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Supreme Court considers recoverability of £1.6m ATE premium for appeal in £5780 claim

Plevin v. Paragon Personal Finance Limited (No 3)
UKSC 2014/0037

Article by David Bowden

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Executive speed read summary
The Supreme Court determined this appeal in November 2014 and decided that there was an 'unfair relationship' under section 140A of the Consumer Credit Act 1974 between Plevin and Paragon. As Plevin won on this narrow issue, a costs order in her favour was made. Master O'Hare assessed the bill of costs. He referred one issue to a Supreme Court justice and it was decided to have a full hearing to resolve it. The Plevin appeal to the Supreme Court could only have started after the Court of Appeal handed down its ruling in December 2013. Plevin needed a new conditional fee agreement for the Supreme Court. The ATE was provided throughout by DAS. Paragon said that the Supreme Court appeal and any funding arrangement started after 1 April 2013 when the new LASPO rules took effect. LASPO prevents success fees or ATE being recovered by a successful party from an unsuccessful one – these can now only be deducted from any damages recovered. Paragon say the Supreme Court ATE is not recoverable from them as the final appeal was a separate set of proceedings for the purposes of costs. Plevin say that it is wrong to interpret 'proceedings' so narrowly, that it is the same ATE insurer and policy number throughout and DAS provided 'top up' cover to Plevin for the final appeal. The Supreme Court has reserved judgment. It has declined to make an interim payment of costs award in Plevin's favour.

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UKSC 2014/0037 *6 February 2017*
Supreme Court of the United Kingdom (Lady Hale DPSC, Lords Clarke, Sumption, Carnwath and Hodge JJSC)

What is the summary of the claim itself?
A broker (Loan Line) put an unsolicited leaflet through an end-user customer's letter box. The broker offered to arrange refinancing at competitive rates. The broker assessed the customer's 'demands and needs' for payment protection insurance as it was required to do under the FSA (now FCA) Insurance Conduct of Business Rules. The broker was one of 11 brokers that Paragon as lender dealt with. Paragon accepted the business and conducted money laundering checks (in a 'speak with' telephone call) but did not conduct any assessment of the suitability of the insurance itself.

The loan was for £34,000 at a highly competitive APR of 7.3% with loan payments spread over 10 years. The loan agreement was on the lender's standard documentation. It was regulated by the Consumer Credit Act 1974 and secured by a second legal charge over her home. Single premium PPI was arranged – this was for 5 years and not the full 10 year period of the loan. The PPI cost £5,780 of which 71.8% was retained as commission. The insurance was provided by Norwich Union. The broker received £1,870 commission (32%), the lender £2,280 (39%) and the balance went to the insurer.

Proceedings were brought in 2009 by the customer's solicitors against both the lender and the broker alleging initially that there were breaches of fiduciary duty and then subsequently that the PPI had been mis-sold in some way. A number of other claims were made which were either abandoned or dismissed at trial. The broker went into insolvent liquidation. The claim against the broker was settled for £3,000. This was paid by the Financial Services Compensation Fund. It is not clear why the claim was not settled in full.

This left the claim against the lender. The trial judge in Manchester County Court (Recorder Yip QC) dismissed all claims after a four-day trial - **[2012] EW Misc 24 (CC)**. The judge found there was not an 'unfair relationship' and made an indemnity costs order in the lender's favour.

The customer appealed and in December 2013 the Court of Appeal allowed that appeal **- [2013] EWCA Civ 1658**. It found that the insolvent broker had acted on the lender's behalf, there was an 'unfair relationship' and remitted it all back to the county court to determine compensation and costs. Paragon appealed to the Supreme Court. On 12 November 2014 Paragon succeeded in overturning the Court of Appeal's ruling in relation to agency (so that Loan Line was not its agent) and in relation to the findings on the FISA and FLA codes - **[2014] UKSC 61**. Plevin lost on all these issues and only succeed on 1 issue on the narrow point that the relationship between Plevin and Paragon was unfair under section 140A of the Consumer Credit Act 1974 because the commission that Paragon retained was beyond a '*tipping point*'.

How was this claim funded?
Mrs Plevin's solicitors (Miller Gardner of Manchester) acted for her in all courts under 'no win, no fee' conditional fee agreements ('CFAs'). Miller Gardner arranged for 'after the event' ('ATE') insurance to be placed on risk to cover Paragon's costs in the event that her claim or appeals failed. This ATE was 'self-insured'. This meant that Mrs Plevin did not have to pay for the ATE premiums at all. The ATE insurer would only collect the ATE premiums from Paragon in the event that Mrs Plevin won and in the amount that the premiums were agreed or assessed at by a costs judge.

What happened when Mrs Plevin submitted her bill of costs in the Supreme Court?
On 5 February 2015 the Supreme Court made a costs order awarding Mrs Plevin her costs. This order is disputed by Paragon because Mrs Plevin lost on all issues other than the 1 narrow one on commission disclosure. Miller Gardner submitted its bill of costs for work undertaken on Mrs Plevin's behalf in the Supreme Court. Paragon served its points of dispute. A detailed assessment of Plevin's bill was carried out by Supreme Court costs officers. Miller Gardner then applied for a variation of the original costs order and also for a review of the costs officer's decisions on a number of grounds.

What order did Master O'Hare make?
A detailed assessment of costs was carried out by Master O'Hare sitting as a costs office of the Supreme Court on 29 and 30 October 2015 and he handed down his judgement on the issues raised in that assessment on 11 February 2016. At the handing down hearing, Miller Gardner raised further issues and Master O'Hare gave a further short judgment on 17 February 2016.

How much was claimed by way of ATE premiums?
At the hearing, leading counsel for Mrs Plevin gave these figures for the ATE cover that DAS provided:

- £262,350 premium for the Court of Appeal,
- £797,650 premium for the main Supreme Court hearing (which was reduced on assessment by Master O'Hare to £531,235), and
- £550,000 including insurance premium tax just to cover the 1 day hearing in the Supreme Court to resolve the ATE issue.

The total ATE claimed for the appeals is £1,610.000.00.

What did the judge in the county court rule on costs?
Recorder Amanda Yip QC gave a short rider to her judgment in Manchester County Court on 4 October 2012. At that stage an ATE premium of over £180,000 was claimed by Plevin for the trial when Paragon's costs were around £30,000. For a layman it cannot make sense to pay an insurance premium of £180k to cover a potential liability of £30k. However that is a battle that Paragon is yet to have with Plevin as the county court costs have not yet been assessed.

Recorder Yip said:

> '*It seemed to me that the costs said to have been incurred by the claimant in this litigation were grossly disproportionate to the sum at stake. In a claim with a value of about £5,000, her costs to trial were estimated to be £320,000. When the relevant offers to settle the claim were made, the first defendant took the view that the claimant's costs were already excessive. Taking a pragmatic and economic view, the first defendant was willing to meet the claim and the costs it considered reasonable but not to pay the costs in full as claimed. In the absence of any explanation as to why the costs claimed were seemingly so high, it appeared to me that the first defendant was taking an entirely reasonable approach to costs. In those circumstances, it was my judgment that the first defendant had done all it reasonably could in a genuine attempt to resolve the litigation at an early stage. By contrast, the claimant's insistence on payment of costs that did not appear reasonable did nothing to genuinely encourage settlement*.'

Recorder Yip went on to say that she had '*found that the claim had been grossly overcomplicated by the way in which it was presented by the claimant's legal representatives'* and that Paragon '*was left with no choice but to respond to that over-complicated claim because the claimant rejected its offers*' and for this reason this took the case '*out of the norm'*. For this reason Recorder Yip awarded Paragon its costs on the indemnity basis.

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What issue was referred to this hearing?
When Miller Gardner applied for a review and variation, a single justice of the Supreme Court in accordance with Supreme Court Rules 2009 rule 53 referred that application to a panel of 3 justices. That panel determined that the issue in relation to whether the ATE is recoverable from Paragon for the Supreme Court appeal was to be determined at a hearing before a panel of 5 justices.

Paragon submits that the ATE premium for the Supreme Court appeal is not recoverable from it because Plevin's ATE policy taken out originally in 2008 did not cover proceedings in the Supreme Court. The issue for the Supreme Court is whether the appeal is part and parcel of the overall proceedings that Mrs Plevin launched in 2009 or whether the Supreme Court appeal is a discrete proceeding in its own right.

Are there any prior authorities on this point?
Yes – there is 1 from the Supreme Court, 3 from the Court of Appeal and 1 from the High Court. Of course the Supreme Court could over rule any Court of Appeal or High Court judgements but it will have to follow its own earlier judgement.
These authorities are relevant in this case:

Wright v Bennett **[1948] 1 KB 601** (Court of Appeal – Somervell LJ).
For the purpose of applying the costs provisions formerly in RSC Order 65 rule 1, the proceedings in the Court of Appeal and below were to be treated separately. Costs incurred in generating material for the trial will be recoverable, if at all, under the costs order made in respect of the trial. It will not be recoverable as part of the costs of a subsequent appeal even if the material is reused on the appeal

Goldstein v. Conley **[2001] EWCA Civ 637** (Court of Appeal – Lords Justices Mantell, Clarke and Evans)
Section 91(8) of the Leasehold Reform, Housing and Urban Development Act 1993 does not deprive the Lands Tribunal of its jurisdiction to make the costs order which Judge Rich made because the costs of and incidental to the proceedings before the Lands Tribunal within the meaning of rule 52 of the Lands Tribunal Rules 1996 cannot ordinarily be fairly described as costs incurred in connection with proceedings before the Leasehold Valuation Tribunal.

Hawksford Trustees Jersey Ltd v. Stella Global UK Ltd **[2012] EWCA Civ *987*** (Court of Appeal – Lords Justices Rix, Etherton and Patten)
Rix LJ - the cost of an ATE premium arises only in the appeal and can be justified only to the extent that it is the price of insuring against the risk of a costs liability in the appeal, when in truth it is the price of insuring against a costs liability in the trial. The costs liability in respect of which the respondent has insured remains a costs liability in the trial.
Etherton LJ – It is perfectly possible to give the word '*proceedings*' in section 29 of the Access to Justice Act 1999 a wide or a narrow meaning. The section would make sense and could work whether the appellants' interpretation or the respondent's interpretation were adopted. Section 29 must be interpreted in a way that will best reflect the legislative purpose which is the improvement of access to the courts for members of the public with meritorious claims.
Patten LJ (dissenting) - I am not persuaded that it would be right for us to give the word '*proceedings*' in s.29 a restricted meaning. It is important to bear in mind that this was legislation designed to expand access to the courts via the use of CFAs and ATE. The purpose of s.29 was to reverse the existing state of the law under which such premiums were not recoverable as costs.

BPE Solicitors v. Gabriel **[2015] UKSC 39** (Lords Mance, Sumption, Carnwath, Toulson and Hodge JJSC)
Lord Sumption JSC declared that in the event that the Trustee adopts the appeal to the Supreme Court he will not be held personally liable for any costs incurred by the respondent in relation to this action up to and including the order of the Court of Appeal dated 22 November 2013, by virtue only of the fact of his office as Trustee of Mr Gabriel's estate in bankruptcy or of his adoption of the appeal. A trial and the successive appeals from the order made at trial are 'distinct proceedings for the purposes of costs', albeit distinct proceedings in the same action. A distinct order for costs will be made in respect of each of them.

Parker v. Butler **[2016] EWHC 1251 (QB)** (High Court, QBD, Edis J)
A case on 'qualified one-way costs shifting' ('QOCS'). A personal injury claim was dismissed at trial and an appeal failed too. Not every step in proceedings (broadly defined) which begins with a claim for personal injuries is included in the definition of the word '*proceedings*' as used in CPR 44.13. That word as there used has a narrower construction. To construe the word '*proceedings*' as excluding an appeal

which was necessary if he were to succeed in establishing the claim which had earlier attracted costs protection would do nothing to serve the purpose of the QOCS regime.

What does the Civil Procedure Rules 1998 say?

CPR part 48 deals with Part 2 of LASPO relating to civil litigation funding and costs and provides for '*transitional provision in relation to pre-commencement funding arrangements'*. In particular, CPR part 48.2 provides as follows:

> **'48.2** (1) *A pre-commencement funding arrangement is—*
> *(a) in relation to proceedings other than insolvency-related proceedings, publication and privacy proceedings or a mesothelioma claim –*
> *(i) a funding arrangement as defined by rule 43.2(1)(k)(i) where –*
> *(aa) the agreement was entered into before 1 April 2013 specifically for the purposes of the provision to the person by whom the success fee is payable of advocacy or litigation services in relation to the matter that is the subject of the proceedings in which the costs order is to be made; or*
> *(bb) the agreement was entered into before 1 April 2013 and advocacy or litigation services were provided to that person under the agreement in connection with that matter before 1 April 2013;*
> *(ii) a funding arrangement as defined by rule 43.2(1)(k)(ii) where the party seeking to recover the insurance premium took out the insurance policy in relation to the proceedings before 1 April 2013'*.

What is the significance of LASPO 2012?

The Legal Aid Sentencing and Punishment of Offenders Act 2012 ('LASPO') has a critical date for costs of 1 April 2013. After that date, success fees and ATE premium are not recoverable by the winning party from the loser but rather they have to be taken out of any damages recovered. There are some complex transitional provisions. In relation to Plevin's case in the County Court, then the CFA is clearly pre-LASPO. The Court of Appeal case straddles the commencement of LASPO. However the Supreme Court appeal could only have started when the Court of Appeal handed down its judgment in December 2013 and so any CFA in relation to that appeal would be post-LASPO with the result that 'additional liabilities' be they success fee or ATE are not recoverable by Plevin from Paragon.

However LASPO provides in section 46(3) that:

> '*46(3) The amendments made by this section do not apply in relation to a costs order made in favour of a party to proceedings who took out a costs insurance policy in relation to the proceedings before the day on which this section comes into force*.'

The Supreme Court will have to construe '*took out'* and decide whether the ATE insurance (provided throughout by DAS with the same policy number in all courts) was '**taken out'** before the county court case started or was '**taken out'** when a decision was made to resist a Supreme Court appeal.

What submissions did Paragon as paying party make?

Paragon was represented at this hearing by Peter Kirby QC and Thomas Bell (both of Hardwicke Building, Lincolns Inn). These counsel did not represent Paragon at any hearings or appeals in relation to the actual case. The court was taken to the Sir Rupert Jackson's work on costs and the reason why his final report recommended that ATE premiums should no longer be recoverable by a winning party from a losing one.

Paragon's counsel said there were only 3 issues:

- Does it suffice for Mrs Plevin to have taken out before 1 April 2013 an all costs ATE policy regardless of when the period runs?
- Is an appeal in relation to the trial proceedings and within or without the scope of LASPO section 46(3)? and
- Did Mrs Plevin 'take out' her ATE policy for the Supreme Court appeal before or after 1 April 2013?

Paragon submitted (relying on *Wright*, *Goldstein* and *BPE*) that the county court case, the Court of Appeal appeal and the final appeal to the Supreme Court for costs purposes were each separate proceedings. A new CFA was needed for each. Paragon submitted that the majority in *Hawksford* were correct and that the word 'proceedings' must be given an interpretation consistent with its legislative approach.

There was some confusion as to which DAS policy terms applied as Paragon had been supplied with both a 'Business Link Policy' and also a consumer policy. Under the former policy terms Plevin would (in theory) remain liable to DAS for any ATE premium not recovered from the other side. Paragon said the Supreme Court decision in *BPE Solicitors* should be followed and that Plevin's trial and her successive appeals from the order made at trial are distinct proceedings for the purposes of costs (albeit distinct proceedings in the same action).

Paragon also relied on a recent decision from a deputy High Court judge in *Shergill v. Khaira* which had applied *Hawksford* and ruled that an appeal to the Court of Appeal was to be treated and regarded as separate for the purpose of costs under CPR part 47.11. *Shergill* had also gone to the Supreme Court **[2014] UKSC 33** and the court below was now resolving costs. Both Lord Sumption and Lord Clarke were on the *Shergill* panel. As to QOCS, Paragon submitted that Edis J in *Parker* came to the right conclusion but for the wrong reason.

In conclusion Paragon submitted that although Plevin had a pre-commencement funding arrangement and also had the benefit of ATE, on appeal to the Supreme Court these were separate proceedings and that the narrower construction gives proper protection to Plevin consistent with the QOCS approach on appeals.

What submissions did Mrs Plevin as receiving party make?
Plevin was represented at this hearing by Robert Marven of 4 New Square, Lincolns Inn and Andrew Clark of 9 St John Street Chambers, Manchester. Neither Mr Marven nor Mr Clark represented Plevin at any hearings or appeals in relation to the actual case.

Plevin submitted that the word '*proceedings*' in LASPO s46(3) was capable of different meanings depending on its context and that there was no decisive definition of 'proceedings'. This point has to be decided 'in the costs context'. In CPR part 47 the word 'proceedings' is used but the CPR does not apply to proceedings in the Supreme Court.

The dissenting judgement of Patten LJ in *Hawksford* is to be preferred for the reasons Lord Justice Patten gives but also to put it in its proper context in view of the Jackson reforms and LASPO. The Supreme Court is invited to over-rule the majority in *Hawksford.* Plevin was in a difficult position, she lost at trial but the Supreme Court found the relationship to be unfair. Plevin would not have been able to afford to fund her case without a CFA and ATE. Plevin submitted it was the DAS business terms which applied to Plevin's ATE.

In conclusion Plevin submitted that there was no good reason to give 'proceedings' a limited meaning. The word as it appears in the CPR cannot be used as an interpretation aid to where it appears in a statute – LASPO. QOCS is underpinned by the '*asymmetric relationship'* between an injured claimant and an insured company or public body. There is that same *'asymmetric relationship'* between Plevin and Paragon. QOCS cannot be used as an aid to construing LASPO.

Could Mrs Plevin be at personal financial risk here?
Mr Marven in answer to a question from Lady Hale said that '*on instructions from my insurers, she will not be pursued*' in the event that Paragon win and the ATE premium for the Supreme Court appeal is not recoverable from it.

What were the interventions from the panel?
There were fewer interventions than during the course of a regular appeal hearing. Lord Sumption asked the most questions. Lady Hale said that she thought Paragon was 'trying to have it both ways'. Lord Carnwath was most enthused about QOCS and how it works. Helpfully the panel asked both counsel what actually happened in costs cases on the ground and whether this was a typical case or not. Neither Lord Hodge nor Lord Clarke made any meaningful interventions.

Will the deliberations in *Flood, Miller and Frost* affect this case?
This case was heard over 3 days by the Supreme Court 2 weeks ago on 24 to 26 January 2017. In *Flood* and *Miller* the newspapers submit that having to pay hefty ATE premiums infringes the media's right to freedom of expression under Article 10 of the European Convention on Human Rights. They also say that the pre-LASPO regime of 'additional liabilities' has already been found in *Naomi*

Campbell not to be Convention compliant and that only England & Wales had such a system. It does not exist in Scotland or Northern Ireland, any other common law country or any other of the 46 member states of the Council of Europe. *Frost* is different because this is a phone hacking case where damages for breach of privacy were eventually upheld after bitterly contested proceedings in which systemic hacking was always denied. The Panel in *Flood* was chaired by Lord Neuberger. Lords Sumption and Hodge were also on the *Flood* panel and no doubt what they heard in Flood will inform their deliberations in Plevin.

Will *BNM* have any impact on this costs assessment?
BNM v. MGN Limited is due to be heard by the Court of Appeal on 10 or 11 October 2017. The *Flood* panel asked about *BNM* and in particular whether the parties wished for *BNM* to be determined first – but nobody was enthusiastic about that course. *BNM* is a transferred appeal. The Court of Appeal will have to determine if the approach of the Senior Costs Judge (Master Gordon-Saker) is correct or whether the approach of 2 other SCCO Masters is correct. In *BNM* the costs judge assessed costs, and the determined that those costs were not proportionate to the amount in dispute. The costs judge in particular reduced the amount of the ATE premium. The Court of Appeal will have to decide if 'additional liabilities' (that is ATE or success fees) are left out of the mix when determining if the global figure for assessed costs is proportionate or not.

What other applications were before the Supreme Court?
Mr Andrew Clark, junior counsel for Plevin had submitted an application late on Friday for an interim payment of costs in the Supreme Court. The justices declined to deal with that application at the hearing.

When will a judgment in this case appear?
Lady Hale at the end of the hearing said that the court would let the parties know of their outcome in the usual way. A draft judgment will be circulated and a hand down date will be listed. It is likely that the judgement in *Plevin* will appear at the same time as *Flood*, but it does not have that much overlap and so it may appear earlier. As the *Flood* appeal is more complex, nobody is expecting a judgment this side of Whit 2017.

What will happen next with this case?
As far as costs are concerned, this case has someway to go. If the Supreme Court rules that the ATE premium is not recoverable, then it will follow that no success fee for the Supreme Court is due either. There is the issue of what costs Paragon is liable for given that Plevin lost on all issues bar one in the Supreme Court. If Plevin loses on the ATE point, she will have to pay Paragon's costs on this in the Supreme Court – or more likely these will be offset against what Paragon have to pay Plevin.

The SCCO has to assess the Court of Appeal costs. At the hearing it was said that the county court (to whom this case had been remitted) had not even started to assess costs. If the matter is reserved to Recorder Yip QC, then given her earlier judgement, Plevin could be in for a rocky ride.

6 February 2017

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