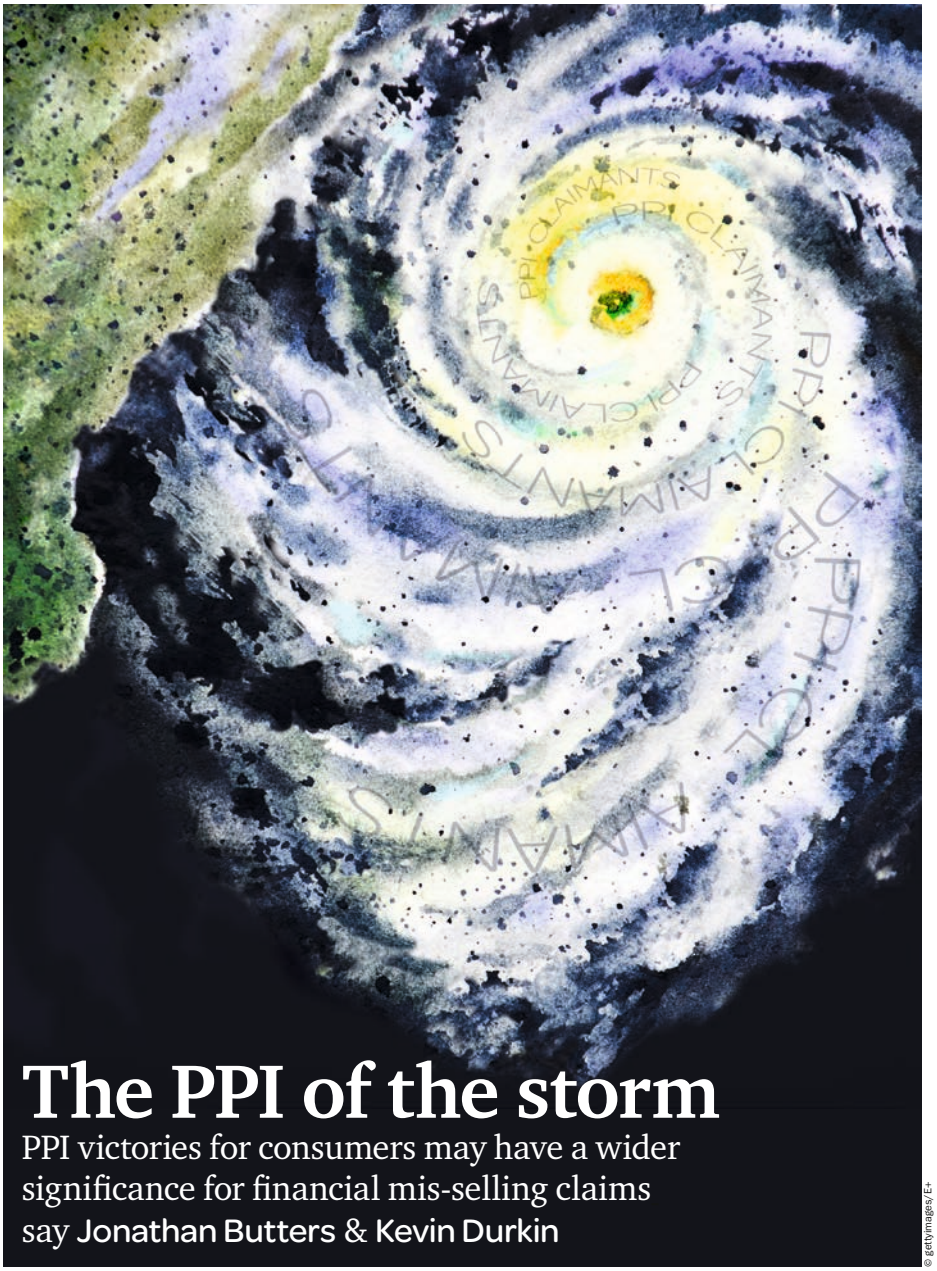

The PPI of the storm

PPI victories for consumers may have a wider significance for financial mis-selling claims say Jonathan Butters & Kevin Durkin

IN BRIEF

▶ *Saville v Central Capital Limited* and *Figurasin v Central Capital*: both cases highlight that the Court of Appeal is willing to give full force to ICOB and, by implication, the other business standard sections of the FCA handbook.

Two recent Court of Appeal judgments have found in favour of consumers in respect of payment protection insurance (PPI) mis-selling claims. The cases of *Saville v Central Capital Limited* [2014] EWCA Civ 337, [2014] All ER (D) 216 (Mar) and *Figurasin v Central Capital* [2014] EWCA Civ 504, [2014] All ER (D) 178 (Apr) have a wider significance for financial mis-selling claims generally. Along with *Rubenstein v HSBC* [2013] 1 All ER (Comm) 915, [2013] 1 All ER (Comm) 915 they demonstrate that the Court of Appeal is willing to give full effect to the consumer protection purpose underlying the business standards section of the Financial Conduct Authority (FCA) handbook.

The claimants in each case, both married couples, were looking to refinance their existing indebtedness and sought the services of a broker, Central Capital Limited (Central) who brokered the sale of a loan together with a payment protection insurance policy which was paid for by a lump sum premium, payable in advance and financed by a sum added to the loan. Both claims were brought under the Financial Services and Markets Act 2000, s 150 (now s 138D) alleging various breaches of the Insurance Conduct of Business rules (ICOB) by Central.

In both cases Central effectively sought to place the responsibility for ensuring that a consumer was properly informed about a product, or that the product was "suitable", with the consumer. Such an approach was firmly rejected.

Saville

While the loan taken out by the Savilles was repayable over 25 years, the term of the insurance was only five years. The Savilles' evidence was that if they wanted PPI at all, they would have wanted it for the full term of the loan. It was common ground that Central had never asked the Savilles what they wanted or needed with respect to the period of cover.

Central conceded that as a result of the failure to enquire as to the desired period of cover there had been a breach of ICOB. The failure to make the necessary enquiry was a plain breach of ICOB. Further, Central cannot have satisfied itself that the policy was in fact suitable for the Savilles' demands and needs or taken into account whether the level of cover was sufficient for the risks that the Savilles wished to insure, as required by ICOB.

The claim failed at first instance on causation. The judge found that the Savilles wanted PPI and knew that the period of cover was only five years. Neither finding was the subject of appeal. However, relying on these findings, the judge also held that the Savilles wanted cover for only five years as this provided them with some cover yet was cheaper than a policy for the full term of the loan. Thus the judge rejected the Savilles' evidence that if they had been asked they would have wanted PPI for the full term of the loan.

The Court of Appeal held that the judge should have asked himself what the Savilles would have said if Central had asked an open and fair question directed to the level (in particular the period) of cover. Lord Justice Floyd, giving the lead judgment, rejected the judge's reliance on a willing and knowing purchase as a factor showing that the Savilles wanted five years' cover.

The Court of Appeal also held that even if the Savilles "knew exactly what they were getting" this did not establish that the policy was in fact suitable for their demands and needs on the basis that: "If that were an adequate basis for a finding that a policy was suitable, the responsibility for assessing whether the policy is suitable would be shifted from the intermediary, where it belongs, to the customer, where it does not."

Analysis

This final sentence neatly summarises the approach endorsed by the Court of Appeal. It follows from the consumer protection purpose of ICOB and other like regulatory regimes as alluded to in *Saville* and other

cases, most notably *Rubenstein v HSBC and Zaki & Ors v Credit Suisse (UK) Ltd* [2013] EWCA Civ 14, [2013] All ER (D) 07 (Feb). In *Zaki* Lord Justice Rix observed that the Conduct of Business rules were, in part, an attempt to "protect investors from ignorance or even from themselves" (para 82). On the one hand, the approach to causation adopted by the court was neither novel nor surprising, representing a straightforward application of the but for principle. The importance of the case lies in the fact that it demonstrates that a claim alleging the sale of an unsuitable product does not fail on causation merely because the consumer wanted the product and/or knew of its terms.

Burden of proof

Interestingly, Sir Stanley Burnton took the opportunity in *Saville* to make the following obiter comments: "In these circumstances, it is unnecessary to decide whether, once the issue is fairly raised (as it was in this case), it is for the intermediary to prove that he complied with the requirements of the rules, and in particular that he properly established that the insurance contract was suitable for the demands and needs of the customer, or for the customer to prove that it was unsuitable. I incline to the view that the burden of proof is on the intermediary to show that he complied with the Rules."

The language of the rules and in particular the use of the term "reasonable steps" is similar to the term "reasonably practicable steps" in employers' health and safety legislation where it has long been established that the burden lies with the employer to establish that it took the required reasonable steps.

Moreover, the placing of the burden of proof on the intermediary is consistent with the regulatory requirement to produce a contemporaneous record of sales setting out, in particular, why a given product is deemed suitable. As a result of this it is the intermediary who holds the evidential cards whereas consumers often have to rely solely on their own recollection of events many years earlier.

Figurasin

At first instance the Recorder held that Central had been in breach of the requirement of ICOB to take reasonable steps to communicate in a manner that was clear, fair and not misleading. This was on the basis that it had misled the claimants into thinking that the PPI was included in the quoted monthly repayment figure at no extra cost when in fact a further advance had been added to the loan to fund the PPI policy. Had the PPI policy not been taken out the monthly repayments would have been significantly lower. This was held to be a breach of ICOB.

On appeal Central sought to argue that ICOB had been complied with because the relevant information was contained in documentation subsequently sent to the claimants. The claimants had not read the relevant sections because they had been misled into thinking the PPI was included at no extra cost. This argument was dismissed. There had been a breach of ICOB in respect of the sales call. Compliance with ICOB was required on every occasion a firm communicated information to a customer.

The court was unimpressed with Central's argument that the claimants were the victims of their own irresponsibility, Lord Justice Vos stating that "it seems to me highly unattractive for [Central] to contend that a positively misleading account of the loan arrangements was cancelled out by the financial details contained (but only contained) in the draft loan agreement".

Analysis

This approach chimes with that of Lord Justice Floyd quoted above. In essence, where there is a relevant statutory duty, this has primacy over any responsibility the consumer may have for protecting his own interests.

Thus, *Figurasin* provides support to consumers facing an argument that they are bound by the terms of a document they have signed in the face of a misrepresentation or breach of statutory duty. In most mis-selling cases the bank or intermediary will rely on contemporaneous documentation as demonstrating or even constituting compliance with the applicable regulations. The approach taken in *Figurasin* may dampen the effect of such documents in future cases and ensure more weight is given to the consumer's account of what he was told and what this led him to believe or understand.

Wider significance

Both cases highlight that the Court of Appeal is willing to give full force to ICOB and, by implication, the other business standard sections of the FCA handbook.

Those sections covering mortgages, investments and interest rate swap products all contain similar provisions to those of ICOB to which the rationale of the decisions in both cases is relevant. These judgments act as a reminder that the FCA rules have a consumer protection purpose and achieve this end by placing the responsibility for ensuring that a product is "suitable" (*Saville*) or that a customer is properly informed (*Figurasin*) with the intermediary rather than the customer. There is scope for the consumer's position to be further enhanced if the courts continue to suggest that the burden is on the bank or intermediary to show that it has complied with the relevant rules. **NLJ**

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