Unfair relationships

Recent cases provide clarity but consumers lose out on agency provisions, say Jonathan Butters & Kevin Durkin

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IN BRIEF

- Recent decisions of the Supreme Court provide much clarity on the approach to credit agreement claims.
- A much criticised decision was overturned.
- Analysis of the peculiar features of the Consumer Credit Act 1974.

The "unfair relationship" provisions at ss 140A-C of the Consumer Credit Act 1974 (the Act) empower the courts to re-open credit agreements on the application of a debtor on the ground that the relationship between creditor and debtor arising out of the agreement is unfair to the debtor. The recent decisions of the Supreme Court in *Plevin v Paragon Finance Limited* [2014] UKSC 61, [2015] 1 All ER 625 and the Court of Appeal in *Scotland v British Credit Trust* [2014] EWCA Civ 790; [2014] All ER (D) 103 (Jun) have provided much clarity on the approach to claims under ss 140A-C.

In both cases the claimants took out loans which included additional advances to fund the purchase of PPI which was payable by way of an up-front premium. Both issued claims against the creditor on the basis that the intermediary who sold the PPI was acting "on behalf of" the creditor for the purpose of s 140(1)(c). In both cases the intermediary had become insolvent. The allegation in each case was that the intermediary had sold the PPI in breach of statutory duty causing loss to the claimants. Thus, it was argued, an unfair relationship arose.

In addition Mrs Plevin argued that the intermediary and creditor had unfairly retained part of the PPI policy premium as commission.

First, the Supreme Court in *Plevin* overturned the much criticised decision of the Court of Appeal in *Harrison v Black Horse Ltd* [2012] Lloyd's Rep IR 521, [2010] All ER (D) 131 (Dec) with the effect that an unfair relationship can now be found even where there has been no breach by the creditor or its agents of any applicable legal duty. Thus the retention of commission was found to be unfair even though this did not involve the breach of any legal duty by the creditor or intermediary.

The second limb of the judgment in *Plevin* clarified the circumstances in which an intermediary is acting "on behalf of" a creditor for the purpose of s 140(1)(c) of the Act. In the Court of Appeal Plevin had successfully argued that the alleged PPI mis-selling of the intermediary took place "on behalf of" the creditor. Likewise in *Scotland* the claimants succeeded on this point. However, this aspect of the case was not resolved in favour of Plevin in the Supreme Court.

The tension between the two results highlights the need for change to the deemed agency provisions within the Act.

Unfair relationships & legal duties

The first aspect of the decision in *Plevin* is welcome. The whole purpose of the unfair relationship provisions was to provide consumers with greater protection than its predecessor, the extortionate credit bargain provisions. Moreover, as Lord Sumption observed, the Insurance Conduct of Business Rules (ICOB rules) of the FSA (now FCA) handbook and ss 140A-C do different things: the ICOB rules (and insert here any other relevant duty) impose hard edged obligations laid down in advance whereas s 140A "does not impose any obligation and is not concerned with the question whether the creditor or anyone else is in breach of a duty. It is concerned with the question whether the creditor's relationship with the debtor was unfair. It may be unfair for a variety of reasons, which do not have to involve a breach of duty".

In determining unfairness the court can take into account the content of the ICOB rules (or other applicable legal duties) as demonstrating the standard of commercial conduct reasonably to be expected of the creditor.

Once the court has decided that the relationship is unfair, it must then decide whether the unfairness arose from something "done (or not done) by, or on behalf of, the creditor". Lord Sumption recognised that this will be easier where the debtor relies on a positive act. Where an omission is relied on, matters become more complicated. In the absence of a legal duty to act, how does the court determine whether the creditor is to be treated as responsible for the unfairness? Lord Sumption suggested that responsibility would fall on the creditor if "he fails to take such steps as (i) it would be reasonable to expect the creditor or someone acting on his behalf to take in the interests of fairness, and (ii) would have removed the source of that unfairness or mitigated its consequences so that the relationship as a whole can no longer be regarded as unfair".

This has certainly provided useful clarity as to the approach to be taken. However, there is clearly scope for litigation as to the precise application of the test.

Deemed agency & "on behalf of"

The Court of Appeal in *Plevin* surprised

many by interpreting the phrase "on behalf of" as including the acts and omissions of those who were not the agent of the creditor. In determining whether the relationship between the creditor and debtor was unfair Lord Justice Briggs held that the court could consider the acts and omissions of those who were "on the creditor's side of the transaction", or who "brought about the business represented by the credit agreement to the creditor" or who "played some material part in bringing about of the transaction".

Overturning the decision, the Supreme Court held that only the acts and omissions of agents of the creditor are relevant to a consideration of fairness under s 140A(1)(c). The decision is not difficult to understand from the perspective of statutory interpretation.

The result is that Plevin cannot bring a claim for damages against the creditor for the mis-selling of the PPI policy by the intermediary.

However, in *Scotland*, on near identical facts, the creditor was found liable under s 140A(1)(c) for the acts and omissions of the intermediary. It is not suggested that either case was wrongly decided. The difference in outcome owes itself to peculiar features of the Act.

Section 56

The critical difference between each case is that in *Scotland* the intermediary concerned was a double glazing company who supplied the claimants with windows, the purchase of which was financed by the principal loan. In *Plevin* the intermediary merely arranged a cash loan and PPI.

This does not, without more, appear to be a particularly relevant fact upon which to determine whether a creditor is liable for the acts and omissions of intermediaries. However, it meant that the claimants in *Scotland* were able to avail themselves of s 56 of the Act whereby the supplier of the windows was deemed the agent of the creditor for the purpose of the PPI sale.

It is not unusual for a consumer to be left without a remedy against an unscrupulous intermediary that has subsequently become insolvent. At common law, the independent intermediary is not the agent of the consumer as a general rule (see *Branwhite v Worcester Finance Limited* [1969] 1 AC 552, [1968] 3 All ER 104). In light of this Parliament followed the recommendations of the Crowther Report and created the deemed agency under s 56 and the separate cause of action against the creditor in respect of the misrepresentations and breaches of contract of the supplier under s 75.

Thus the Act addresses the problem of the unscrupulous and insolvent intermediary by rendering the creditor liable for the acts and omissions of an intermediary but only in certain circumstances. The deemed agency under s 56 only applies to restricted use, debtor-creditor-supplier agreements such as hire-purchase and credit-sale agreements arranged by a credit-broker (s 56(1)(b)) or loans financing a transaction with a supplier made pursuant to "pre-existing arrangements" or "in contemplation of future arrangements" between the supplier and creditor" (s 56(1)(c)).

> *"There is clearly scope for litigation as to the precise application of the test"*

Pre-existing arrangements or the contemplation of future arrangements

The notion of pre-existing arrangements or the contemplation of future arrangements between the supplier and creditor is the device used in s 56(1)(c) to ensure that there is the relevant nexus between the supplier and the creditor to justify the imposition of the deemed agency on policy grounds.

On the facts, this nexus was present between the intermediary and the creditor in *Scotland*. But it was present in *Plevin* also. The relevant factors are the same as those identified by Briggs LJ as present in *Plevin* and going to the phrase "on behalf of" within s 140A(1)(c) in the test that was rejected by the Supreme Court.

In both cases:

- The creditor relied on the intermediary to bring it the business represented by the credit agreement.
- The creditor and the intermediary had made prior arrangements under which the creditor would consider applications for finance initiated by the intermediary.
- The intermediary was paid a commission by the creditor.

There would have been no need for Briggs LJ to stretch the interpretation of s 140A(1)(c) if those factors had already established the intermediary as the deemed agent of the creditor under s 56.

The underlying policy rationale to the approach that found favour with Briggs LJ is the same as that behind the deemed agency provided by s 56 as identified in the Crowther report: to protect consumers from the unscrupulous intermediary by transferring the risk of misconduct and/or insolvency onto the greater resourced creditor who benefits from the business brought to it by the intermediary. Given this is the purpose of the deemed agency provisions, there seems little reason why the claimants in *Scotland* can succeed but Plevin cannot succeed.

Intermediaries not the suppliers of the PPI

Moreover, the role of the supplier of the windows in *Scotland* viz the PPI was no different to the role played by the intermediary in *Plevin*. Neither were the suppliers of the PPI.

In *Scotland* the deemed agency relied on by the claimants was conferred on the intermediary by the transaction for the sale of the windows. On one view the PPI policy was a separate transaction financed by the credit agreement in respect of which the relevant supplier, and candidate to be a deemed agent, was the insurer. But the insurer said and did nothing other than issue a policy. Nevertheless, the Court of Appeal held that the representations of the salesmen concerning the PPI fell within the deemed agency created by s 56 in respect of the transaction for the windows. This followed a similarly wide interpretation of the scope of the deemed agency by the Court of Appeal in *Forthright Finance Limited v Ingate* [1997] 4 All ER 99.

In this context the application of the deemed agency provisions in one case but not the other becomes even more difficult to justify.

Comment

The requirement for pre-existing arrangements or the contemplation of future arrangements is apt to provide the necessary limitation on the deemed agency under s 56 of the Act were it extended to all unrestricted credit agreements arranged through intermediaries. The likes of Plevin would then be able to bring common law claims and actions under section 140A-C against the creditor, relying on s 56 in the same way as those whose credit agreements have been arranged by suppliers can at present. **NLJ**

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