

IN THE MANCHESTER COUNTY

Case Number: 9CH00028

HHJ PLATTS

REMITTED FROM THE SUPREME COURT OF THE UNITED KINGDOM

[2014] UKSC 61

B E T W E E N:

SUSAN PLEVIN

Claimant

-and-

(1) PARAGON PERSONAL FINANCE LIMITED

(2) LL PROCESSING (UK) LIMITED (IN LIQUIDATION)

Defendants

NOTE OF THE JUDGMENT OF HIS HONOUR JUDGE PLATTS

HANDED DOWN *EX TEMPORE* ON MONDAY 2nd MARCH 2015

Mr Andrew Clark (9 St John Street Chambers, 9 St John Street, Manchester, M3 4DN) instructed by Miller Gardner Limited, 497 Chester Road, Trafford, Manchester M16 9HF for the Claimant.

Mr Ian Wilson (3 Verulam Buildings, Gray's Inn, London, WC1R 5NT), instructed by Irwin Mitchell LLP, Imperial House, 31 Temple Street, Birmingham, B2 5DB for the First Defendant.

After reading the Skeleton Arguments filed on behalf of both parties

And after reading the Hearing Bundle and the Bundle of Authorities

And after hearing oral submissions from both parties, the following *ex tempore* judgment was delivered at 2.15pm

JUDGEMENT:

1. This case is remitted by the Supreme Court. In this application the Claimant relies on section 140B of the Consumer Credit Act 1974. The claim relates to a payment

protection insurance (“PPI”) policy that protected the Claimant’s loan with the First Defendant. In 2006 the Claimant borrowed £34,000 and added to that was PPI of £5780.00.

2. In her claim, there are a variety of allegations. Miss Recorder Amanda Yip QC tried this claim over 4 days in October 2012 and at the conclusion of this trial she rejected all the claims.
3. As a result of rulings by the Court of Appeal and the Supreme Court, the Claimant succeeded on one aspect only. The Supreme Court held the relationship between the Claimant and the First Defendant was unfair because the First Defendant failed to disclose to her the commission payments it was receiving.
4. Of the PPI premium of £5780, Norwich Union received £1630. The broker (the 2nd Defendant), took no active part in these proceedings, received £1870; and the First Defendant received £2280¹. Thus 71.8% was paid as commission.
5. Section 140 of the Consumer Credit Act 1974 confers a wide discretion on the court. Under section 140A(1) the court may make an order under section 140B if it determines the relationship is unfair to the Defendant. Only section 140A(1)(c) is relevant: “anything done or not done” by the creditor.
6. The relief available under section 140B(1) is
“140B Powers of court in relation to unfair relationships
(1) An order under this section in connection with a credit agreement may do one or more of the following—
(a) require the creditor, or any associate or former associate of his, to repay (in whole or in part) any sum paid by the debtor or by a surety by virtue of the agreement or any related agreement (whether paid to the creditor, the associate or the former associate or to any other person);”
7. The Claimant argues that in the light of the “unfair relationship” finding, all PPI premiums should be repaid together with interest so that the sum that should be refunded to her is £7233.

¹ Figures from paragraph 25 of the judgment of Recorder Yip QC dated 4th October 2012. [2012] EW Misc 24 (CC). www.bailii.org/ew/cases/Misc/2012/24.html

8. The First Defendant concedes a repayment of anything relating to the commission element of £4500. The difference between these figures is £2733.
9. I regard with some dismay that the parties have litigated over such a small sum.
10. There is little guidance given by section 140 itself. I have been referred to a number of authorities including the decision of Deputy Judge George Leggatt QC in *Patel v. Patel*² where at paragraph 79 he says:
- “79. I must therefore consider what order, if any, to make under s.140B in the light of this determination. It is plain from the width of the provisions that the intention is to give the court a very wide discretion to make whatever order it thinks just. But in principle it seems to me that the order made should reflect and be proportionate to the nature and degree of the unfairness which the court has found.”
- Both parties have cited this case to me.
11. There is reference to other cases on how to apply section 140A. There is *Patel* itself, *Bevin v. Datum Finance*³ and *Wilson v. Link Financial*⁴. I find those cases to be of limited assistance. It is not surprising on the facts that they do not assist me. The parties accept that each case turns on its own facts where unfairness is identified.
12. The decision in *Yates and Lorenzelli v. Nemo Personal Finance*⁵ is of assistance, it is a decision of mine, because it relates to the same unfairness: non-disclosure of commission on PPI.
13. In that case the PPI premium was £15,468 and 57.4% was retained by the lender as commission and split between the lender and the broker. The Claimants’ own evidence was they were told PPI had to be taken out (paragraph 6⁶). I accepted her evidence on this – the misrepresentation was made by the broker and not the lender. There was no evidence that **had** the commission been disclosed what would have been the effect on the borrower: the claimant may still have taken out the loan if told there was commission. On the other hand the Claimant may well have questioned the independence of the advice if they knew the broker was receiving substantial sums of commission. I found there was an “unfair relationship” in that case.

² [2009] EWHC 3264 (QB). www.bailii.org/ew/cases/EWHC/QB/2009/3264.html

³ [2011] EWHC 3542 (Ch). www.bailii.org/ew/cases/EWHC/Ch/2011/3542.html

⁴ Unreported. Note on case here: www.wragge-law.com/insights/finance-litigation-briefing-march-2014-report-and/

⁵ Unreported. 14th May 2010. Manchester County Court, HHJ Platts. Judgment here: <http://legalbeagles.info/wp-content/uploads/Yates-v-Nemo-HH-Judge-PlattsManchester.pdf>

⁶ Of *Yates* judgment

14. The appropriate remedy⁷ (paragraph 1) was to rescind the PPI part of the loan agreement and an undertaking from both claimants to surrender the PPI policy and for any rebate to them. I heard Mr MacDonald who said take out the profit element. *Yates and Lorenzelli* did not make an informed choice. The proper remedy was to allow them to resile from it. That was the approach I took in 2010.
15. The Claimant submits that this case is on all fours with her own case. It is time to review the findings in this case.
16. I record that the following findings made by the Recorder to be of significance.

Finding 1: PPI Not Represented as Compulsory

17. She dismissed the assertion that the PPI was represented as being compulsory. This finding is at paragraph 23 of the Recorder's judgment:

"23. The allegation that the PPI was misrepresented as being compulsory is simply not supported by the factual evidence. It was not Mrs Plevin's evidence that she was told that PPI was compulsory. She had virtually no recollection of the initial conversation with the broker. Contrary to the approach taken in her statement, she was anxious to avoid saying anything in oral evidence that might not be entirely accurate. Her answer to most questions about the transaction was that she simply could not recall matters. The Claimant's case that there had been a misrepresentation relied heavily on the broker's "Demands and Needs Statement" at page 511. It was said that insofar as this purported to record her answers to questions establishing the need for insurance it could not be right as the word "Insurance" had simply been recorded against all four questions, including one relevant only to the self-employed, which Mrs Plevin was not. I agree that this document is of some relevance and put it into the balance but I look also at what Mrs Plevin said in giving evidence and the other documents in the case. Mrs Plevin was really not sure whether the broker had suggested that PPI was compulsory. She said "I don't remember whether they said I had to have it." Later, she said "I don't recall one way or another whether he said insurance was optional." What she did say on a number of occasions was that she thought insurance was mentioned "in a package way"."

18. Mrs Plevin also ticked the "Yes" box saying she wanted PPI. This is at paragraph 24 of the Recorder's judgment:

"24..... The letter of 27th February 2006, to which I have already referred set out in the clearest possible terms that PPI was optional and was "not a requirement for purchasing your loan". Mrs Plevin referred to that document when completing the application form, having regard to the figures within it, which she found acceptable. When she filled out the details on the application form a few days later, she ticked the relevant box to indicate that she wanted payment protection. At paragraph 9 of her statement, this is the very thing she complains she was not required to do when she says "*had I realised at the time [that cover was optional] or had I been required to perform a positive act i.e. to sign an option box if I wished to take PPI I would have certainly declined the cover as I had sufficient cover in place and did not require PH. As the PPI was already stated on the face of the agreement I believed it formed part of the agreement.* In light of her oral evidence, this argument fell away completely. It was clear

⁷ In *Yates*

that the Claimant did make a positive choice to tick the "yes" box. Further, all documentation subsequently sent to her reiterated that PPI was optional.....

Finding 2: Effect of Non-Disclosure of Commission

19. As for the effect of non-disclosure, this is at paragraph 25 of the Recorder's judgment:

"25. It is not in dispute that from the premium of £5,780, the insurer, Norwich Union, received only £1,630. The balance comprised commission payments to the broker and to Paragon. The broker took £1,870 by way of commission from the premium and Paragon received £2,280. That meant that less than 30% of the premium actually went to the insurer to cover the risk. Mrs Plevin complains that this fact was not disclosed to her and that had it been she would have *"certainly questioned this"*. In her evidence, she did not go so far as to say that she would not have taken out the insurance had she known about the commission arrangements. She said that the details of what she was required to pay represented *"the package I expected to receive"*. Asked whether she had been happy that the monthly payments, even with insurance, were lower than those she had been paying while also giving her money to do her house up and allowing her to consolidate her loans into one, she replied *"That's exactly why I did it."*

20. Also at paragraph 28 of the Recorder's judgment:

"28. Here, the Claimant was given clear information about the total payment for the PPI. She knew what the product cost and the limit of its cover. She was content that the total she was being asked to pay in respect of the loan and the insurance was acceptable. She agreed to pay the total price asked for the PPI. With hindsight, I have no doubt that she has *"buyer's remorse"* and would if in the same situation again give the matter much more thought."

21. Further at paragraph 30 of the Recorder's judgment:

"30...I have considered carefully whether these large commission payments and the fact that they were not disclosed to the Claimant created an unfair relationship between her and Paragon. On the facts of this case, where she was given clear written advice that the PPI was optional and did not affect the making of the loan and where she was given a clear total price with which she was content, I cannot see that the fact of the commission payments led to any misrepresentation on the part of the broker that was in turn relied upon by Mrs Plevin. Further, I find that she probably did receive the "FISA Borrower Information Guide" at page 281 of the bundle, although as she readily admits she did not read all documents sent to her carefully. She is an educated and articulate woman and could readily have understood the information had she chosen to read it. At page 296 there is a section covering payments to credit brokers which indicated that "If your broker is FISA registered you can assume he will be receiving a commission for arranging your loan". That section also made it clear that this may include an element for any insurance product sold with the loan."

Finding 3: Lack of unfairness

22. Finally, at paragraphs 42 and 43, the Recorder in her judgment made these findings:

"42. Looking at all the facts of the case as I have analysed them above in relation to the question of unfairness, I do not think the Claimant would have suffered prejudice through the non-compliance. She was given sufficient information to understand the extent of her obligations and the cost of the PPI and of the loan to cover it.

"43. Even if I was wrong about both the nature of the agreement and the issue of enforceability, questions as to the consequences of non-enforceability and the remedy for the Claimant would arise. Here, I do not consider it would be right to order repayment of all payments made for the PPI in circumstances where the Claimant's evidence suggested she wanted, and perhaps specifically requested, the cover for her large loan. She has had the benefit of such cover over the term to which she agreed. Had I considered that it was right not to enforce the PPI part of the agreement, I would have considered ordering that the First Defendant could not enforce future repayments related to the credit for the PPI. However, as

Mr Wilson points out at paragraph 74 of his skeleton argument, when the settlement from the Second Defendant is taken into account, the difference this would make would be extremely modest.”

23. As to the last question the Claimant submitted that I should exercise my own discretion based on the findings of fact and I should not put myself in the position of the Recorder. These are the relevant findings from the court below.

24. As to the Supreme Court decision⁸, Lord Sumption gave the leading speech. At paragraph 18 he said:

“18. I turn therefore to the question whether the non-disclosure of the commissions payable out of Mrs Plevin's PPI premium made her relationship with Paragon unfair. In my opinion, it did. A sufficiently extreme inequality of knowledge and understanding is a classic source of unfairness in any relationship between a creditor and a non-commercial debtor. It is a question of degree. Mrs Plevin must be taken to have known that some commission would be payable to intermediaries out of the premium before it reached the insurer. The fact was stated in the FISA borrowers' guide and, given that she was not paying LLP for their services, there was no other way that they could have been remunerated. But at some point commissions may become so large that the relationship cannot be regarded as fair if the customer is kept in ignorance. At what point is difficult to say, but wherever the tipping point may lie the commissions paid in this case are a long way beyond it.”

25. So that's the saga. In my judgment the following 5 factors are important:

Factor 1: Commission was significant

26. The commission was significant – it was a long way beyond the “tipping point” and it was higher than the commission in *Lorenzelli and Yates*.

Factor 2: Claimant's evidence of what she would have done otherwise

27. The evidence of what the Claimant would have done is both limited and equivocal. At paragraph 25 of her judgment Recorder Yip finds that the Claimant would have questioned it and wanted value for money. It is clear from the Recorder's judgment that the Claimant is not saying she would not have taken PPI at all.

Factor 3: Background

28. In this case the Claimant had a choice as to whether to accept the PPI – irrespective of how the cost was made up. I distinguish *Lorenzelli and Yates* where the borrowers were told taking PPI was a *condition* of the loan.

⁸ www.bailii.org/uk/cases/UKSC/2014/61.html

Factor 4: Benefit of the PPI

29. The Claimant had the benefit of the PPI during the period of the loan and had the peace of mind that the cover brought.

Factor 5: Claimant made a free choice

30. In *Lorenzelli and Yates* the Claimants might have questioned that they had to take PPI at all. This is not the situation here. Here the Claimant made a free choice and was prepared to pay £5780 for the PPI and made a free choice.

31. I now need to look at the appropriate relief. It seems to me that this matter is wholly in my discretion. I find relief and relieve the Claimant from paying commission but not from paying the entire PPI premium. This decision is not inconsistent with *Lorenzelli and Yates*. The matters here are different to *Lorenzelli and Yates*.

32. This is a decision on the particular facts of this case. It is not intended to give general guidance. I hope this point is clear.

33. I prefer the First Defendant's submissions on relief. Mr Wilson in his skeleton argument gives the sum as £4500.

There followed further submissions as to whether the £3000 payment already made by FSCS should be apportioned in any particular way in relation to commission.

34. In the light of my decision that the Claimant can receive commission only under section 140B of the Consumer Credit Act 1974, an issue arises as to what credit should be given. The Claimant agreed by way of compromise in February 2010.

35. The Claimant submits that because the claim against the First Defendant and for interest thereon, and she succeeded against the Second Defendant⁹, only the commission element of the FSCS award is available as a credit – that is 71.8%. I think there are difficulties with this approach.

36. This pre-supposes that commission is properly allocable to the First Defendant. The settlement/compromise takes into account all claims made. It is not possible for the

⁹ In her claim submitted to the Financial Services Compensation Scheme following the 2nd Defendant's insolvency in which she received and accepted £3000.

Claimant to say it should be split. Litigation does not work like this. The whole of the £3000 can be deducted.

37. In paragraph 3 of the settlement, my view is strengthened. In paragraph 3 the Claimant agrees to give credit of the sums received from the Second Defendant in relation to her claim against the First Defendant. This is the whole £3000 and it was conceded would be set off.

38. For this reason I accept the First Defendant's submission that the whole £3000 be set off. We are now at the figure of £4500.

There followed further submissions on costs and whether the case should now go back to Recorder Yip QC or not

39. I will adjourn costs and reserve this to myself as we don't know Recorder Yip's availability.

40. The First Defendant to repay to the Claimant the sum of £3369.95 and statutory interest of £1130.05. The Claimant to have credit for the £4500 already paid.

41. The issue of costs of the action be adjourned to the first open day reserved to HHJ Platts with a time estimate of half a day. There be mutual exchange of skeleton arguments.

42. Costs of today be reserved to the next hearing. I will keep the costs bundle lodged on the court file.

The court rose at 3.20pm.

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3rd March 2015.