

3 June 2015

Summary Disposal of Unfair Relationships Claims: *Axton & Axton v GE Money Mortgages Limited and another* [2015] EWHC 1343

By Henry Warwick

Judgment on appeal

1. The High Court (Swift J, 22 May 2015) has upheld an order dismissing a claim under section 140A of the Consumer Credit Act 1974 (CCA) on the summary basis, in the absence of conduct on the part of a lender causative of unfairness in a debtor/creditor relationship.

The claim and summary judgment

2. The appellants, who had been introduced to the lender by a broker, entered into a series of secured loan agreements with the lender between 2000 and 2004. In respect of all but the final agreement, they purchased payment protection insurance from the broker using, in each case, part of the sum advanced under the loan agreements.
3. The policies were neither offered by the lender, nor obtained through it; rather, they were the policies of a third party insurance provider sold by the broker. Although the lender's documentation recommended PPI, the appellants declined to purchase it from the lender. The loan agreements

did not oblige them to purchase any PPI policy and the premiums were not added to the loans.

4. It was said in support of the claim that policies were 'related agreements' for the purposes of section 140A(1)(a) CCA (read with section 140C(4)) and their terms gave rise to unfairness in the relationship between the appellant borrowers and the lender.
5. It was alleged, for example, that the policy premiums were excessive, there was a lack of correspondence between the period of cover and the term of the agreements, and the policies were otherwise unsuitable. No complaint was made about the terms of the loan agreements taken alone.
6. The lender obtained summary judgment (HHJ Armitage QC, County Court at Manchester) dismissing the claim on the ground there was no real prospect it would be found that the relationship was unfair "*because of...*" one of the prescribed considerations in subsections 140A(1)(a) to (c) CCA.
7. The reasoning of the court, in determining the matter on a summary basis, was that the mere promotion of PPI, without more, would not be sufficient to amount to a causative act even if the terms of the policies were assumed to be unfavourable.
8. The Judge further concluded that it would not be proven that the broker's handling of the sale was conduct '*on behalf of*' the lender for the purposes of section 140A(1)(c). The borrowers appealed.

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9. On considering the issues, the High Court dismissed the appeal and upheld the order below. Two points of wider interest arise from the judgment.

Summary disposal of unfair relationships claims

10. The first relates to the ease with which claims under the unfair relationships provisions of the CCA may be disposed of on a summary basis. Under section 140B(9) CCA, once a debtor alleges unfairness, it is for the creditor to prove the contrary.
11. The appellants' submission, relying upon *Bevin v Datum Finance Limited* [2011] EWHC 3542 (Ch), was that the judge should not have attempted to determine the issue of unfairness on an application for summary judgment.
12. As observed by the Court in *Bevin* (Peter Smith J, at §[53]), the reverse burden of proof makes it difficult to resolve the issue one way or another on a summary basis. But it was submitted on behalf of the lender that the further observation of the Court in *Bevin*, that doing so is a "*virtually impossible exercise*" at a summary stage, should not be followed.
13. While the Court did not address those observations directly, it accepted that it cannot be the case that the burden of proof imposed by section 140B(9) CCA was intended to mean, in a case where an unfair relationship is alleged, that summary disposal should not take place. It had been open to the Judge below to dispose of the matter on the basis of certain uncontroversial facts, the documents before him, assumptions favourable to the appellants and his interpretation of the legislation.

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14. The endorsement of the approach taken may lend support to creditors facing unfair relationships claims they regard as having no real prospect of succeeding, and who wish to persuade the Court that summary disposal of such claims should not be ruled out on the basis of the observations made in *Bevin*.

Cause of alleged unfairness in the relationship

15. The second point, at the heart of the appeal, relates to what has been described (broadly) as causation for the purposes of section 140A CCA. The appellants argued that the Judge below had erred in basing his decision on whether or not the lender's conduct had been causative of any unfairness.
16. Their case was that it is arguable the relationship was unfair by reason only of the terms of the policies. It was said that because the Judge had assumed for the purposes of the application that the policies were related agreements and were in terms unfavourable to the borrowers, it was not open to him to find any unfairness was not caused by the lender.
17. Further, it was suggested, citing the judgment of the Supreme Court in *Plevin v. Paragon Personal Finance and another* [2014] UKSC 61 (handed down after judgment and resolving, thereby, a further issue as to whether the broker acted '*on behalf of*' the lender) that it was arguable the relationship was made unfair by reason of an alleged failure to disclose commissions said to have been earned from the sale of the policies.

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18. The lender stressed that under section 140A(1) CCA, what is unfair must be *"the relationship between the creditor and the debtor"*, and relied upon the findings of the Supreme Court in *Plevin* that such unfairness *"...must arise from one of the three categories of cause"* in subsections 140A(1)(a) to (c) (per Lord Sumption, at §[10]) and of the Court of Appeal below that those categories must be *"...in some sense causative of the perceived unfairness of the relationship of the debtor"* ([2014] Bus LR 557, per Briggs LJ at 566D-F).
19. The Court accepted that, given it is the debtor/creditor relationship arising out of a credit agreement (or the agreement, taken with any related agreement) whose fairness falls to be considered, the borrowers would face difficulty succeeding even were the policy terms assumed to be unfavourable.
20. The Court observed it would be difficult to see how the lender's very limited involvement could be sufficient to found a successful claim in such circumstances.
21. Further, the Court did not accept there had been a failure on the lender's part to disclose commission. Responsibility had been allocated to the broker to provide appropriate information to customers and the evidence before the court was that no commission was paid or received.
22. In any event, the argument that the lender should have disclosed any commission paid to the broker or insurer was not considered compelling: the circumstances of the case differed from those in *Plevin*, in which the lender was the only party with full knowledge of the commission paid.
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Summary

23. The judgment gives further helpful clarification to the limits of section 140A CCA and the statutory considerations that may form the basis of a finding of unfairness.
24. In the light of the judgment it is clear that it is open to the Court to dispose of such claims on a summary basis, notwithstanding the reverse burden of proof, where there is no causal link between the matters the Court may have regard to and alleged unfairness in the debtor/creditor relationship.

Henry Warwick

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Henry Warwick acted for the lender at first instance and on appeal