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Consumer Credit

7 October 2024

Harrop v Skipton Building Society and Self v Santander Cards UK Limited [2024] EWCA Civ 1106

An appeal seriously compromised

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The Court of Appeal has dismissed the appeals by consumer claimants in the most recent round of PPI claims. Stuart Smith LJ (with whom the Chancellor of the High Court, Flaux J, and Asplin LJ agreed) dismissed the conjoined appeals in two cases arising out of mortgage PPI and credit card PPI. The Court of Appeal found that a number of the grounds of appeal were unarguable.

Within the context of Financial Services law, the Court of Appeal has concluded that that the dispute resolution regime within the FCA handbook (DISP) does not:

- **Impose upon an institution an enforceable obligation to make a payment of redress;**
- **Prevent an institution from making an offer of redress conditional upon the waiver of past or even potential future claim.**

More generally, the Court of Appeal made clear that courts will continue to uphold the compromises reached with customers if on the terms of the settlement they compromised their claim/s.

The judgment is available here.

For a previous alerter by Harrison Denner on a lower court appeal dealing with substantially similar issues, please see here.

INTRODUCTION

1. The appeals attacked the decisions of the courts below on two broad fronts:

   i. First, it was said that, as a matter of construction, the process by which the Defendant offered and the Claimant accepted and received the sum offered by the Defendant did not give rise to a binding settlement of any claims that the Claimant might have arising out of the mis-selling of the PPI, including claims arising out of the recurring non-disclosure of PPI. The Claimants argued that this result follows from a close analysis of the terms that were used by the parties; but they also asserted that, even if the words used by the parties would otherwise have been sufficient to give rise to a full and final settlement covering the present proceedings, there was no consideration given for that purported settlement by the Defendants, so that there can be no legally binding settlement.

   ii. Second, even if the settlements were appropriately supported by consideration, the Claimants submitted that it was not open to the parties to exclude the jurisdiction of the Court to examine and act upon the unfairness of the relationship between them pursuant to the Court's powers as set out in sections 140A-140C of the CCA and that the relationships were and remained unfair despite the settlements.

HARROP V SKIPTON BUILDING SOCIETY

2. The facts of Harrop were in brief: on 23 November 1990, Mr Harrop charged his property to Skipton. On 10 June 1996, he took out a mortgage PPI policy in relation to his property and the charge. The mortgage was redeemed and the relationship between Mr Harrop and Skipton ended in May 2014. Later in 2017, a claims management company claimed that the PPI had been mis-sold. The letter of complaint positively asserted breach of section 2(1) of the Misrepresentation Act 1967 and breach of a common law duty of care in providing information to Mr Harrop which was said to have caused him loss, it merely raised the spectre of a claim pursuant to section 140A by asking Skipton whether it had received commissions. Skipton in turn responded by rejecting the claims in misrepresentation and breach of common law duty of care, but went on to explain that it would make payment of redress in relation to commission plus profit share. It set out the basis of the proposed refund (£1,095.75) and enclosed an acceptance form. It made no mention of the desirability of consulting a solicitor or taking legal advice. It was accompanied by a detailed schedule which showed exactly how the sum of £1,095.75 was calculated by reference to the excess that had been charged for commission and profit share over and above 50% of the individual monthly premium payments made by Mr Harrop. The PPI commission almost with exception varied between 52.97% and 90.1% of the individual monthly premium payments, frequently exceeding two-thirds. On 13 March 2018 FRS responded to Skipton's Redress Letter, saying:

> *"… we confirm that we are instructed by our client to accept your offer in full and final settlement of his claim for his mis-sold [PPI]. Please find attached hereto our client's duly completed acceptance authority.*
>
> *Please make the payment as per our client's instructions and we would be grateful if you could notify us once our client's settlement has been processed."*

3. The "acceptance authority" to which FRS referred was headed "MPPI Compensation Acceptance Form", and was the form enclosed with Skipton's Redress Letter and to which it had referred. It was signed by Mr Harrop and said, so far as is relevant to the present appeals:

> *"I/We hereby accept the sum of £1095.75 in full and final settlement of my/our complaint."*

4. Skipton duly paid, and Mr Harrop received, the sum of £1095.75.

SELF V SANTANDER

5. The facts of Self were in brief: in 2001 Mrs Self entered into a credit agreement for a "Kwik Fit" card operated by Santander's predecessor, GE Capital Bank Limited. At the same time she entered into a PPI policy to cover her repayments. The PPI policy premiums were charged on a monthly basis and were financed by the credit agreement, thereby attracting interest if not paid in full. The credit agreement was subsequently assigned to Santander and then on to another entity. On 23 March 2018 a claims management company ("UC4M") wrote to Santander on behalf of Mrs Self. The letter ["Mrs Self's Claim Letter"] alleged that her PPI policy had been mis-sold in four respects, alleging in relation to each of those respects that there had been breaches of specified ICOB rules. The letter then said:

> ***"Paragon v Plevin – Commission Complaint Issue***
>
> *We reiterate that the breach of these regulations has caused an unfair relationship to exist. This was due to your failure to disclose to our client the amount of commission that fell to form part of the PPI payment. This breach qualifies our client for relief under s. 140 CCA. Had our client been aware of the level of commission payment, they would not have taken out PPI on the account.*

…

The level of commission payment, which you failed to convey to our client, rendered the relationship between you unfair. In light of this, please review all of the circumstances regarding the potential mis-sale of this product to our client. Our client is seeking repayment of all premiums and associated interest paid, together with 8% statutory interest on the total sum.

As you can see from our authority, our clients have authorised us to receive the claim on their behalf, and so we would be grateful if you would forward your refund to the above making all cheques payable to [UC4M]. We will disperse funds accordingly to our clients."

6. UC4M enclosed a form of authority, signed by Mrs Self, which authorised UC4M to act on her behalf *"in respect of [her] claim for compensation for … a mis-sold Payment Protection Insurance Policy and/or any other financial irregularities."* It stated that she acknowledged that she could pursue a claim directly with Santander but that she had opted instead to engage UC4M, whose fees would be recoverable from her.

7. Santander sent two letters to Mrs Self on 27 April 2018. Each was headed "*Sale of Payment Protection Insurance (PPI) attached to your GE Money Card (subsequently Santander Cards UK Limited)*". One was a response on behalf of her PPI insurers and rejected the claim of mis-selling so far as it related to them. Amongst other things, the response noted that the PPI was still active on the account and pointed out that, if Mrs Self wished to cancel the policy, she would need to take steps to do so. The other letter was a holding response on behalf of Santander itself. Having asserted that on normal principles her complaint would be time barred, Santander continued, under the heading *"Plevin Complaint"*:

"You may be due redress in respect of undisclosed commission charged by [Santander] (commonly referred to as a Plevin complaint). We will consider

this aspect of redress pending further advice from our regulators. We will write to you again in due course to tell you our view on this aspect of your complaint, and on whether you can potentially refer this aspect of your complaint to the Financial Ombudsman Service."

8. Mrs Self continued to pay the premiums on the PPI policy until on or about 22 July 2018, when the policy was cancelled.

9. Santander wrote to Mrs Self again on 1 February 2021, copying its letter to UC4M ["Santander's Redress Letter"]. Santander's Redress letter said that they had already written to her about the dismissal of her mis-selling claim, but that this letter was in respect of the unfair relationship claim. They explained the basis of the calculation (which came to £830.84) in full and final settlement of any claim against them and / or the other entity. The enclosed customer acceptance form read as follows:

   "PLEASE SIGN BELOW IN ALL INSTANCES

   I understand that, by signing below, I am accepting the payment in full and final settlement of my non-disclosure of commission complaint ("the Complaint"). I agree that by accepting the payment, this fully settles the Complaint against [Santander] and that [Santander has] no further liability to me. If I raise further issues on the same or similar terms, I understand that [Santander] may choose to rely on this acceptance form as proof that such issues have already been settled.

   …

   I want to accept the above offer of redress in full and final settlement of my complaint against [Santander]." *[Emphasis here and above in the original]*

10. Under the heading "How have you calculated my redress?", Santander explained:

"If the commission on the PPI had been charged at a rate which meant there was no unfair relationship you would have been charged less for the PPI.

If you paid off your balance in full regularly, you would have paid less to do so.

If you didn't pay off your balance in full, your statement balances would've been lower (because you would've been charged less for PPI), and so you'd also have been charged less interest. In reconstructing your account, we've worked out each month how much less the PPI would've cost you, how much less interest you would've paid, and whether your monthly repayments were more than they should've been. If you were charged any overlimit fees, we've worked out whether you would still have incurred them if the PPI had been charged at a lower rate. Any fees that should not have been charged will be included in the redress calculation.

If the monthly payments you made were higher than they should have been, we've refunded the difference (fig A), and added compensatory interest (fig B) to that difference.

At the end of the reconstruction period - which will either be now if the account is still open, or the time when your account closed - we work out how much lower than the actual balance the reconstructed balance would have been. We refund that amount to you as well (fig E)."

11. Finally, under the heading "What if my PPI is still in force", Santander said that they would have explained in their letter what the current commission and profit share rate was and that "[this] means that you have the information available to you to allow you to make an informed decision about whether the policy offers you value for money". It explained that PPI was an optional product but that "if you leave the policy running, we won't consider any future complaint about the commission or profit share earned on the policy."

12. Mrs Self duly signed the Customer Acceptance Form and returned it to Santander. The offer sum of £830.84 was paid by cheque, which Mrs Self accepted and banked.

13. Santander did not disclose the actual level of their commission or profit share until December 2022, when a statement from their solicitor, made for the purposes of the small claims hearing before the Deputy District Judge, revealed that the average level of the commission and profit share was 99.18% of the premium payments Mrs Self had paid since 6 April 2007.

14. Notwithstanding the settlements reached the customers launched County Court proceedings against their respective lenders for the entirety of the PPI premium paid on the basis of section 140A of the Consumer Credit Act 1974 (CCA").

15. Stuart Smith LJ's judgment is a tour de force. It forensically dissects appeals of the customers and exposes their weaknesses with masterful clarity.

Harrop Grounds Of Appeal and the Court Of Appeal's Response

16. In Summary,

- **Ground 1** challenged the Deputy District Judge's conclusion that there was no real prospect of success on Mr Harrop's case that the acceptance of the sum offered and paid by Skipton did not constitute a contract of compromise between the parties in full and final settlement of any claim the Claimant may have arising from an unfair relationship between Mr Harrop and Skipton under section 140A of CCA. The basis of this ground is that DISP mandated the lender to make payment.

- **Ground 2** was that the Court should have found the relationship was unfair having regard to the failure to disclose the amount of commission.

17. As to Ground 1 (DISP), Stuart-Smith LJ found, in summary, that the DISP regime did not create a requirement on a creditor to make a payment as a result of a presumption of unfairness under the Appendix 3 process. At most, that merely led to a requirement to make an offer, but such an offer only became a binding obligation once accepted. It was the resulting contract between the parties, not the DISP provisions, that gave rise to any obligation of payment. He said as follows:

> *DISP App 3 provided regulatory guidance on achieving best practice in support of the mandatory (regulatory) rule in DISP 1.4.1R…[B]y this route DISP provides a systemic response to individual claims of section 140A unfairness, albeit with built-in flexibility depending upon all the circumstances of the case... As such, it provides a process that is intended to lead to a fair outcome by a type of alternative dispute resolution designed to marry best practice with the objective of reducing pressure on the Financial Ombudsman Service and the likelihood of resorting to litigation... Even where a respondent (for whatever reason) decides to adopt the default positions under the process, that does not of itself give rise to an obligation to pay a particular sum…[paragraph 100]*

18. As to the correspondence in Harrop, he found, in summary, that it was plain that the correspondence related to the full extent of the dispute arising out of non-disclosure of commission, and that such a claim could not be subdivided into discreet elements, some settled, some not. Stuart-Smith LJ said as follows:

> *106. What then did Mr Harrop and Skipton purport to settle? In my judgment this question admits of only one possible answer: they settled Mr Harrop's claim under section 140A for unfairness based on non-disclosure of (excessive) commission and profit share foreshadowed in Mr Harrop's Claim Letter, directly addressed by the offer contained in Skipton's Redress Letter. That offer was accepted in full and final settlement of that complaint by FRS's letter in*

response and Mr Harrop's signing the acceptance authority. Whether in the early stages of the negotiation the dispute about section 140A unfairness should be characterised as an actual or a potential dispute does not matter. It is plain beyond argument to the contrary that both parties understood what was being addressed and settled: it was the claim arising from Skipton's non-disclosure of commissions and profit share in respect of which Mr Harrop had claimed in his Claim Letter (as he has subsequently claimed in these proceedings) to be returned to the position he would have been in had he not been sold the policy, including a full refund of the premium, interest charged on the premium and statutory interest from inception of the policy.

107. It is unrealistic to attempt to distinguish between the claim being advanced by FRS and the Section 140A claim that Mr Harrop wishes to pursue in the present proceedings. They are one and the same. They are an unliquidated claim to remedy the unfairness caused by Skipton's non-disclosure of commission and profit-share. If there was otherwise any doubt about this (which there is not) it would be removed by the facts that (a) FRS headed the relevant section of Mr Harrop's Claim Letter with a specific reference to section 140A, (b) non-disclosure of commission and profit share was, after Plevin, a (if not the) paradigm basis for a claim pursuant to section 140A and 140B, (c) Skipton responded with reference to the DISP scheme that was specifically designed to be applicable to such claims, and (d) the factual basis for the claims was the same, as is clear from the terms of the Claim Form and Particulars of Claim: see [18]-[19] above.

108. The exchange of correspondence cannot, in my judgment, be interpreted as anything other than an offer to compromise the section 140A claim by the payment of the sum of £1,095.75. That sum was significantly less than the full return of premium and interest that Mr Harrop's Claim Letter had sought; and Skipton described it as "a fair outcome" while inviting Mr Harrop to let them know if they had missed anything. Taken overall, the language of the letter was the language of compromise by consensual offer and acceptance of a lesser sum than demanded in the context of an unliquidated claim under section 140A. That it was understood to be an offer of compromise and

settlement was made clear by FRS' response that they were instructed "to accept your offer in full and final settlement of this claim." The essential character of Skipton's offer to settle is not subverted by the use of the word "due", for the reasons I have given earlier: see [80] above. The sum offered and paid was good consideration for the agreement, also for the reasons I have given: see [83]-[85] above.

19. As to Ground 2, Stuart-Smith LJ found that there was a fundamental intertest in upholding settlement agreements, and while the court was not precluded from reopening the agreement, it would be very slow to go behind that settlement. The fact or absence therefore of formal legal advice by lawyers was not relevant. He said as follows:

> *115. On the basis that the settlement was voluntary and fair, it is material when considering the overarching question whether the relationship between Mr Harrop and Skipton was unfair within the meaning of section 140A for two related reasons. First, it alters the balance of the relationship which must now be assessed giving due weight to the settlement. Second, it is the general policy of the law to encourage settlements: see Mionis v Democratic Press SA [2018] QB 662 at [88]-[89] per Sharp LJ. It may also be said that the objectives of the FCA scheme include the promotion of settlements to reduce the impact of long-tail PPI claims on the Financial Ombudsman service and the courts....*
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> *116. The guidance from Holyoake supports the view that a settlement should not be set aside or superseded except for good reason: see [504] of Holyoake set out at [93] above. It is not possible to assert that there was no genuine dispute when Mr Harrop was seeking return of all his premiums plus interest and Skipton was contending for far less on the basis of the FCA scheme package…I would accept that the courts below were entitled to conclude that the terms of the compromise were fair and reasonable; and, for what it is worth, I would come to the same conclusion. There is no question of Skipton having taken undue advantage of Mr Harrop in relation to the settlement. Mr*

Harrop was advised by FRS and, for the reasons I have given above, I would attribute no weight to the fact that he had not been advised by lawyers.

…118. For essentially similar reasons, the Deputy District Judge's approach to the suggestion that the whole FCA scheme results in inherent unfairness in [34] of her judgment was correct. As is evident from the passages of PS17/3 set out above, there were strongly held divergent views on where the tipping point should be pitched. In the event, having considered all the arguments, the FCA pitched it at 50% for the reasons they gave. If, as Mr Harrop would contend, that was too high a bar to set, then the remedy was for complainants to reject offers of settlement made on that basis. If that became widespread, the FCA scheme would fail in its objectives. There is no evidence before us to suggest that has happened. Individual cases where bona fide settlements have voluntarily been concluded are not the appropriate vehicle for an assertion on a case by case basis that the FCA scheme is inherently unfair.

119. In these circumstances, looking at the matter broadly, the court should be very slow to go behind the settlement. That, in my judgment, is how both the Deputy District Judge and the Judge below approached the jurisdiction issue. In my judgment the Deputy District Judge and the Judge below were right to conclude that there were no real prospects that the court would conclude that the terms of Mr Harrop's settlement were not fair and reasonable or, taking all relevant matters into account, that the court would grant Mr Harrop relief under section 140B.

Self Grounds of Appeal and the Court of Appeal's Response

20. In summary,

- **Ground 1** was that the Judge was wrong to find that either Santander's offer to pay redress to Mrs Self in its Redress Letter or its subsequent payment of the agreed redress amounted to consideration for a waiver of further claims for two main reasons:

i. Santander was already under a duty to offer and/or pay the redress sum pursuant to DISP; and

ii. Santander did not dispute and/or admitted its liability to pay the redress sum to Mrs Self or her entitlement to it.

- **Ground 2** was that the alleged waiver did not cover a civil claim such as the present case: it was limited to complaints pursuant to DISP.

- **Ground 3** was that the Judge erred in holding that the compromise "cured" the pre-existing unfairness in the relationship between Santander and Mrs Self.

21. As to Ground 1, having considered the correspondence, Stuart-Smith LJ found that there was no basis for distinguishing between a non-disclosure complaint and a "mis-selling" complaint. It was clear that the settlement was in relation to the full extent of any claim arising out of the non-disclosure of commissions. Further and as in the Harrop appeal, an argument that there was no consideration because of an obligation to make a payment was firmly rejected. He said as follows:

> *128. The Customer Acceptance Form also made plain (twice) that acceptance of the payment would be in full and final settlement of her non-disclosure of commission complaint. It would, in my judgment, be far too legalistic to attach any significance to the fact that the form referred both to her complaint (with a small c) and "the Complaint" (with a capital C): her mis-selling complaint was now past history. The section entitled "Frequently Asked Questions – Store Cards" provided further relevant information about the basis for Santander's response, all of which related to non-disclosure of profit and commission: see [33]-[35] above. Mrs Self (or her advisers) could have asked for a breakdown of the actual level of the commission or profit share but did not do so. It can only be assumed that she was content to settle with Santander without access to that level of detail. By signing the Customer Acceptance Form, she confirmed*

that she knew that she was accepting Santander's offer in full and final satisfaction, as stipulated by Santander's Redress Letter and agreed by the terms of the form.

129. Mrs Self's submission that there was no consideration because Santander was already under a duty to offer and/or pay the redress sum pursuant to DISP is formulated in much the same way as Mr Harrop's, relying upon Arrale: she alleges that there was a pre-existing obligation because there was a duty to offer redress calculated in accordance with DISP App 3 and, subsequently, to pay redress once the offer had been accepted. The submission fails for the same reasons as Mr Harrop's: see [66]-[90] above.

130. Nor can I accept Mrs Self's submission that Santander admitted or did not dispute its liability to pay her the redress sum or her entitlement to it. For the reasons I have set out earlier, there clearly was an actual dispute. Mrs Self alleged that she qualified for relief under section 140A and wanted repayment of all premiums and associated interest; Santander offered only a fraction of all her premiums calculated on the basis of a 50% tipping point in accordance with DISP App 3. Whether Santander admitted liability to pay Mrs Self the redress sum depends on the proper interpretation of their correspondence. In Mrs Self's favour is that Santander used the word "due" both in their holding response on 28 April 2018 and in their redress letter. However, viewed overall and in context, these cannot be taken as admissions of legal entitlement: see [80] above. As Santander submitted, "there cannot be an admission of liability where no legal obligation exists and a party cannot unilaterally create a legal liability." The overwhelming sense of the Santander Redress Letter is that Santander was offering to settle an unliquidated claim on terms calculated by reference to DISP. That being so, there is no impediment to the offer or payment of the redress sum being good consideration: see [83]-[84] above.

22. As to Ground 2, Stuart-Smith LJ found that the 'complaint' referred to in the settlement agreement could only refer to a claim arising out of the non-disclosure of commissions. It was misconceived to draw a distinction

between settling a 'complaint' under the DISP procedure and settling a claim under s.140A arising out of those facts. He said as follows:

> *132. Mrs Self submits that the only contractual document is Mrs Self's signed Customer Acceptance Form and that both her original Claim Letter and Santander's Redress Letter are merely background materials having limited, if any, relevance to the construction of the Customer Acceptance Form. I do not agree. The agreement between the parties was concluded by (a) the offer made in Santander's Redress Letter and (b) Mrs Self's acceptance of that offer by her signed Customer Acceptance Form.*
>
> *133. Mrs Self goes on to submit that the waiver in the Customer Acceptance Form is limited to the claimant's complaint, which is a reference to the DISP process, and that there is no mention of excluding any future civil claim. This submission is, to my mind, unarguable. It would be misconceived even if it were right that the only contractual document were the signed Customer Acceptance Form. The form states that Mrs Self accepts the payment "in full and final settlement of my non-disclosure of commission complaint": see [32] above. Her non-disclosure of commission complaint was her complaint under section 140A that Santander's levels of non-disclosed commission rendered the relationship unfair and qualified her for relief pursuant to section 140B. Her complaint was nothing to do with the "DISP process", as she submits. The DISP process was merely the process by which she had come to settle her section 140A complaint. The Frequently Asked Questions section of the Customer Acceptance Form also made clear that what was being addressed was her non-disclosure complaint, because it fell squarely within the second category of unfair commission case i.e. RND cases where the section 140A unfairness of the relationship was based on the recurring failure to disclose commission or profit share: see [33] above. Treating the Santander Redress Letter as a contractual document merely serves to confirm what is plain from the terms of the Customer Acceptance Form alone. Most obviously, the Santander Redress Letter stipulated:*

> *"In your case, the amount we received as commission and profit share (which we'll refer to simply as 'commission') was more than 50% of the premiums you paid. Therefore we'd like to offer you £830.84 in full and final settlement of your complaint and any claim that you have against [Santander] … in respect of RND commission."*

> *134. Thus what was settled was precisely the claim that Mrs Self now wishes to pursue, namely her section 140A claim based on the unfairness of the relationship because of Santander's failure to disclose commission or profit share.*

23. Finally, As to Ground 3, Stuart-Smith LJ found that the Deputy District Judge was correct to find that the settlement agreement had cured any persisting unfairness in the relationship between Mrs. Self and Santander. He said as follows:

> *140. Looking at the matter broadly, I conclude that the parties reached a bona fide settlement and that, although she did not obtain legal advice, the compromise was entered into in circumstances where she had access to paid specialist advice from UC4M. In those circumstances, the court should be very slow to go behind the compromise. That does not automatically mean that the relationship between Mrs Self and Santander was fair. However, in the circumstances of this case, the Deputy District Judge was entitled to reach the conclusion that he did and the Judge was entitled to uphold his decision for the reasons he gave. I would reach the same conclusion as the Judge and the Deputy District Judge and hold that Santander has discharged the burden of showing that the relationship was fair. In reaching this conclusion I would rely upon essentially the same features as applied in the case of Mr Harrop and Skipton. The fact that Santander followed the guidance set out in DISP (and DISP App 3 in particular) is a significant, but not determinative consideration, for the reasons I have explained earlier in this judgment.*

THE FUTURE

24. For those claims where the parties entered into a sequence of settlement correspondence, including the signing and returning of acceptance forms which included 'full and final settlement' wording, it is likely that the Court of Appeal's judgment will be determinative.

25. For those claims where the exchanges are more ambiguous, for example where payment is made without the signing of an acceptance form and where acceptance would consequently be by conduct, or where a form is signed but it includes wording less strong than that in this case, some uncertainty may remain.

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