Reassessing remediation in unfair relationship cases

25/11/2015

Financial Services analysis: The Court of Appeal has endorsed the approach of a county court judge on the proper assessment of remediation in unfair relationship cases. David Bowden, independent consultant talks to Fiona Hayles, partner at Harrison Clark Rickerbys, and Edward Foster, partner at Lester Aldridge LLP, about what lessons can be learned from Plevin v Paragon for financial services practitioners.

What were the facts in this case?

David Bowden (DB): In March 2006 Mrs Susan Plevin borrowed £34,000 from Paragon Personal Finance Limited (Paragon). This loan was secured by a second charge over her home. At that time, the regulated financial limit under the Consumer Credit Act 1974 (CCA 1974) was £25,000. This loan was therefore not regulated under CCA 1974. Mrs Plevin also agreed to buy payment protection insurance (PPI). This was a single premium product costing £5780. The PPI was to cover the loan during the first five years. The loan itself was to be repaid over ten years. The annual percentage rate for the loan was 7.3%. Mrs Plevin was introduced to Paragon by an independent broker, LL Processing (UK) Limited (Loan Line).

Loan Line went into liquidation. After court proceedings were started Mrs Plevin compromised her claim against Loan Line in February 2010 by accepting a payment of £3,000 in full and final settlement from the Financial Services Compensation Scheme (FSCS). It's not clear why Mrs Plevin did not settle for the full amount of her claim.

In August 2006 Mrs Plevin moved home and the loan was transferred and secured over her new home. Mrs Plevin then borrowed a further £6000 from Paragon in April 2007 for home improvements but did not take out PPI because 'it was not a mortgage sized loan'. The 'unfair relationship' provisions inserted into CCA 1974 by the Consumer Credit Act 2006 (CCA 2006) applied to all loans with individuals which were not 'completed agreements' by April 2008. Mrs Plevin brought proceedings against Paragon and Loan Line in relation to the sale of the PPI claiming there was an 'unfair relationship'.

What did the Supreme Court decide?

DB: On 12 November 2014, the Supreme Court overruled the Court of Appeal's finding in relation to agency and the industry codes (see *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61, [2015] 1 All ER 625). Mrs Plevin succeeded on only one point--that there was an 'unfair relationship' under CCA 1974, s 140A because Paragon had failed to disclose the amount of commission it had earned. The only judgment was given by Lord Sumption where he overruled the Court of Appeal decision in *Harrison and another v Black Horse Ltd* [2011] EWCA Civ 1128, [2011] All ER (D) 112 (Oct).

While Lord Sumption's short judgment is disappointingly thin on analysis and reasoning, he ruled that the 71.8% commission that Paragon received was beyond what he labelled a 'tipping point', but declined to rule where that tipping point should be. Lord Sumption ordered 'that the case must be remitted to the Manchester County Court to decide what if any relief under section 140B should be ordered unless that can be agreed'.

What happened when the case went back to Manchester County Court?

DB: The case was remitted to the county court and heard by HHJ Platts on 2 March 2015. Before that hearing, Paragon had repaid to Mrs Plevin all the commission it had received on the transaction. Judge Platts made three observations:

- the PPI was not represented to Mrs Plevin as compulsory by Paragon
- Mrs Plevin was given clear information about the total payment for the PPI by Paragon
- looking at all the facts of the case in relation to the question of unfairness, Mrs Plevin would not have suffered prejudice through any non-compliance--she was given sufficient information to understand the extent of her obligations and the cost of the PPI

Judge Platts noted that the terms of CCA 1974, s 140A were widely drawn and he had a wide discretion in this matter. However, Judge Platts' ruling was that Plevin should receive the return of the commission--which Paragon had already

paid--but should not be relieved from paying the entire PPI premium. Therefore Judge Platts did not order any other relief. In view of the high profile of the case, Judge Platts was at pains to stress that 'this is a decision on the particular facts of this case. It is not intended to give general guidance.'

On what grounds was permission sought for another appeal to the Court of Appeal and why was it refused?

DB: Mrs Plevin then sought permission from the Court of Appeal to appeal the ruling of Judge Platts. Two grounds were advanced. They were that Judge Platts had erred:

- in principle and on the facts in relation to the calculation of the quantum of the commission
- in crediting Paragon with 100% of the £3000 compensation paid by the FSCS to settle the claim against Loan Line commission refund in the manner he did--Mrs Plevin submitted that only 71.8% of the FSCS payment should have been apportioned to Paragon's liability to Mrs Plevin

On 13 July 2015, Lord Justice Floyd refused permission to appeal on both grounds and the matter was then listed for an oral permission hearing on 18 November 2015 before Sir James Munby, the President of the Family Division. At the oral permission hearing, Mrs Plevin abandoned her second ground of appeal and sought permission solely on the basis that Judge Platts was wrong in the way he exercised his discretion.

Counsel for Mrs Plevin sought to put the case forward on a different basis at the oral permission hearing. He said in that contained in the bundles for the hearing before Judge Platts were quotations from other insurance providers which gave prices for PPI which were lower than the price that Paragon paid. Based on these quotations, Mrs Plevin's counsel said that she was due further remediation of about £400 over and above the amount of commission that Paragon had already repaid her. Her counsel submitted, therefore, that Judge Platts was wrong in principle to tie the quantum of compensation to the amount of commission. This, he submitted, tied into the complaint that Judge Platts said that he had a free choice as to what to do. Judge Platts, it was submitted, erred in principle as to what considerations he had to bear in mind because:

- the Supreme Court result (in which Mrs Plevin won)
- the wide discretion conferred on the court under CCA 1974,s 140A

Permission to appeal was unequivocally refused. The President said the point about the cost of alternative cover was neither put before Judge Platts nor was his attention specifically drawn to the quotations in the bundle at the March 2015 hearing. The President ruled that he did not read the commission point in the judgment of Judge Platts as demonstrating that he was treating as axiomatic that the question of relief should be tied to the quantum of the premium. The President said if he turned Mrs Plevin's argument on its head, what Mrs Plevin was saying was that Judge Platts should simply have plucked a figure out of thin air--and if he had done so then she would be seeking permission to appeal because a figure was so plucked.

The President ruled that it was beyond argument that Judge Platts was entitled to proceed as he did. He did not treat the quantum of commission as determinative. The figure he used in the circumstances of this case where no other figure was available to him. In conclusion, this demonstrates that Judge Platts wasn't very far wide off the mark. The President also noted that the consequences for Mrs Plevin 'would be very severe' if he had granted permission to appeal and she had lost--saying that any such victory would be pyrrhic, but he made it clear that this was not why he was refusing permission. The President was also unpersuaded to grant permission on the basis it would be useful to have a Court of Appeal judgment for the general interest of consumers.

What will happen next in this case?

DB: The case will now go back to Manchester County Court for the question of liability for costs to be determined and thence for the quantum of those costs to be assessed. It should be noted that before the original trial before Recorder Amanda Yip, an offer was made by Paragon to refund the PPI and that Mrs Plevin has failed to better this offer in the course of this litigation. Recorder Yip ordered Paragon's costs to be paid on the indemnity basis by Mrs Plevin. Finally, in the Supreme Court Mrs Plevin lost on all arguments apart from the narrow argument based on commission disclosure.

What lessons can financial services practitioners learn from this case?

Fiona Hayles: This result is a useful reminder for practitioners that while the Supreme Court's determination in *Plevin* is of course of great importance, it should not be used to support a blanket approach to mean that for every customer the same outcome will result. The purpose behind the 'unfair relationship' provisions under CCA 1974, s 140 is to ensure that an individual customer relationship should be scrutinised to determine whether there is unfairness--and if so, what the relief should be, based on the facts and evidence in that particular case. It should not be presumed that a finding of an 'unfair relationship' will now automatically result, or that the appropriate relief will be full PPI redress. What is important is that the facts are examined on a case-by-case basis, which was the approach taken by HHJ Platts and which has been upheld on appeal.

DB: It remains unsatisfactory that the Department for Business, Innovation and Skills (BIS) failed to include a test for what is or is not an 'unfair relationship' when the bill--which led to CCA 2006--was going through Parliament. In the House of Commons, Gerry Sutcliffe MP said a test was not needed and that the courts would recognise an 'unfair relationship' when they saw it. Here although the Supreme Court found the commission to be beyond the 'tipping point', it has disappointingly failed to say where that tipping point should lie. It is useful that the Court of Appeal has endorsed the manner in which Judge Platts systematically approached the assessment of remediation by reference to the evidential findings made by the Recorder at the original trial.

While Judge Platts was at pains to say his judgment was 'not intended to give general guidance'--the effect of the detailed reasons given by Lord Justice Floyd and the President in refusing permission have achieved precisely the opposite of what Judge Platts said. This gives some useful yardsticks for lenders or brokers and those advising them in the assessment of redress under CCA 1974, s 140A.

Edward Foster: While the ruling is undoubtedly correct, it is of limited impact as the fundamental basis for the failure of the application was that it was based upon an argument which was never put before the County Court. It could not be said, therefore, that HHJ Platts was wrong to reject an argument never put, or to not consider documents which were never brought to his attention. The President indicated, obiter, that had the argument been put to the lower court, he himself may well have reached a different conclusion on the application. The issue may therefore simply have been postponed to another day.

Is there anything to be aware of that may impact the assessment of cases in this field?

DB: On 2 October 2015, the FCA issued a statement on its website that it has decided to consult by the end of 2015 on the introduction of a deadline for customers to make complaints to firms or the Financial Ombudsman Service about PPI sales. It is intended there will be a press campaign funded by the industry to raise awareness and that customers would have at least until spring 2018 to complain.

In relation to the Supreme Court decision in *Plevin*, the FCA says its new proposed rules and guidance would say 'that a firm should presume, when assessing a relevant complaint in respect of a PPI policy covering a credit agreement under s 140A, that a failure to disclose a commission of 50% or more gave rise to an unfair relationship under s 140A.' The Financial Conduct Authority (FCA) says that 'this presumption to be set aside in certain limited circumstances' which it has not yet elaborated on. However, the FCA says it proposes 'also to consult on limited circumstances where the non-disclosure of commission of less than 50% could be regarded as giving rise to an unfair relationship under s 140A.'

On 6 November 2015, HHJ Keyser QC sitting as a judge of the High Court in the Cardiff Mercantile Court handed down his 29 page judgment in the unreported case of *Gareth and Samantha Brookman v Welcome Financial Services Limited*. In that case, Judge Keyser did have before him the cost of alternative PPI policies. Judge Keyser found the relationship (again in a PPI case) to be an 'unfair relationship' and also referred to the FCA proposed 50% commission cut-off.

Counsel for Brookmans produced calculations to show that the actual cost of PPI, when allowance is made for rebates, was £3571 exclusive of contractual interest, but by contrast, the total cost of pay-as-you-go insurance for the period of cover would have been at most £922, according to the quotations. However, Judge Keyser assessed redress under CCA 1974, s 140A as 'one of judgment rather than strict arithmetic'. Having regard to the benefit of cover under a policy for which the premium was paid up front, Judge Keyser ordered 'the refund of all payments and the remission of all subsisting liability to the extent that the total of such payments and liability exceeds £1,500.'

Brookman was cited to the President at the oral permission hearing. In giving reasons for refusing permission, the President said:

'It is interesting (but nothing turns on this) that....although Judge Keyser identified the relevant cost as £923--the amount he actually awarded was the far greater figure of £1, 500.'

Interviewed by David Bowden.

The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor