties' relationship, even if the borrower has stopped paying for PPI at some earlier date. That finding relied on reasoning that the cause of action did not accrue until the end of the parties' relationship.

8. Unfairness continues if the commission is not repaid and/or the borrowers remained in ignorance: Lord Leggatt was clear that the parties' relationship did not cease to be unfair in April 2006 when the last PPI payment was made [**66**]. He added: "*It is true that no more payments for PPI cover were made by her after April 2006 out of which the bank received further commission. But the bank did not at any time before the relationship ended in 2015 repay any of the sums which Ms Smith had paid for PPI cover, nor did it disclose to her the existence let*

alone the amount of the commission that it had received out of those payments." He later noted that, "*Ms Smith was financially worse off as a result of having paid the PPI premiums which she would never have paid if the bank had disclosed the amount of its commission persisted throughout that period of around nine years*" [**67**]. As such, the relationship was still unfair when it ended in 2015.

9. Assessing unfairness: On a more positive note for lenders, the Supreme Court reaffirmed that, in judging unfairness, the Court must consider the whole history of the relationship and have regard to any matter that it thinks relevant [**23**]. From a temporal perspective, the Court must consider the whole history of the relationship - going back not only to the making of the credit agreement but to any relevant act or omission of the creditor before the making of that agreement or any related agreement. The borrowers' particulars of unfairness should not be considered in isolation. Defendant banks would be well advised to plead any particularly generous aspects of the parties' agreement or relationship in response to an allegation of unfairness. Lord Leggatt gives an interesting example of how this might apply, in a hypothetical scenario, at [**54-55**].

10. Transitional Provisions: RBS had sought to argue that where policies were cancelled before the end of the transitional provisions used to bring the unfair relationship provisions into force, that fact should be excluded from the Court's fairness analysis. The Supreme Court disagreed; the cancellation of a policy before the conclusion of the transitional provisions did not prevent the Court from considering the unfairness of the relationship arising out of the continuing credit agreement that financed that policy. This means that banks cannot draw a curtain on events that occurred before the end of the

transitional provisions on 5 April 2008; all factors will be potentially relevant to the court's fairness assessment.

11. Unfairness can be remedied: The Supreme Court also explicitly agreed with the Court of Appeal that an unfair relationship can be made fair by subsequent actions. The Court of Appeal 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). The Supreme Court described those observations as "*indisputable*" **[63]**. As such, independent actions by lenders to, for example, pay redress can reverse unfairness before a claim is brought, although the contestable issue of redress was not addressed directly by Lord Leggatt.

12. Delay: Delay in bringing an unfair relationships claim is a factor to consider against the claimant when assessing fairness. If a debtor sits on his or her hands with knowledge of the relevant facts, it would be, as Lord Leggatt states, inconceivable that a court would think it just to make an unfairness order **[89]**. See, again, the scenario envisaged by Lord Leggatt at **[54-55]**.

13. Pleading Unfairness: Where borrower alleges unfairness, the burden is on the lender to prove that the relationship is not unfair. However, this does not mean that the claimant is absolved from pleading particulars of claim which identify concisely the facts on which the claimant relies **[40]**.

14. Proving facts: Likewise, the claimant must prove any individual allegations of fact relied on in support of its claim (see *Promontoria (Henrico) Ltd v Samra* [2019] EWHC 2327 (Ch)) **[40]**. In other words, the reversal of the burden on proof does not absolve the borrower from having to prove factual allegations on balance.

15. Remedies: The Supreme Court reiterated that the legislation gives the Court, "*the broadest possible remedial discretion in deciding what order, if any, to make…".* The remedies were described as an "*extensive menu of options*" which, on the face of the legislation, the Court's discretion is unfettered. However, in principle, the purpose of any remedy *"must be to remove the cause(s) of the unfairness which the court has identified, if they are still continuing, and to reverse any damaging financial consequences to the debtor of that unfairness, so that the relationship as a whole can no longer be regarded as unfair"* [**25**].

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