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Case Nos: CA-2023-001817
CA-2023-001002

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26 September 2024

CA-2023-001817

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT AT DERBY
HIS HONOUR JUDGE JONATHAN OWEN
J00MF108

Before:

THE CHANCELLOR OF THE HIGH COURT
LADY JUSTICE ASPLIN
and
LORD JUSTICE STUART-SMITH

- -

Between:

CHRISTINE SELF **Claimant/Appellant**

- and –

SANTANDER CARDS UK LIMITED **Defendant/Respondent**

- -

Jonathan Butters (instructed by **Consumer Rights Solicitors**) for the **Appellant**
Alexia Knight (instructed by **Eversheds Sutherland (International LLP**) for the **Respondent**

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- -

CA-2023-001002

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT AT PRESTON
HIS HONOUR JUDGE KHAN
J00ZP182

Before:

THE CHANCELLOR OF THE HIGH COURT
LADY JUSTICE ASPLIN
and
LORD JUSTICE STUART-SMITH

- -

Between:

JASON LEE HARROP

Claimant/Appellant

- and –

SKIPTON BUILDING SOCIETY

Defendant/Respondent

- -

Max Mallin KC and Andrew Clark (instructed by **Harcus Parker Ltd**) for the **Appellant**
Giles Wheeler KC and Christopher Monaghan (instructed by **TLT LLP**) for the **Respondent**

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Hearing dates: 15-17 May 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 26 September 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Stuart-Smith:

Introduction

1. Each of these second appeals is based on unremarkable facts and is of modest value in its own right; but they are typical of very many cases arising out of the mis-selling of policies of payment protection insurance ("PPI"). In each case the purchaser of the PPI paid recurring periodical premium payments; but they were not told, either when originally entering into the policy or thereafter until much later, that a very high proportion of the payments that they were making represented commission and profit share which was paid to those responsible for introducing or selling the policies, leaving only a small fraction of their periodical payments as the actual policy premium retained by the insurer. This repeated failure may be described as "RND", standing for "recurring non-disclosure".

2. In each case, the Claimant made a written claim for repayment of all the sums that they had paid for the PPI. In each case, the Defendant offered a smaller sum, which was calculated by reference to rules and guidance issued by the FCA and which was offered (in broad outline) on the stated basis that acceptance of the offer would settle the Claimant's claim. After acceptance of the offer and payment of the offered sum, each Claimant has brought a claim in the County Court claiming more than had previously been paid by the Defendant, basing their claims on sections 140A and 140B of the Consumer Credit Act 1974 ("the CCA"). The Defendants object to making any further payment, asserting that there has been a bona fide settlement of the claims on terms that preclude further claims being made. That contention has been upheld by the Deputy District Judge and, on appeal, by the County Court Judge in each case.

3. The Judge in Mr Harrop's case was HHJ Khan sitting in the County Court at Burnley, on appeal from the decision of Deputy District Judge Wilcox in the County Court at Preston. In Mrs Self's case the Judge was HHJ Owen sitting in the County Court at Nottingham, on appeal from the decision of Deputy District Judge Smith in the County Court at Mansfield.

4. The Claimants now appeal to this Court. It will be necessary to look at the factual background and the issues raised in some detail later. At this stage it is sufficient to say that the appeals attack the decisions of the courts below on two broad fronts. First, it is said that, as a matter of construction, the process by which the Defendant offered and the Claimant accepted and received the sum offered by the Defendant did not give rise to a binding settlement of any claims that the Claimant might have arising out of the mis-selling of the PPI, including claims arising out of the RND. The Claimants argue that this result follows from a close analysis of the terms that were used by the parties; but they also assert that, even if the words used by the parties would otherwise have been sufficient to give rise to a full and final settlement covering the present proceedings, there was no consideration given for that purported settlement by the Defendants, so that there can be no legally binding settlement. Second, even if the settlements were appropriately supported by consideration, the Claimants submit that it was not open to the parties to exclude the jurisdiction of the Court to examine and act upon the unfairness of the relationship between them pursuant to the Court's powers as set out in sections 140A-140C of the CCA and that the relationships were and remained unfair despite the settlements.

Harrop v Skipton: the factual and procedural background

The factual background

5. On 23 November 1990, Mr Harrop charged his property at 16A Kelswick Drive in Nelson to Skipton. On 10 June 1996, he took out a mortgage PPI policy in relation to his property and the charge. The mortgage was redeemed and the relationship between Mr Harrop and Skipton ended in May 2014.

6. On 20 December 2017, an organisation known as Financial Recovery Solutions Ltd ("FRS"), which described itself as a regulated claims management company, wrote to Skipton on behalf of Mr Harrop. The letter ["Mr Harrop's Claim Letter"] alleged that the PPI policy had been mis-sold in five respects: Mr Harrop had not been made aware of the policy exclusions; he was not made aware of the terms and conditions of the policy; the policy was included automatically; he was not made aware of the true cost of the policy; and he had been in secure employment and there was no reason to suspect he would lose his job.

7. The letter then said:

> "**Commissions, Fiduciary Responsibility, Section 140A of the Consumer Credit Act 2006**
>
> Please advise if you have received any commissions by the insurer for arranging the Policy and if so how much, how this was disclosed to our client, and what affect this had on the decision of your company to sell the Policy to our client.
>
> **Your breaches of statutory duty and negligence**
>
> We believe that your sale of the Policy breached the FCA's Principles, in particular, Principle 6, Principle 7 and Principle 9. However, the manner which the Policy was sold to our client would also have breached guidance provided by previous regimes (e.g ABI, GISC, FLA) that you may have subscribed to.
>
> In addition, we believe such actions and omissions as detailed within this letter are in breach of s.2(1) Misrepresentation Act 1967.
>
> Further, in your capacity as a professional financial Institution you owed our client a common law duty of care not to make negligent misrepresentations by making false statements, using words in a reckless manner, creating a misleading Impression and/or giving the wrong information about the Policy.
>
> **Redress sought**
>
> Our client has suffered loss as a result of your negligence, misrepresentation and breach of statutory duty. The redress we seek is for you to return our client to the position he would have been in had he not been sold the policy. This includes (not

> exhaustively) a full refund of the premium, interest charged on the premium and statutory interest at the rate of 8% in accordance with Section 69 of the County Courts Act 1984, from inception of the Policy."

The letter said that, in the absence of a satisfactory reply, FRS would take "appropriate remedial action via the Courts or through the Financial Ombudsman Service".

8. FRS enclosed a form of authority, signed by Mr Harrop, which authorised FRS to act on his behalf in the handling of his claim for mis-sold financial products sold to him "in accordance with the FCA's Dispute Resolution: Complaints procedures (DISP 2.7.2R)." It gave FRS full authority to refer his claim to the Financial Ombudsman Service or the Financial Services Compensation Scheme if he agreed that it was in his best interest. It referred to the payment of a fee to FRS for their services but is otherwise not informative.

9. FRS also enclosed a consumer questionnaire (copyright for which was said to be owned by the Financial Ombudsman Service who had designed it) signed by Mr Harrop. In that questionnaire Mr Harrop described FRS as his "Claims Advisors" and outlined his complaints. He said that, if he had been given the option at the time of sale, he would have declined the policy as he would not have wanted an extra charge and did not feel he needed such a policy. Immediately above his signature, the questionnaire said:

> "I confirm that I want to make a formal complaint about the sale of the payment protection insurance described in this questionnaire."

10. It will immediately be noted that, although Mr Harrop's Claim Letter positively asserted breach of section 2(1) of the Misrepresentation Act 1967 and breach of a common law duty of care in providing information to Mr Harrop which was said to have caused him loss, it merely raised the spectre of a claim pursuant to section 140A by asking Skipton whether it had received commissions. It would, however, have been naïve in the extreme for anyone not to understand that a claim based on receipt of excessive commission or profit share would be pursued once the relevant information was provided. On any view, Mr Harrop's Claim Letter was, as the questionnaire put it, "a formal complaint about the sale of the [PPI]".

11. Skipton replied to FRS on 1 February 2018 by a letter that has been referred to as Skipton's "Redress Letter". The letter was addressed to FRS. Under the headings "Summary of Complaint" and "Investigation" it referred to Mr Harrop's Claim Letter and included a detailed refutation of each of Mr Harrop's five specific complaints of mis-selling contained in that letter. It is of passing interest that, in the course of that refutation, Skipton referred to Mr Harrop having made a successful claim of £670 in 2005. That section of the letter concluded:

> "In view of the above I believe that the information provided was clear, fair and not misleading and would have enabled your client to make an informed choice about the policy."

12. Skipton's Redress Letter then responded to the request for information about commission as follows:

"I have also considered whether any redress is due in relation to commission plus profit share we received during the period the MPPI policy was live.

The Financial Conduct Authority has established that redress is due in instances where there was a non-disclosure of commission and this resulted in an unfair relationship. If the commission at the point of sale was or had the potential to be more than 50% of premiums over the period the MPPI policy was live, we are required to presume this created an unfair relationship.

Having assessed the MPPI products held, we have found that there was a non-disclosure of commission and this was above or had the potential to be above 50% of premiums at the point of sale. On this basis a refund of £1,095.75 is now due to your client.

I have set out below how this figure was arrived at; your client may wish to refer to the breakdown for more detailed information:

Redress on premiums over 50%	£652.30
Plus interest at 8%	£554.32
Less tax at 20% on the above interest	£110.86
Total payable	**£1,095.75**

Please note, as we have included interest at the statutory rate of 8% we have, in line with HM Revenue and Customs guidelines, deducted tax at 20% on this amount. If you do not believe that your client is liable for tax, then he should contact his local tax office.

If your client is willing to accept this offer of £1,095.75 I would be grateful if he would complete and sign the enclosed acceptance form. A prepaid envelope is enclosed for his convenience.

…

As my response completes our internal complaints procedure you can ask the Ombudsman to review your complaint if you remain unhappy with our investigation or proposed resolution.

Conclusion

Thank you for taking the time to bring your client's concerns to our attention but in light of my investigation I cannot uphold your client's complaint about misspelling [sic] of MPPI. I

> appreciate my decision will be disappointing but I trust that I have been able to explain why I have reached this conclusion.
>
> We believe we've provided a fair outcome to your client's complaint, so please let us know if you feel we've missed anything. Alternatively, **you have the right to refer your client's complaint to the Financial Ombudsman Service, free of charge - but you must do so within six months of the date of this letter."** (Emboldening in the original)

13. Skipton's Redress Letter provided details of how to contact the Financial Ombudsman Service. It made no mention of the desirability of consulting a solicitor or taking legal advice. It was accompanied by a detailed schedule which showed exactly how the sum of £1,095.75 was calculated by reference to the excess that had been charged for commission and profit share over and above 50% of the individual monthly premium payments made by Mr Harrop. The PPI commission almost with exception varied between 52.97% and 90.1% of the individual monthly premium payments, frequently exceeding two-thirds.

14. On 13 March 2018 FRS responded to Skipton's Redress Letter, saying:

> "… we confirm that we are instructed by our client to accept your offer in full and final settlement of his claim for his mis-sold [PPI]. Please find attached hereto our client's duly completed acceptance authority.
>
> Please make the payment as per our client's instructions and we would be grateful if you could notify us once our client's settlement has been processed."

15. The "acceptance authority" to which FRS referred was headed "MPPI Compensation Acceptance Form", and was the form enclosed with Skipton's Redress Letter and to which it had referred. It was signed by Mr Harrop and said, so far as is relevant to the present appeals:

> "I/We hereby accept the sum of £1095.75 in full and final settlement of my/our complaint."

16. Skipton duly paid, and Mr Harrop received, the sum of £1095.75.

The proceedings

17. By a letter of claim dated 31 August 2021, a firm of solicitors, Fuse Legal, notified Skipton of Mr Harrop's intention "to pursue a claim against [Skipton] arising from the unfair relationship and/or erroneous charges applied to our client's account." It asserted that the payment Skipton had made had been made further to the provisions of DISP App 3 pursuant to Skipton's regulatory duties under DISP 1.4.1R and claimed repayment of all payments of capital and interest made by Mr Harrop under the credit agreement. This was followed on 2 December 2021 by a further letter before action from another firm of solicitors, Messrs Hattons, who then went on to represent Mr Harrop when he issued his proceedings on 10 February 2022.

18. The Claim Form gave brief details of the claim as:

> "Claim for damages and other monetary relief arising from an unfair relationship between [Mr Harrop] and [Skipton] pursuant to section 140A of the Consumer Credit Act 1974."

19. Consistently with what was said in the Claim Form, the Particulars of Claim alleged that the relationship between the parties had been or was unfair to Mr Harrop for the purpose of section 140A(1)(c) of the Act. The material facts pleaded by Mr Harrop included that if Skipton had disclosed that it would receive commission from the sale of the PPI policy or the extent of the commission "he may not have purchased" the PPI policy or entered into the PPI credit agreement. In relation to the payment of the sum of £1,095.75 the Particulars of Claim pleaded that it would have been made pursuant to the provisions of DISP App 3 and was made following Skipton's regulatory duties under DISP 1.4.1R. The pleaded "Particulars of Unfairness" focussed on Skipton's receipt of commission that was so large that the relationship between Skipton and Mr Harrop could not be regarded as fair if he was kept in ignorance; Skipton's failure to inform Mr Harrop that it was to receive commission or the amount of it; and that he suffered loss and damage in the form of the repayments of capital and interest (including compound interest) made under the PPI credit agreement. Accordingly, Mr Harrop claimed an order under section 140B(1)(a) requiring Skipton to repay all payments of capital and interest (including compound interest) made by him under the PPI credit agreement.

20. Skipton responded by issuing an application for summary judgment and to strike out the claim. The application was supported by a witness statement from Skipton's Chief Conduct Risk Officer and Secretary, Mr Gibson. Mr Gibson explained how the decision in *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61; [2014] 1 WLR 4222 led to the relevant changes to the FCA Handbook including the formulation of PS17/3 and DISP App 3 "which applies (and applied at all material times) in relevant respects to the relationship between [Mr Harrop] and Skipton". He stated that "redress calculated in accordance with DISP App 3.7A.3A(E) may in some cases over-compensate a consumer." He did not make the obvious point that it could equally, in some cases, under-compensate a consumer, depending on the facts. He explained precisely how the sum of £1,095.75 was calculated and that it "was calculated in accordance with, and was consistent with, the methodology prescribed by the FCA's PS17/13 and DISP App 3.7A.3A(E)." At paragraph 33 of the statement Mr Gibson said that "Skipton denies that the relationship between the parties was unfair within the meaning of section 140A of the 1974 Act and its rights remain fully reserved generally in relation to its Defence to the Particulars of Claim". He provided no further information or basis to support this general denial. He did not address the presumption of unfairness or give evidence in support of a rebuttal of the presumption.

21. Mr Harrop served a witness statement from his solicitor which took various points including that:

    i) The purported settlement was not supported by consideration;

    ii) The payment made by Skipton was not a bona fide compromise between the parties;

iii) The redress was inadequate;

iv) Mr Harrop was not advised to take legal advice; and

v) The Court was entitled to review any agreement or related agreements including a purported compromise in order to determine whether or not the claim had no real prospect of success.

22. Skipton's application was heard by the Deputy District Judge on 19 May 2022. By a reserved judgment delivered orally on 22 June 2022 she granted summary judgment to Skipton. Permission to appeal was given by the County Court and, by that route, the appeal came before HHJ Khan on 7 December 2022. He gave judgment on 30 March 2023.

The judgment

23. Mr Harrop's arguments before HHJ Khan were essentially the same as before us. First, he argued that the compromise evidenced by the acceptance of the redress amount made in the redress letter was unsupported by consideration (which the Judge called "the compromise issue"); and, second, he argued that the Court retained the power to review the compromise under the provisions of the CCA and the redress amount was inadequate to satisfy his claims (which the Judge called "the jurisdiction issue"). After outlining the course adopted by the Deputy District Judge, the Judge identified the two grounds of appeal before him, namely that the Deputy District Judge was wrong to find that Mr Harrop's arguments on the compromise issue and the jurisdiction issue had no real prospects of success.

24. Dealing first with the compromise issue, the Judge set out the competing submissions in detail. He identified that the question whether there was a binding agreement depended upon whether Skipton was obliged to pay Mr Harrop the redress amount. He concluded that the Deputy District Judge had not been wrong to reach the conclusion that, by accepting the offer contained in Skipton's Redress Letter, Mr Harrop had compromised his claim. He upheld the Deputy District Judge's conclusions that (a) the redress amount was not an amount that Skipton was obliged to pay (so as to deprive it of the possibility of being good consideration for the compromise) and (b) the redress amount was not a liquidated sum on which Mr Harrop could have sued. Having reached those conclusions, he held that the Deputy District Judge was right to conclude that Skipton gave good consideration and to reject Mr Harrop's arguments based on *Newton Moor*, of which more later: see [90] below. The Judge rejected Mr Harrop's submissions advanced to him (but not the Deputy District Judge) based on *Arrale*, of which more later: see [88] below. Central to his reasoning was that none of the provisions upon which Mr Harrop relied gave rise to an obligation to pay a specific sum: "they do no more than require Skipton to offer redress, which Mr Harrop was entitled to accept or reject as he chose or as he was advised."

25. Turning to the jurisdiction issue, the Judge again set out the competing submissions in detail. He concluded that the Deputy District Judge's approach, which had taken into account the fairness of the terms of the compromise when determining whether or not there was an unfair relationship between the parties, had been consistent with the decision of Nugee J in *Holyoake v Candy* [2017] EWHC 3397: see [93] below. He concluded that the terms of the compromise were fair, and the circumstances in which

the agreement was entered into gave rise to no unfairness. On that basis, the Judge upheld the Deputy District Judge's conclusion that Mr Harrop could not justify going behind the agreement. He rejected the submission that the FCA Scheme gave rise to inherent unfairness. Overall, he concluded that the compromise agreement was fair (and had been concluded by Mr Harrop with the benefit of advice) and that there was no basis for going behind it or reopening it as inherently unfair.

Self v Santander: the factual and procedural background

The factual background

26. In 2001 Mrs Self entered into a credit agreement for a "Kwik Fit" card operated by Santander's predecessor, GE Capital Bank Limited. At the same time she entered into a PPI policy to cover her repayments. The PPI policy premiums were charged on a monthly basis and were financed by the credit agreement, thereby attracting interest if not paid in full. The credit agreement was subsequently assigned to Santander and then on to 'NewDay.' The assignments do not affect the principles with which we are concerned and, for simplicity, I shall refer to Santander throughout.

27. On 23 March 2018 a regulated claims management company trading as UClaim4Me ("UC4M") wrote to Santander on behalf of Mrs Self. The letter ["Mrs Self's Claim Letter"] alleged that her PPI policy had been mis-sold in four respects, alleging in relation to each of those respects that there had been breaches of specified ICOB rules: Mrs Self was covered for any illness by sick pay or other insurance; she did not feel it was made clear that PPI was optional; she felt pressured into taking out the PPI; and the terms and conditions, small print and policy exclusions were not explained. The letter then said:

> "**Paragon v Plevin – Commission Complaint Issue**
>
> We reiterate that the breach of these regulations has caused an unfair relationship to exist. This was due to your failure to disclose to our client the amount of commission that fell to form part of the PPI payment.
>
> This breach qualifies our client for relief under s. 140 CCA.
>
> Had our client been aware of the level of commission payment, they would not have taken out PPI on the account.
>
> …
>
> The level of commission payment, which you failed to convey to our client, rendered the relationship between you unfair. In light of this, please review all of the circumstances regarding the potential mis-sale of this product to our client. Our client is seeking repayment of all premiums and associated interest paid, together with 8% statutory interest on the total sum.
>
> As you can see from our authority, our clients have authorised us to receive the claim on their behalf, and so we would be grateful if you would forward your refund to the above address

> making all cheques payable to [UC4M]. We will disperse funds accordingly to our clients."

28. UC4M enclosed a form of authority, signed by Mrs Self, which authorised UC4M to act on her behalf "in respect of [her] claim for compensation for … a mis-sold Payment Protection Insurance Policy and/or any other financial irregularities." It stated that she acknowledged that she could pursue a claim directly with Santander but that she had opted instead to engage UC4M, whose fees would be recoverable from her.

29. Santander sent two letters to Mrs Self on 27 April 2018. Each was headed "Sale of Payment Protection Insurance (PPI) attached to your GE Money Card (subsequently Santander Cards UK Limited)". One was a response on behalf of her PPI insurers and rejected the claim of mis-selling so far as it related to them. Amongst other things, the response noted that the PPI was still active on the account and pointed out that, if Mrs Self wished to cancel the policy, she would need to take steps to do so. The other letter was a holding response on behalf of Santander itself. Having asserted that on normal principles her complaint would be time barred, Santander continued, under the heading "Plevin Complaint":

> "You may be due redress in respect of undisclosed commission charged by [Santander] (commonly referred to as a Plevin complaint). We will consider this aspect of redress pending further advice from our regulators. We will write to you again in due course to tell you our view on this aspect of your complaint, and on whether you can potentially refer this aspect of your complaint to the Financial Ombudsman Service."

30. Mrs Self continued to pay the premiums on the PPI policy until on or about 22 July 2018, when the policy was cancelled.

31. Santander wrote to Mrs Self again on 1 February 2021, copying its letter to UC4M ["Santander's Redress Letter"]. The letter was headed "Sale of Payment Protection Insurance (PPI) in relation to your GE Money card (subsequently Santander Cards UK Limited ("SCUKL"))". The letter said:

> "On 29 March 2018, you raised a complaint alleging mis-selling of a policy taken out with GE Money. We investigated your complaint and wrote to you summarising the reasons why your complaint wasn't upheld.
>
> We've considered whether there was an unfair relationship arising out of the agreement under the Consumer Credit Act 1974 (CCA) as we didn't disclose the commission that was paid to us from the recurring insurance premiums charged in relation to your PPI policy. This is known as 'recurring non-disclosure of commission' or 'RND'.
>
> The Financial Conduct Authority (FCA) has provided rules and guidance which determine that to receive redress for the RND aspect of your complaint, the store card amount must have been open on or after 6 April 2008. However, the redress is calculated

only on premiums charged to the account on or after 6 April 2007 (even if the policy itself was sold prior to this date). This is explained further in the attached FAQs.

…

In your case, the amount we received as commission and profit share (which we'll refer to simply as 'commission') was more than 50% of the premiums you paid. Therefore we'd like to offer you £830.84 in full and final settlement of your complaint and any claim that you have against SCUKL and NewDay in respect of RND commission.

…

In order to calculate the amount of redress due to you, we've carried out a reconstruction of your account to find out what would have happened if the commission on the PPI had been charged at a fair rate.

Our offer is broken down in the table below. For further information about the calculation, please refer to the Frequently Asked Questions sheet included with this letter.

A	Difference between payments made to account	£630.35
B	Compensatory interest on difference*	£250.49
C	Less 20% tax on compensatory interest	£50.10
D	Net compensatory interest	£200.39
E	Difference between final closing balances	£0.10
F	Total gross commission redress (A+B+E)	£880.94
G	Total commission redress (A+D+E)	£830.84
H	Amount of the total RND Commission redress paid by SCUKL	£783.10
I	Amount of the total RND Commission redress paid by NewDay	£97.84

…

In line with HM Revenue & Customs (HMRC) regulations, we've deducted 20% income tax from the compensatory interest payment.

…

The total gross amount of this interest is £250.49 and in line with HMRC regulations, we've deducted tax of £50.10 from this amount, which results in a net payment of £200.39 income. Please retain this letter for future reference, as it will allow you to complete your Self-Assessment Return if you need to do so.

What you need to do

If you want to accept our offer, please complete the enclosed Customer Acceptance Form and return it to us, using the pre-

> paid envelope provided, within 28 days of the date of this letter. We can pay the money straight into your bank account if you provide your bank details in the Customer Acceptance Form. If you'd prefer an alternative payment method please call us on the number above. If you accept this offer it will be in full and final settlement of this and any other claims you may have against [Santander] and/or NewDay.
>
> Before we release the payment, we'll check the personal and account details you provide against details held with credit reference agencies as part of our security checks. This will leave a footprint on your credit file but won't affect your credit score and lenders won't be able to see it. Please contact us if you aren't happy for us to use your data in this way.
>
> If we're unable to validate the bank account specified, we'll send a cheque as an alternative method of payment.
>
> **Next steps**
>
> When we receive your signed Customer Acceptance Form we'll make the payment directly to your chosen bank account. Please allow 14 days to receive the payment.
>
> This offer is available for six months from the date of this letter. If we don't receive your form within this time, you may not be entitled to the refund and the offer may be withdrawn.
>
> A copy of this letter has been sent to your third party representative for their consideration and you'll be responsible for paying any fees that they may charge you, as a result of this offer.
>
> This is our final response to your complaint. … .
>
> We hope you'll be happy with this outcome, but if not, you have the right to refer your complaint to the Financial Ombudsman free of charge. You'll need to do this within six months of the date of this letter.

32. Santander's Response Letter enclosed its Customer Acceptance Form, which included, under the heading "Authorising the payment":

> "**PLEASE SIGN BELOW IN ALL INSTANCES**
>
> I understand that, by signing below, I am accepting the payment in full and final settlement of my non-disclosure of commission complaint ("the Complaint"). I agree that by accepting the payment, this fully settles the Complaint against [Santander] and that [Santander has] no further liability to me. If I raise further issues on the same or similar terms, I understand that [Santander]

> may choose to rely on this acceptance form as proof that such issues have already been settled.
>
> …
>
> **I want to accept the above offer of redress in full and final settlement of my complaint against [Santander].**" [Emphasis here and above in the original]

Immediately below this declaration were three boxes, for Mrs Self's name, her signature and the date.

33. The Customer Acceptance Form also included a section entitled "Frequently Asked Questions – Store Cards". Under the heading "What is unfair commission about?" it provided a summary of *Plevin* and, by reference to the FCA's intervention identified two circumstances "in which a consumer may be able to claim compensation for unfair commission". The first was point of sale claims, where the regulated entity failed to disclose the fact of commission or profit share at the point of sale of the policy; the second was RND cases where the section 140A unfairness of the relationship was based on the recurring failure to disclose commission or profit share. After explaining what is meant by commission and profit share and specifying the criteria for acceptance of claims under the heading "Do I qualify for redress", it explained that redress would be calculated and payable only in relation to premiums paid on or after 6 April 2007 "because most store cards and other similar types of restricted credit agreements were generally not subject to the Ombudsman's jurisdiction before this date."

34. Under the heading "How have you calculated my redress?", Santander explained:

> "If the commission on the PPI had been charged at a rate which meant there was no unfair relationship you would have been charged less for the PPI.
>
> If you paid off your balance in full regularly, you would have paid less to do so.
>
> If you didn't pay off your balance in full, your statement balances would've been lower (because you would've been charged less for PPI), and so you'd also have been charged less interest.
>
> In reconstructing your account, we've worked out each month how much less the PPI would've cost you, how much less interest you would've paid, and whether your monthly repayments were more than they should've been. If you were charged any overlimit fees, we've worked out whether you would still have incurred them if the PPI had been charged at a lower rate. Any fees that should not have been charged will be included in the redress calculation.
>
> If the monthly payments you made were higher than they should have been, we've refunded the difference (fig A), and added compensatory interest (fig B) to that difference.

> At the end of the reconstruction period - which will either be now if the account is still open, or the time when your account closed - we work out how much lower than the actual balance the reconstructed balance would have been. We refund that amount to you as well (fig E)."

35. Finally, under the heading "What if my PPI is still in force", Santander said that they would have explained in their letter what the current commission and profit share rate was and that "[this] means that you have the information available to you to allow you to make an informed decision about whether the policy offers you value for money". It explained that PPI was an optional product but that "if you leave the policy running, we won't consider any future complaint about the commission or profit share earned on the policy."

36. Mrs Self duly signed the Customer Acceptance Form and returned it to Santander. The offer sum of £830.84 was paid by cheque, which Mrs Self accepted and banked.

37. For completeness, I note that Santander did not disclose the actual level of their commission or profit share until December 2022, when a statement from their solicitor, made for the purposes of the small claims hearing before the Deputy District Judge, revealed that the average level of the commission and profit share was 99.18% of the premium payments Mrs Self had paid since 6 April 2007.

The proceedings

38. Mrs Self, now represented by solicitors, issued her proceedings on 18 February 2022. The brief details of the claim as set out in the Claim Form were that:

> "An unfair relationship exists or existed between [Ms Self] and [Santander] within the meaning of s. 140A Consumer Credit Act 1974 ("the Act") as a result of undisclosed commission earned or obtained by [Santander] in relation to a payment protection insurance policy funded in accordance with a credit agreement between the parties."

39. The Particulars of Claim were served with the Claim Form. The claim was advanced solely on the basis of there being (or having been) an unfair relationship within the meaning of section 140A because of Santander's failure to disclose the substantial amount of commission to which it was entitled and which it was being paid and the small amount that was being paid to insurers as the price of the insurance. Mrs Self alleged that, if not for the unfairness of the relationship, she would not have purchased the PPI policy.

40. The Particulars of Claim outlined the economic effect and consequences of the non-disclosure to be that the PPI premiums were added to the debt owed by Mrs Self to Santander and incurred interest which was compounded and continued to accrue after 6 April 2008 and throughout the duration of the credit agreement or until trial. The sum paid to Mrs Self by Santander in 2018 was characterised as a part payment and partial refund of the PPI Policy Premium which "has not settled the unfairness associated with the Commission". Mrs Self therefore claimed full repayment of the PPI Policy premium plus interest. The relief sought was all claimed pursuant to section

140B of the Act. There was no claim in respect of any allegation of mis-selling other than the *Plevin* claim based on section 140A unfairness.

41. Santander filed a Defence which pleaded limitation and that the claim has been compromised by the offering and acceptance of the £830.84 (which it described as "the Settlement Sum") which, it pleaded, was "calculated in accordance with DISP" and was "in accordance with FCA Guidance". It also pleaded a denial that the relationship between the parties was unfair (paragraphs 7 and 12) and that "there is nothing that the Defendant has either done or not done which could amount to an unfair relationship." After emphasising factors such as that (a) the policy had been sold to Mrs Self on a non-advised basis, (b) the policy was optional and not sold as a condition of advancing credit (as was made clear at the time), and (c) Mrs Self could have chosen not to enter into the Policy or to cancel it at any time within the first 30 days, Santander pleaded that any unfairness has been remedied by Santander's payment and Mrs Self's acceptance of the Settlement Sum.

42. The proceedings were allocated to the small claims track. Mrs Self provided a statement in which she said that no one had ever disclosed that Santander would be receiving commission or profit share and that, had she known that commission formed a significant part of the PPI premium she would not have purchased the PPI policy. Santander's solicitor's witness statement, as well as disclosing the average level of commission and profit share, provided background information about the previous history of the claim and explained why Santander did not consider that a full return of premiums would be appropriate.

43. The Deputy District Judge dealt with the issue of compromise first. He found in favour of Santander on that issue and dismissed Mrs Self's claim. Mrs Self appealed; and so it was that the case came before HHJ Owen, who handed down judgment on 26 July 2023.

The judgment

44. There were four grounds of appeal before HHJ Owen, of which the fourth has now fallen away. Ground 1 was that the alleged compromise by the acceptance by Mrs Self of the purported settlement sum did not extend to cover the claim that was now being brought. As she had done before the Deputy District Judge, Mrs Self distinguished between (a) a complaint under the FCA Redress Scheme as set out in DISP and (b) a claim such as might be brought in civil proceedings pursuant to sections 140A and 140B of the CCA based on unfairness in the relationship between the parties. She relied upon *Arrale*, which she said was materially identical to the facts of her case. The Judge rejected the proposition that the Santander Redress Letter and Customer Acceptance Form were only dealing with a specific remedy under the FCA redress scheme. In his view, the Appellant's complaint was not limited to a claim under the FCA DISP scheme but was simply that she wanted all of her premium back, however it was to be analysed. He took the point that the default remedies under the DISP App 3 methodology are not exhaustive and that, if some other measure of redress was appropriate, the firm should depart from the default calculation. Santander in its Redress Letter did not limit itself to a complaint under the FCA Scheme and was on its terms wide enough to cover any claim in respect of undisclosed commission. Therefore, subject to the issue of consideration, by signing and returning the Customer Acceptance Form, Mrs Self

"unequivocally and clearly" waived any further claim to the return of the PPI Premiums on whatever basis.

45. Ground 2 was that there was no consideration for the agreement. Mrs Self argued that Santander was under a legal duty to make the offer which it did and that, accordingly, that offer could not found good consideration for a compromise agreement. The Judge rejected this ground on the basis that Santander's agreement to pay the purported settlement sum was good consideration. In doing so, he agreed with and adopted the reasoning of HHJ Belcher in *Taylor v GE Money Consumer Lending Limited*. He summarised the key points as being that there was no obligation upon Santander to pay anything until the Customer Acceptance Form was signed and returned. Although Santander was under an obligation to make an offer of what it considered to be appropriate redress, it was not obliged to make any payment unless and until an offer was accepted. Accordingly, Mrs Self obtained some benefit from agreeing the terms set out in Santander's Redress Letter and the Customer Acceptance Form because, on agreeing the terms she obtained a directly enforceable entitlement to be paid the settlement sum where before she had no directly enforceable entitlement at all. Finally, the Judge rejected a submission that there was no dispute to compromise with respect to commission in excess of 50% of the PPI premiums. In his judgment there was a clearly articulated dispute because Mrs Self had demanded a return of all premium payments whereas Santander was only prepared to settle on the more limited basis set out in the Santander Redress Letter.

46. Ground 3 was that the Deputy District Judge had wrongly treated the compromise (on the assumption that it was valid and legally binding) as a jurisdictional bar to the claim when he should have determined the overall fairness of the parties' relationship pursuant to Sections 140A-140C of the CCA. This gave the Judge pause for thought, as the short ex tempore judgment of the Deputy District Judge did not address the question of the court's residual power to consider fairness pursuant to sections 140A and 140B after and in the light of a compromise such as he had found. However, the Judge concluded that the Deputy District Judge had effectively followed the guidance in *Holyoake* and that his ultimate conclusion had not been wrong. For good measure he made clear that if he were to apply the correct principles himself, he would inevitably reach the same conclusion as the Deputy District Judge.

47. For these reasons (and because he dismissed Ground 4 as well) the Judge dismissed the appeal.

The legal framework: introduction

Sections 140A-C of the Consumer Credit Act 1974

48. The relevant provisions of sections 140A-140C of the CCA have been in force since 6 April 2007. They were intended to provide consumers with protection based on the concept of an "unfair relationship". The most pertinent provisions for the purposes of these appeals are:

> "**140A Unfair relationships between creditors and debtors**
>
> (1) The court may make an order under section 140B in connection with a credit agreement if it determines that the

relationship between the creditor and the debtor arising out of the agreement (or the agreement taken with any related agreement) is unfair to the debtor because of one or more of the following—

(a) any of the terms of the agreement or of any related agreement;

(b) the way in which the creditor has exercised or enforced any of his rights under the agreement or any related agreement;

(c) any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement).

(2) In deciding whether to make a determination under this section the court shall have regard to all matters it thinks relevant (including matters relating to the creditor and matters relating to the debtor).

…

(4) A determination may be made under this section in relation to a relationship notwithstanding that the relationship may have ended.

…

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);

(b) require the creditor, or any associate or former associate of his, to do or not to do (or to cease doing) anything specified in the order in connection with the agreement or any related agreement;

…

(f) alter the terms of the agreement or of any related agreement;

…

(2) An order under this section may be made in connection with a credit agreement only—

(a) on an application made by the debtor or by a surety;

…

(9) If, in any such proceedings, the debtor or a surety alleges that the relationship between the creditor and the debtor is unfair to the debtor, it is for the creditor to prove to the contrary.

140C Interpretation of ss. 140A and 140B

(1) In this section and in sections 140A and 140B 'credit agreement' means any agreement between an individual (the 'debtor') and any other person (the 'creditor') by which the creditor provides the debtor with credit of any amount.

…

(4) References in sections 140A and 140B to an agreement related to a credit agreement (the 'main agreement') are references to—

(a) a credit agreement consolidated by the main agreement;

(b) a linked transaction in relation to the main agreement or to a credit agreement within paragraph (a);

…"

49. Authoritative guidance on the approach to be adopted by the Court when implementing these provisions is provided by the judgment of Lord Leggatt (with whom the other Justices agreed) in *Smith v Royal Bank of Scotland plc* [2023] UKSC 34, [2023] 3 WLR 551 at [16]-[25]. The passage requires reading in full and, without derogation from that, includes the following:

> "16 It can be seen that, in dealing with a claim by a debtor under these provisions, the court is required to follow a two-stage process. The first stage is to determine whether the relationship between the creditor and the debtor arising out of the credit agreement is unfair to the debtor because of one or more of the matters specified in section 140A(1). If the court finds that the relationship is unfair for that reason, the court must then proceed to the second stage and decide what, if any, order to make, selecting from the list of options in section 140B(1).
>
> 17 Some further general points may be made which are apparent on the face of sections 140A-140C.
>
> 18 First, under section 140A(1) it is not the fairness or otherwise of the credit agreement which the court must determine: it is whether the relationship between the creditor and the debtor arising out of the credit agreement (on its own or taken with any related agreement) is unfair to the debtor. A relationship, by its

nature, extends over a period of time and may continue for as long as there is any sum payable or which will or may become payable under the credit agreement.

19 Second, the question to be determined under section 140A(1) is not whether the relationship between the creditor and the debtor was unfair to the debtor when the credit agreement was made or at some other time in the past. It is whether the relationship is unfair to the debtor, i e at the time when the determination is made. This is reinforced by section 140B(9)… which is likewise framed in the present tense.

20 If nothing further had been said, it might have been thought impossible to make a determination of unfairness under section 140A if the relationship between the creditor and the debtor has ended before the hearing takes place. But this contingency is catered for by subsection (4). That provides that a determination may be made under section 140A in relation to a relationship "notwithstanding that the relationship may have ended". The logical implication is that, in a case where the relationship has ended, although the court cannot decide whether the relationship is (currently) unfair to the debtor, it must do the closest thing and determine whether the relationship was unfair to the debtor at the time when it ended.

21 …

22 A third point which is apparent on the face of the provisions is the breadth and open-ended nature of the assessment required by section 140A. The court is not left entirely at large, as subsection (1) requires the court to decide whether the relationship is unfair to the debtor because of one or more of three specified matters. These three possible causes of unfairness are, however, extremely broad. … It would be hard to cast the possible causes of unfairness more broadly than this. What is more, subsection (2) makes it clear that there is no restriction on the matters to which the court may have regard in deciding whether the relationship is unfair to the debtor, provided only that the court thinks them relevant. Subsection (2) also makes it clear that, if any matter is thought relevant, the court not only can but must have regard to it. … .

23 Fourth, the descriptions of the possible causes of unfairness in section 140A(1)(a)-(c) demonstrate that, for the purpose of deciding whether the relationship is now (or was when it ended) unfair to the debtor, the court must consider the whole history of the relationship - going back not only to the making of the credit agreement but to any relevant act or omission of the creditor before the making of that agreement or any related agreement. This is so without any limit on how long ago the credit agreement or any related agreement was made. The matters to which the

> court is obliged to have regard under subsection (2) because it thinks them relevant are likewise not limited in time.
>
> 24 …
>
> 25 Fifth, as well as requiring the court to make a very broad and holistic assessment to decide whether the relationship between the creditor and the debtor is unfair to the debtor, the legislation also gives the court, where a determination of unfairness is made, the broadest possible remedial discretion in deciding what order, if any, to make under section 140B. Section 140B gives the court an extensive menu of options from which to select but says nothing at all about how this selection may or should be made. On the face of the legislation the court's discretion is entirely unfettered. It is, I think, clear that the court is not in these circumstances required to engage in the kind of strict analysis of causation, loss and so forth that would be required, for example, in deciding what remedy to award in a claim founded on the law of contract or tort. Some constraint is, however, imposed by consideration of the general purpose of an order under section 140B. In principle, the purpose must be to remove the cause(s) of the unfairness which the court has identified, if they are still continuing, and to reverse any damaging financial consequences to the debtor of that unfairness, so that the relationship as a whole can no longer be regarded as unfair.

50. The guidance provided by the Supreme Court in *Smith* built on earlier guidance provided by Lord Sumption (with whom the other Justices agreed) at [10] of *Plevin*. There Lord Sumption said:

> "Section 140A is deliberately framed in wide terms with very little in the way of guidance about the criteria for its application, such as is to be found in other provisions of the Act conferring discretionary powers on the courts. It is not possible to state a precise or universal test for its application, which must depend on the court's judgment of all the relevant facts. Some general points may, however, be made. First, what must be unfair is the relationship between the debtor and the creditor. … Secondly, although the court is concerned with hardship to the debtor, subsection 140A(2) envisages that matters relating to the creditor or the debtor may also be relevant. There may be features of the transaction which operate harshly against the debtor but it does not necessarily follow that the relationship is unfair. These features may be required in order to protect what the court regards as a legitimate interest of the creditor. Thirdly, … . Fourthly, the great majority of relationships between commercial lenders and private borrowers are probably characterised by large differences of financial knowledge and expertise. It is an inherently unequal relationship. But it cannot have been Parliament's intention that the generality of such

> relationships should be liable to be reopened for that reason alone."

Plevin v Paragon Personal Finance Limited

51. *Plevin*, like *Smith* and the present cases, involved the non-disclosure of commissions received out of premiums paid for PPI cover. The claimant had taken out a loan that had been arranged by a broker. The broker also recommended that the claimant take out PPI. The PPI premium was all paid upfront and added to the amount of the loan. 71.8% of the PPI premium was taken in commissions by the broker and the lender. The claimant was told that commission was paid but not the amount of the commission nor who received it. The claimant brought proceedings against the lender, which included an allegation that her relationship with the lender was unfair within the meaning of section 140A(1)(c) of the 1974 Act because of the non-disclosure of the amount of the commission. At the time, the relevant regulatory structure was provided by the ICOB Rules, which did not require the disclosure of the level of commission or the identity of the recipient. The claimant succeeded on that issue on appeal to the Supreme Court.

52. At [17] Lord Sumption accepted that "the view which a court takes of the fairness or unfairness of a debtor-creditor relationship may legitimately be influenced by the standard of commercial conduct reasonably to be expected of the creditor"; and that "the ICOB Rules are some evidence of what that standard is." But he rejected the submission that compliance or non-compliance with the ICOB Rules was determinative of a question of unfairness arising under section 140A because the Rules and the Section are doing different things:

> "The fundamental difference is that the ICOB Rules impose obligations on insurers and insurance intermediaries. Section 140A, by comparison, 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. There are other differences, which flow from this. The ICOB Rules impose a minimum standard of conduct applicable in a wide range of situations, enforceable by action and sounding in damages. Section 140A introduces a broader test of fairness applied to the particular debtor-creditor relationship, which may lead to the transaction being reopened as a matter of judicial discretion. … Most of the ICOB Rules, including those relating to the disclosure of commission, impose hard-edged requirements, whereas the question of fairness involves a large element of forensic judgment. It follows that the question whether the debtor-creditor relationship is fair cannot be the same as the question whether the creditor has complied with the ICOB Rules, and the facts which may be relevant to answer it are manifestly different. An altogether wider range of considerations may be relevant to the fairness of the relationship, most of which would not be relevant to the application of the rules. They include the characteristics of the borrower, her sophistication or vulnerability, the facts which she could

> reasonably be expected to know or assume, the range of choices available to her, and the degree to which the creditor was or should have been aware of these matters. ”

53. At [18] Lord Sumption turned to the question whether the non-disclosure of the commissions payable out of Mrs Plevin’s PPI premium made her relationship with Paragon unfair and came to the conclusion that 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.* … Any reasonable person in [Mrs Plevin’s] position who was told that more than two thirds of the premium was going to intermediaries, would be bound to question whether the insurance represented value for money, and whether it was a sensible transaction to enter into. The fact that she was left in ignorance in my opinion made the relationship unfair.” [Emphasis added because these words have been referred to repeatedly by the parties on either side.]

54. In a passage that is relevant to the questions of responsibility and what needs to be done to prevent a finding that a relationship is unfair, Lord Sumption said at [19]-[20]:

> “19 … Bearing in mind the breadth of section 140A and the incidence of the burden of proof according to section 140B(9), the creditor must normally be regarded as responsible for an omission making his relationship with the debtor unfair 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.
>
> 20 On that footing, I think it clear that the unfairness which arose from the non-disclosure of the amount of the commissions was the responsibility of Paragon. Paragon were the only party who must necessarily have known the size of both commissions. They could have disclosed them to Mrs Plevin. Given its significance for her decision, I consider that in the interests of fairness it would have been reasonable to expect them to do so. Had they done so this particular source of unfairness would have been removed because Mrs Plevin would then have been able to make

> a properly informed judgment about the value of the PPI policy. This is sufficiently demonstrated by her evidence that she would have questioned the commissions if she had known about them, even if the evidence does not establish what decision she would ultimately have made."

55. It is convenient to highlight at this stage some relatively simple points that arise from these passages. First, what matters is whether the relationship between the creditor and the debtor is unfair to the debtor. That involves consideration of the whole history of the relationship: see *Smith* at [23]. Second, the court is required to carry out a "very broad and holistic" assessment to decide whether the relationship is unfair to the debtor. In carrying out that assessment, the court must consider any act or omission that the court thinks relevant: see *Smith* at [23]. Third, where the court assesses that the relationship between the parties is unfair to the debtor, the purpose of the legislation is to remove the cause(s) of the unfairness that the court has identified. The remedies available to the court are not dependent upon proof of causation, loss and so forth that would be required in a case founded in contract or tort: see *Smith* at [24]. Fourth, while most relationships between commercial lenders and private borrowers are likely to be characterised by large differences of financial knowledge and expertise, inequality of bargaining power is unlikely of itself to be sufficient for a finding of unfairness: see *Plevin* at [10]. That said, the characteristics of the borrower, their sophistication or vulnerability, the facts they may reasonably be expected to know or assume, the range of available choices and the degree to which the creditor was or should have been aware of those matters are typically likely to be relevant considerations: see *Plevin* at [17].

56. It follows that application of sections 140A and 140B is bound to be fact-sensitive: even in a world of widespread mis-selling and unfairness, this is not a jurisdiction where, on its proper analysis and application, a single pre-determined criterion will always determine the question of unfairness; nor will one size of remedy fit all cases where the relationship is found to be unfair. It is easy to conceive of cases where allowing a full refund of all premiums (including commissions and profit share) together with interest would be to do more than was required to remedy the causes of the identified unfairness. It is equally easy to conceive of cases where anything short of a full refund will fail to remedy them. That is why the Supreme Court in *Plevin*¸ while being clear that the commissions paid in that case were a long way beyond the tipping point, were equally clear that the case had to be remitted to the County Court to decide what if any relief under section 140B should be ordered unless that could be agreed.

The involvement of the FCA

57. The FCA's general duties are specified in Chapter 1 of the Financial Service and Markets Act 2000 ["FSMA"]. Section 1C(1) of FSMA defines the consumer protection objective as "securing an appropriate degree of protection for consumers". Section 1C(2) mandates that, in considering what degree of protection for consumers may be appropriate, the FCA must have regard to specified matters, which include "the needs that consumers may have for the timely provision of information and advice that is accurate and fit for purpose" (section 1C(2)(c)), "the general principle that consumers should take responsibility for their decisions" (section 1C(2)(d)), and "the general principle that those providing regulated financial services should be expected to provide consumers with a level of care that is appropriate having regard to the capabilities of the consumers in question" (section 1C(2)(e)).

58. Skipton and Santander are regulated by the FCA and are therefore authorised persons for the purposes of FSMA. By Section 137A of FSMA, the FCA may make such rules applying to authorised persons as appear to it to be necessary or expedient for advancing its operational objectives. Contravention of the FCA's rules is dealt with in Sections 138C–E of FSMA. Section 138C(1), under the heading "evidential provisions", provides that, if a particular rule so provides, then contravention of the rule does not give rise to any of the consequences provided for by other provisions of FSMA. Such a rule must provide that contravention may be relied on as tending to establish contravention of "such other rule as may be specified" or that compliance therewith may be relied on as tending to establish compliance with such other rule as may be specified: see section 138C(2). By Section 138D(2) a contravention by an authorised person of a rule made by the FCA is actionable at the pursuit of a private person who suffers loss as a result of the contravention, subject to the defences and other incidents applying to actions for breach of statutory duty. In addition to its rule-making powers, the FCA may give guidance consisting of such information and advice as it considers appropriate with respect to any matters about which it appears to the FCA to be desirable to give information and advice: see section 139A(1).

59. The FCA's rules and guidance are set out in the FCA Handbook, which includes the "Dispute Resolution: Complaints" sourcebook ("DISP"). DISP sets out how complaints are to be dealt with by respondents to those complaints, including respondents who are authorised persons. DISP "is a statutory scheme found in the FCA Handbook … . It is delegated legislation made under … the FSMA 2000": *The Official Receiver v Shop Direct Finance Company Ltd* [2023] Civ 367 at [1] per Singh LJ.

60. In DISP, rules are denoted by the suffix "R", evidential provisions are denoted by the suffix "E", and guidance is denoted by the suffix "G". As I have said, contravention of a rule marked "R" is actionable at the suit of a private person who suffers loss as a result of the contravention. Contravention of an evidential provision marked "E" does not give rise to any of the consequences provided for by provisions of FSMA other than section 138C: see above. DISP App 3.10.3E provides that contravention of an evidential provision in that appendix may be relied upon as tending to establish contravention of DISP 1.4.1R, which I set out below. The difference in the status of the various types of provision is reflected in DISP's consistent use of the mandatory word "must" in rules marked "R" but not in provisions marked either "E" or "G", where the lesser word "should" is used (unless referring to a mandatory obligation imposed elsewhere).

61. When construing a provision of DISP:

> "(1) Ultimately it is the actual wording of a provision that must govern any decision as to its effect.
>
> (2) The Handbook should be read as a whole, taking an holistic and iterative approach, so that a preliminary view on one provision can be tested by reference to the rest of the relevant provisions.
>
> (3) The provision should be construed in the light of its overall purpose.

> (4) It should be construed on the basis that it is intended to produce a practical and commercially sensible result. …": see *Shop Direct* at [46].

62. PPI developed into the biggest issue of financial mis-selling in recent years and significantly damaged trust in financial institutions. Between 2011 and March 2017, firms had handled over 18.4 million PPI complaints and paid over £26 billion in redress. Also, the FCA took the view that some uncertainty was created by the Supreme Court's decision in *Plevin.* The FCA concluded, for obvious reasons, that ensuring that firms put things right by handling PPI complaints fairly was vital to rebuilding public confidence. Despite there being current rules and guidance about PPI complaint handling in place since December 2010, the FCA concluded that further FCA intervention was required. It therefore proposed a package of measures which included new rules and guidance on handling PPI complaints in light of *Plevin*. The FCA consulted on that package from November 2015 and, in March 2017, published its Policy Statement PS17/3 entitled "Payment protection insurance complaints: feedback on CP16/20 and final rules and guidance".

63. The FCA's objective in introducing its new rules and guidance was explained in paragraph 1.8 of the Forward to PS17/3:

> "The *Plevin* decision introduced a significant new uncertainty into an already uncertain landscape, where the long tail of PPI complaints looked set to continue. So we have used our regulatory judgement to create a framework that we believe will reduce uncertainty and enable firms to take a fair and consistent approach to handling PPI complaints. This will help ensure the best outcomes for consumers at the earliest stage in the complaint process, and will make it easier for us to act if we become concerned that firms are not handling complaints appropriately."

64. PS17/3 reveals that there were widely differing reactions to the proposed package of measures. At the most fundamental level, some consumer groups and claims management companies maintained the view that creating a rigid complaint assessment process would usurp the function of the courts when applying the provisions of sections 140A and 140B while others, though in principle in favour of FCA intervention, considered the FCA's proposals wrong and unfair to consumers. Similarly, the responses from the industry side were not consistent.

65. The FCA set out its thinking in response to these multi-faceted expressions of view (at page 32):

> "We recognise that disclosure of commission to consumers was not required by our insurance conduct of business rules (ICOB/ICOBS), so firms' failure to disclose was not in breach of those rules at the time (or the industry codes which preceded them), and is unlikely in and of itself to have been a breach of our Principles.

However, the *Plevin* decision is in the public domain. Following the *Plevin* judgment, some complaints have already been made to firms and to the Financial Ombudsman Service about lack of commission disclosure in PPI sales. CMCs are well aware of the *Plevin* judgment and PPI complaints referencing *Plevin* and undisclosed commission are being made in growing volumes.

Given that firms are required to assess complaints fairly, including taking into account relevant decisions from the Financial Ombudsman Service, and that the Financial Ombudsman Service is required to take into account the general law when deciding complaints in accordance with its fair and reasonable remit, *Plevin* cannot be ignored. But firms are uncertain how they should take the judgment into account in the context of PPI complaints made to them and their interpretation of *Plevin* varies. So, the issue is how best to address the judgment.

We carefully considered whether the availability of the Financial Ombudsman Service alone is enough or whether there should be regulatory intervention. Overall, we continue to think that the rationale for us exercising our regulatory judgement about appropriate assessment and, where appropriate, redress of relevant PPI complaints in light of s.140A-B, taking account of *Plevin*, and making rules and guidance now for firms to follow, is stronger, because:

• **Firms will then take a fair and consistent approach to handling *Plevin* complaints.** Otherwise, given the variety of industry views of Plevin's significance, it is likely that individual firms would adopt different approaches to handling these complaints. This would create inconsistency in PPI complaints handling and be likely to increase demands on the Financial Ombudsman Service. Additionally, many consumers might not complain to the Financial Ombudsman Service, to their potential detriment.

• **Our ability to take future action is improved.** By giving firms a clear idea of how we expect relevant complaints to be dealt with in light of *Plevin*, it will be easier for us to ensure that firms act fairly and consistently.

• **It is more appropriate for us, as a policy making body, to set out a framework approach in rules and guidance.** The FCA has the power to make rules and guidance to help ensure firms reach fair and consistent outcomes for complainants on cases with common issues and similar facts. This helps to ensure the best outcomes for consumers when making complaints to firms at the earliest stage in the complaint process. The Financial Ombudsman Service focuses on individual cases and will continue to take our rules and guidance, among other things, into

account when determining cases on a fair and reasonable basis in light of all the circumstances.

…

By proposing rules and guidance on PPI complaints in light of *Plevin* we do not in any way seek to usurp the prerogative or discretion of the courts under s.140A-B.

…

We are not asserting that the Supreme Court created a set of binding rules that can be applied strictly across to all PPI complaints where non-disclosure of commission is relevant. Instead, we are exercising our regulatory judgement about appropriate assessment and, where appropriate, redress of relevant PPI complaints in light of s.140A-B, taking account of *Plevin*.

We are not proposing a mechanical test or mandatory redress. Our provisions all take the form of either guidance or evidential provisions. *Additionally, the provisions explicitly direct that individual case circumstances ('all relevant matters') should be taken into account, explicitly highlight the scope for rebuttal of the presumption of an unfair relationship, and include specific examples of circumstances where rebuttal might be appropriate or where firms should consider paying more redress than the excess over 50% ... .* (Emphasis in this paragraph added)

…

Our aim is to provide consistency of interpretation and outcome to relevant PPI complaints in light of *Plevin* while also ensuring there is flexibility for firms to take into account the circumstances of every case. We think this approach is consistent with the aim of the Civil Procedure Rules which is to encourage alternative methods of dispute resolution.

Consumers will remain free to go to the courts, including if they desire the kind of assessment a judge would undertake. However, having the fair alternative of our rules and guidance may help avoid an increased flow of cases to the courts, with all of the challenges and costs that might involve for consumers and firms. Our intervention will help to ensure that, in the particular context of PPI complaints where *Plevin* is relevant, the framework of our complaint handling rules for firms and the availability of the Financial Ombudsman Service continues to provide its usual simpler, more informal and free-to-the-consumer route to an assessment and potential redress of relevant expressions of dissatisfaction.

> We agree that the courts themselves are likely to give some weight to what we, as the sector regulator, set out as our approach."

66. Here as elsewhere the FCA emphasised that its package was "designed to provide a common framework within which firms should approach these complaints, to reduce uncertainty and enable firms to take a fair and consistent approach to handling them" (page 35) and that its approach to redress had to be "viewed in the round as a package" (page 46).

67. The 50% tipping point was intended to provide a degree of certainty in the light of the observation in *Plevin* that the 71.8% undisclosed commission in that case was a "long way beyond" the tipping point for unfairness. It too provoked a wide range of strongly-held reactions with some industry sources suggesting it should be set at 60% (in particular for regular premium PPI) and some proposing that there should be multiple tipping points, while consumer bodies maintained that 50% was biased towards lenders and should be reduced, with suggestions ranging from 16% to 30%. At pages 85-86 the FCA set out its response, the nuanced complexity of which is illustrated by the following:

> "We have carefully considered all the feedback on this point, but see no reason to change our views or approach. So we are basing our final approach around a single presumptive tipping point of 50%, which we remain of the view is fair and appropriate and not remote from the approach the courts would take.
>
> Specifically:
>
> • We continue to consider that 50% is appropriate in the context of our regulatory judgement concerning PPI complaints, based on what the Supreme Court said in *Plevin* about undisclosed commission of 71.8% being a 'long way beyond' the 'tipping point' for unfairness.
>
> …
>
> • Adopting a presumptive 50% tipping point is not the same as saying that most or all consumers would think 50% was a reasonable level of commission to pay. Rather, undisclosed commission of 50% is the level at which we think it can be reasonably presumed that an unfair relationship was created.
>
> • It is important to note that such presumption is rebuttable: our approach allows for flexibility around that tipping point, including allowing that in some circumstances undisclosed commission of less than 50% may have created an unfair relationship in particular cases.
>
> • We consider that the level of the tipping point in the context of our approach is a matter of regulatory judgement.

> • We do not think that further information on consumer behaviour and preferences, or on firms' costs, is necessary for seeking to justify the 50% tipping point or identifying potential alternatives.
>
> • There is an important conceptual distinction between commission being so high that it makes the whole relationship between lender and debtor unfair if not disclosed, and being too high economically in relation to efficiently incurred costs in a competitive market. We are concerned with the former, as this was the focus in *Plevin*, not the latter. We are not trying to regulate prices retrospectively or to redress economic detriment caused by high prices in an uncompetitive market."

68. PS17/3 did not say or imply that adopting the 50% tipping point and refunding the excess was necessarily or probably the "right" result or the result that should or would be obtained if the parties were not able to reach agreement either about the substance of the complaint or the respondent's assessment of an appropriate remedy. What the new rules and guidance set out to achieve was a package that would provide consistency of approach and certainty for consumers at an early stage. The express purpose was to defuse the long-tail PPI complaints that were emerging after *Plevin* by offering consumers what amounted to a free-to-the-consumer systemic response: the "best outcomes for consumers at the earliest stage in the complaint process" was overtly and expressly a systemic response designed to restore confidence in the relevant financial institutions. The FCA expressly recognised that it was seeking to lay down a scheme that achieved fairness by providing the merits of consistency combined with simplicity, informality, early resolution, and being free to the consumer. It was not proposing or imposing a mechanical test or mandatory guidance: see the highlighted passage in [65] above.

69. The end result of the consultation, and the FCA's response to *Plevin*, was the amended version of DISP that is now in issue, including DISP App 3.

70. Chapter 1 of DISP lays down rules and guidance for "Treating complainants fairly". Respondents "must" establish, implement and maintain effective and transparent procedures for the reasonable and prompt handling of complaints: see DISP1.3.1R. DISP1.4.1R and DISP1.4.2G lay down rules and guidance for investigating, assessing and resolving complaints:

> "1.4.1R Once a complaint has been received by a respondent, it must:
>
> (1) investigate the complaint competently, diligently and impartially, obtaining additional information as necessary;
>
> (2) assess fairly, consistently and promptly:
>
> (a) the subject matter of the complaint;
>
> (b) whether the complaint should be upheld;

(c) what remedial action or redress (or both) may be appropriate;

(d) if appropriate, whether it has reasonable grounds to be satisfied that another respondent may be solely or jointly responsible for the matter alleged in the complaint;

taking into account all relevant factors;

(3) offer redress or remedial action when it decides this is appropriate;

(4) explain to the complainant promptly and, in a way that is fair, clear and not misleading, its assessment of the complaint, its decision on it, and any offer of remedial action or redress; and

(5) comply promptly with any offer of remedial action or redress accepted by the complainant.

1.4.2G Factors that may be relevant in the assessment of a complaint under DISP 1.4.1R (2) include the following:

(1) all the evidence available and the particular circumstances of the complaint;

(2) similarities with other complaints received by the respondent;

(3) relevant guidance published by the FCA, other relevant regulators, the Financial Ombudsman Service or former schemes; and

(4) … ."

71. DISP 1.4.1R is the governing rule for the purposes of the present appeals. Its terms are clear. Under it, the respondent's mandatory obligation is that it must investigate and assess the complaint and offer redress or remedial action if and when it decides that is appropriate; thereafter, if its offer of redress or remedial action is accepted, the respondent is obliged to comply with it. It goes without saying that a complainant will always be free to reject an offer of redress or remedial action. If that happens, no further obligation to pay or otherwise remediate arises under the terms of DISP 1.4.1R, though there remains the prospect of resort to the Financial Ombudsman or litigation alleging section 140A unfairness by the dissatisfied complainant.

72. DISP App 3 sets out the approach which respondents should use in assessing complaints relating to the sale of PPI contracts and determining appropriate redress where a complaint is upheld: see DISP 1.4.6G. In summary, DISP App 3, which had been introduced in 2010, was amended to introduce a 2-step process. We are directly concerned with Step 2.

73. The key provisions of DISP App 3 for present purposes are:

- App 3.1.1(a)G: "(1) This appendix sets out how… a firm should handle complaints relating to the sale of a payment protection contract by the firm which express dissatisfaction about the sale, or matters related to the sale, including where there is a rejection of claims on the grounds of ineligibility or exclusion (but not matters unrelated to the sale, such as delays in claims handling) … ."

- App 3.1.4AG: "At step 2, the aspects of complaint handling dealt with in this appendix are how a CCA lender should:

  (1) assess a complaint to establish whether failure to disclose commission gave rise to an unfair relationship under section 140A of the CCA; and

  (2) determine the appropriate redress (if any) to offer to a complainant."

- App 3.2.1G: "The firm should consider, in the light of all the information provided by the complainant and otherwise already held by or available to the firm, whether (at step 1) there was a breach or failing by the firm or (at step 2) whether there was a failure to disclose commission."

- "App 3.3A.2E: Where the firm did not disclose to the complainant in advance of a payment protection contract being entered into (and is not aware that any other person did so at that time):

  (1) the anticipated profit share plus the commission known at the time of the sale; or

  (2) the anticipated profit share plus the commission reasonably foreseeable at the time of the sale; or

  (3) the likely range in which (1) or (2) would fall;

  the firm should consider whether it can satisfy itself on reasonable grounds that this did not give rise to an unfair relationship under section 140A of the CCA. The firm's consideration of unfairness should take into account all relevant matters, including whether the non-disclosure prevented the complainant from making a properly informed judgement about the value of the payment protection contract."

- App 3.3A.4E: "(1) The firm should presume that failure to disclose commission gave rise to an unfair relationship under section 140A of the CCA if:

  (a) the anticipated profit share plus the commission known at the time of the sale; or

  (b) the anticipated profit share plus the commission reasonably foreseeable at the time of the sale;

  was:

  (c) in relation to a single premium payment protection contract, more than 50% of the total amount paid in relation to the payment protection contract; or

  (d) in relation to a regular premium payment protection contract, at any time in the relevant period or periods more than 50% of the total amount paid in relation to the payment protection contract in respect of the relevant period or periods.

  (2) The firm should presume that failure to disclose commission did not give rise to an unfair relationship under section 140A of the CCA if the test in (1) is not satisfied.

- App 3.3A.5G: "The presumption that failure to disclose commission gave rise to an unfair relationship is rebuttable. …"

- App 3.7A.2E: "Where the firm concludes in accordance with DISP App 3.3A that the non-disclosure has given rise to an unfair relationship under section 140A of the CCA, the firm should remedy the unfairness."

- App 3.7A.3AE: "In relation to a regular premium payment protection contract, the firm should pay to the complainant in respect of each redress period a sum equal to:

  (1) an amount appropriately representing the commission paid in respect of that period; plus

  (2) an amount appropriately representing profit share in respect of that period;

  minus

  (3) 50% of the amount appropriately representing the total amount paid in respect of that period (or other percentage as in DISP App 3.7A.4E).

A firm should pay the aggregate of those sums and also pay historic interest in relation to each of those sums, where relevant. It should also pay simple interest, where relevant."

- App 3.8.3E: "The remedies in DISP App 3.7A are not exhaustive."
- App 3.8.4E: "A firm should depart from the remedies set out in n DISP App 3.7A if there are factors in a particular complaint which require a different amount or form of redress in order to remedy the unfairness found."

74. None of these provisions of DISP App 3 have the suffix "R". They are all items of Guidance or Evidential Provisions. Despite the liberal use of the word "should", they do not give rise to a direct cause of action at the suit of a dissatisfied complainant. Instead, they provide a basis upon which the respondent is advised that they should proceed in order to comply with the mandatory obligation established by DISP 1.4.1R. Thus App 3.3A.4E sets out the basis for applying the rebuttable presumption that failure to disclose commission gave rise to an unfair relationship; and DISP App 3.7A.2E read in context is the manner in which an appropriate remedy may be calculated. However, these provisions are not prescriptive of the approach to be followed in every case, as DISP App 3.8.3E and DISP App 3.8.4E make plain, reflecting the breadth of sections 140A and 140B. Despite the use of the word "pay" in DISP App 3.7A.2E, the context and the structure of provisions having different status makes plain that DISP App 3 does not impose a free-standing obligation to pay money without the respondent first having offered and the complainant having agreed to accept it. It is (rightly) common ground that a complainant could not sue a respondent for a sum calculated by reference to DISP App 3.71.2E (or any variation on that sum) unless and until that sum (or its variant) has been offered by the respondent to the complainant and the complainant has accepted that offer. Once that is done, the respondent's obligation to pay derives from the agreement between the parties and the respondent is required to comply with it.

75. Adopting a holistic and iterative approach to these provisions, responsibility for assessing a complaint and deciding what to do about it (at each stage "taking into account all relevant factors") rests throughout on the respondent – here Skipton and Santander respectively. That applies whether the respondent assesses the complaint to be well founded or not. Hence the obligation upon the respondent to offer redress or remedial action "when it decides this is appropriate" and the further obligation to explain to the complainant "its assessment of the complaint, its decision on it, and any offer of remedial action or redress." Equally, it is obvious that, on the respondent making an offer of redress, the complainant and respondent will be in the territory of (negotiated) consensual settlements. This is so whatever the reason why the redress or remedial action offered by the respondent is not what the complainant may have wanted or would choose to accept. If the parties agree on an offer of redress or remedial action, all well and good; the respondent is then obliged to comply promptly. If they do not agree, further steps (including, where appropriate, recourse to the Financial Ombudsman or to litigation) may follow; but in the absence of agreement there is no obligation (legally enforceable or otherwise) upon the respondent derived from DISP 1.4.1R to make payment or to provide any other redress or remedial action.

76. This interpretation is supported by the overall purpose of DISP in general and DISP 1.4.1R in particular as disclosed in PS17/3: see [65]-[67] above. It is in my view commercially sensible in offering a fair and consistent early alternative dispute resolution procedure while not usurping the residual role of the courts. It is therefore wrong to assert without more that DISP 1.4.1R obliges the respondent to a complaint to pay money or otherwise to make redress. No such obligation arises unless and until (a) the respondent has offered redress or remedial action and (b) that offer is accepted by the complainant. Equally it is wrong to assert without more that DISP requires the payment of a specific and pre-ordained sum. No sum is ordained in any sense of the word until the respondent decides what it considers appropriate and offers it. Even then, it is not a sum to which the complainant is legally entitled or which the respondent is legally obliged to pay until the complainant accepts the offer. Accordingly, it is wrong to describe the sum offered by the Respondents in these appeals as "a debt under delegated legislation".

77. As already said, a failure to comply with the relevant evidential provisions of DISP App 3 could be relied upon by a complainant as tending to establish contravention of DISP 1.4.1R. That does not arise in either of these appeals since each respondent adopted the rebuttable presumption from DISP App 3.3A.4E and calculated the sum which they offered the complainants in accordance with DISP App 3.7A.3AE. The main complaint about the form of the respondents' offers is that they were made subject to the condition that all other claims or potential claims would be settled, which it is submitted was not permitted by the DISP Scheme. Consistent with the appellants' submission that the DISP Scheme gave rise to an obligation to pay a particular sum of money calculated in accordance with DISP App 3, it is submitted that making the offer subject to any condition was contrary to that DISP-imposed mandatory obligation to pay the set sum. That submission is wrong, for two reasons.

78. First, DISP does not oblige the payment (or the offering) of a specific sum. Rather, it provides a process that is intended to lead to the making of an offer of redress, if the respondent thinks it appropriate. Put another way, payment of the sum produced by applying the provisions of DISP App 3.7A.3AE, though potentially very important, cannot be regarded as a universal remedy for unfairness: if it were otherwise, there would no scope for the courts' residual discretion to consider the issue of unfairness after a settlement based upon payment of a sum calculated in accordance with DISP App 3.7A.3AE. Whatever sum is offered should be taken as being the product of a fact-sensitive exercise taking into account all relevant factors: see *Plevin* at [17], set out at [52] above.

79. Second, there is nothing in DISP or elsewhere that either says or implies that a person may not attempt to achieve a binding settlement of present or potential future claims when making an offer in conformity with its obligation under DISP 1.4.1R. As I have indicated, the process of offering redress which may or may not be accepted by the complainant falls within the territory of negotiated consensual settlements, with all the flexibility that implies. So there is no principled reason why a respondent whose assessment is that the complainant's claim is worth less than a figure calculated in accordance with DISP App 3.7A.3AE may not all the same be prepared to offer to pay what they regard as a premium if a broader settlement can be achieved, with all the benefits of certainty that would involve. It is, after all, open to the complainant to reject the respondent's offer of redress if they consider it to be inadequate because it includes

a "full and final settlement" clause. I turn to the issue of good consideration next; but *if* a sum offered by a respondent is capable of being good consideration for the settlement of a complainant's immediate claim, there is no good reason why it should not be good consideration for a wider settlement of claims.

80. Finally on this point, the appellants rely upon each respondent's use of the word "due" in their Redress Letters: see [12], [29] and [31] above. But all that can mean in context is that it is the sum produced by the given respondent's application of the systemic approach created by the FCA with a view to the respondent remedying any unfairness in accordance with DISP 1.4.1R by offering it to the complainant. The use of the word "due" in the respondents' letters does not create a pre-existing obligation to pay where no obligation otherwise exists.

Offer, acceptance and consideration

81. Whether the process of the offering of redress and the acceptance of an offer that has been made gives rise to a legally binding agreement depends on the terms used by the parties, whether they intend to create legal relations, and whether, assuming the other criteria are met, the respondent gives good consideration for the agreement. In these appeals, for reasons that I shall explain later, the terms of the agreements pursuant to which the respondents made their payments to the appellants were legally binding compromises *provided* that there was good consideration.

82. The Appellants submit that no consideration flowed from the Respondents because of the common law rule summarised by Peter Gibson LJ (with whom the other members of the court agreed) in *Re Selectmove* [1995] 1 WLR 474 at 480A:

> "In *Vanbergen v. St. Edmunds Properties Ltd.* [1933] 2 K.B. 223, 231, Lord Hanworth M.R. said:
>
> > "It is a well established principle that a promise to pay a sum which the debtor is already bound by law to pay to the promisee does not afford any consideration to support the contract."
>
> More recently in *D. & C. Builders Ltd. v. Rees* [1966] 2 Q.B. 617 this court also applied *Foakes v. Beer*, Danckwerts L.J. saying, at p. 626, that the case
>
> > "settled definitely the rule of law that payment of a lesser sum than the amount of a debt due cannot be a satisfaction of the debt, unless there is some benefit to the creditor added so that there is an accord and satisfaction.""

83. A suitably concise summary of principles that are relevant to the present appeals is provided by Chitty on Contracts, 35th Edition:

> "6-094 At common law, the general rule is that a creditor is not bound by a promise to accept part payment in full settlement of a debt. An accrued debt can be discharged by the creditor's promise only if the promise amounts to or gives rise to an

> effective accord and satisfaction. A counter promise by the debtor to only pay part of the debt provides no consideration for the accord as it is merely a promise to perform part of an existing duty owed to the creditor.
>
> …
>
> 6-101 The rule stated in 6-094 does not apply where the creditor's claim or its amount is disputed in good faith. In such a case, the value of the creditor's claim is doubtful, and the debtor therefore provides consideration by paying something even though it is lesser than the amount claimed.
>
> Unliquidated claims
>
> 6-102 For reasons similar to those given in 6-101 above, the general rule applies only if the original claim is a liquidated one, i.e., a claim for a fixed sum of money, such as one for money lent or for the agreed price of goods or services. It does not apply where the creditor's claim is an unliquidated one, such as a claim for damages or for a reasonable remuneration where none is fixed by the contract. The value of such a claim is again uncertain. And even if the overwhelming probability is that it is worth more than the sum paid, the possibility that it may be worth less suffices to satisfy the requirements of consideration."

84. There is a very short answer to the Appellants' submissions on this issue. It is (rightly) common ground that there was no sum for which the Appellants (or complainants generally) could sue before acceptance of a respondent's offer of redress. And, for the reasons I have just given, there is no obligation upon a respondent to pay any or any particular sum unless and until their offer of redress is accepted. Therefore there was no sum which the Respondents were already bound by law to pay to the Appellants; nor was there anything in the nature of a debt, in respect of which the sums offered by the Respondents could be described as part payment. A claim based on a failure to disclose commission or profit share such as made by the Appellants in these appeals is a claim in respect of alleged unfairness that contravenes section 140A of CCA. Such a claim is quintessentially a claim for an unliquidated sum, the value of which is uncertain. The doctrine upon which the Appellants rely has no application to such a claim: see *Chitty* at paragraph 6-102, set out above. These three features are, singly and cumulatively, fatal to the Appellants' assertion that there was a pre-existing legal obligation to pay a particular sum. That in turn is fatal to their assertion that there was no consideration for any settlement. The proper analysis is that the Respondents provided good consideration for the compromises by making an offer of payment which, upon acceptance, created something to which the Appellants had not previously been entitled, namely an enforceable contract giving them a right to payment of a specific sum. The principle derived from *Foakes v Bear* is not applicable in such circumstances. Nor are the appellants right to characterise the offers of redress made by the Respondents as admissions that turn an unliquidated claim into a liquidated claim. On their face they were offers to settle an unliquidated claim on terms calculated by reference to DISP, which is different: see *Ferguson v Davies* [1997] 1 All ER 315, 322a-b.

85. None of the authorities to which the Appellants have referred provide support for their submissions.

D& C Builders v Rees [1966] 2 QB 617 (CA)

86. In *D&C Builders v Rees* the critical finding made by the first instance Judge was that "by the middle of August the sum due to the plaintiffs was ascertained and not then in dispute. … It was a case of agreeing to take a lesser sum when a larger sum was already due to the plaintiffs": see 622E-F, and see Winn LJ's statement at 627C that "1. when the plaintiff builders ceased work on the defendant's house there was no dispute as to the amount, in terms of money, of the work they had done. 2. After allowing due credits, the defendant in August 1964 owed the plaintiffs £482 13s 1d." There was therefore a pre-existing obligation to pay a liquidated debt and the defendant's offer of a lesser sum in satisfaction could not amount to good consideration. Lord Denning MR considered (at 625C-F) that there was no accord (and consequently no accord and satisfaction) because the defendant had procured the plaintiff's agreement to accept the lesser sum by intimidation. Danckwerts and Winn LJJ agreed that there was no accord and satisfaction and relied upon *Foakes v Beer* as governing the case. It was not (as Mrs Self submitted at paragraph 66 of her skeleton argument) a case of a party turning an unliquidated claim into a liquidated one. For the reasons I have given above, in the present case no debt was owed by the Respondents to the Complainants. The Respondents' potential unliquidated liability was not converted into a liquidated claim by the terms of their respective Redress Letters. *D&C Builders v Rees* provides no support for the Appellants' submissions.

Arrale v Costain Civil Engineering Ltd [1976] 1 Lloyd's LR 98

87. In *Arrale* the critical finding for present purposes was that the injured plaintiff "was entitled as of right to payment under the ordinance of the sums paid to him: and the defendants paid him the full sums due under the ordinance, and no more": see page 100, col 2. Lord Denning MR based his decision on there being no accord and satisfaction and upon his interpretation of the receipt given by the plaintiff which, he concluded, did not exclude the plaintiff's common law claim for damages. Stephenson LJ agreed with Lord Denning's interpretation of the receipt. He also agreed (at page 105, col 1) that there was no consideration. Geoffrey Lane LJ disagreed with the majority about the interpretation of the receipt. But he concluded (at page 106) that "the defendants by paying the workmen's compensation money to the plaintiff were doing no more than perform an obligation already cast upon them by law."

88. Mr Harrop draws attention to Geoffrey Lane LJ's formulation of the question in terms of "cast upon them by law" rather than the separate question whether the plaintiff would have been able to enforce that right before an English court. He seeks to build on this to support a submission that a pre-existing obligation does not have to be legally enforceable in order to fall within the scope of the doctrine derived from *Foakes v Beer*. This submission is, in my view, unarguable. First, it places far too much weight upon a short phrase in an ex tempore judgment. Second, there is no suggestion in the report that the plaintiff could not have sued for the sums due to him under the Dubai Ordinance. Third, it is plain that the Plaintiff could in fact have sued to enforce the obligation since Article 11(c) of the Ordinance (set out at page 100 col 2) provided that the worker should not be entitled to any benefit "if it is proved by the employer to the satisfaction of the Court that the worker deliberately contravened instructions issued to

safeguard his health and person or displayed serious negligence in executing those instructions." Fourth, seen in this light, *Arrale* is a conventional application of the rule in *Foakes v Beer* in the context of a statutory obligation to pay a liquidated sum. Fifth, there is no reason in principle why an unenforceable pre-existing obligation (if established) should prevent a payment pursuant to that unenforceable obligation from being good consideration. Such a case seems far removed from the part-payment of a debt as in *Foakes v Beer* or *D&C Builders v Rees.* Sixth, for the reasons I have given, there was on the facts of the present appeals no (unenforceable) legal obligation to make the offers of payment that the Respondents made. Seventh, if such a category of unenforceable payment obligations does exist and could be relevant, the Respondents conferred a benefit by the process of offer and acceptance which gave the Appellants the ability to sue on the contract of compromise, thereby taking the case out of the scope of the principle in *Foakes v Beer.*

Newton Moor Construction Ltd v Charlton (1997) 13 Const LJ, 275

89. The critical feature of *Newton Moor* is the finding that the letter enclosing a cheque in part payment of a builder's liquidated claim for work done was not to be interpreted as an offer to compromise the claim. "The defendant was not saying in effect: "I do not owe you anything" or "I owe you only a comparatively small sum but I am willing to pay you £8,847": see page 277. Instead the letter was treated as "in effect, making an admission that that sum was due". If it fell to be treated as an admitted sum due that amounted to part-payment of a liquidated sum, the principle of *Foakes v Beer* would be applicable and the part-payment would not amount to good consideration for any agreement. Sir David Cairns held that the effect of the letter was to make an admission that the sum tendered in payment was admitted to be due. Accordingly, the ground on which he would decide the case was that there was no consideration for any agreement that could be said to have been made. Eveleigh LJ treated the case as one where there was a dispute as to the larger sum "and one, therefore, that could have been compromised by the payment of a smaller sum. But the question would be whether agreement was reached that that should be so. On the facts of this case it clearly was not… ." The parties were not ad idem, therefore there could be no accord and satisfaction. Lawton LJ held that there was no evidence of an accord and satisfaction.

90. In my judgment, the significance of *Newton Moor* is to make plain that, even where there is a claim for a liquidated sum, all will depend upon the facts of a given case and whether an offer of part payment is to be interpreted as an admission that may invoke the principle of *Foakes v Beer* or as an offer to compromise. As well as being claims for unliquidated sums, the correspondence and conduct of the parties surrounding the offer and acceptance of the Respondents' proposed redress in these appeals were in terms that differed from those in *Newton Moor*, the most obvious differences being that in *Newton Moor* the cheque was sent without prior agreement in purported full and final settlement but was accepted on a different basis, namely that it was *not* accepted in full and final settlement but as a payment on account.

91. We were also referred to *Rustenberg Platinum Mines Ltd v South African Airways and Pan American World Airways Inc.* 1979] 1 Lloyds Rep 19, 24, *Ferguson v Davies*, and *BCCI v Ali* [2002] 1 AC 251 (HL) at [26] and [29]. We have read the indicated passages. They do not require any further reference here.

92. I return to the interpretation of the correspondence in the present appeals and the application of these principles when I come to discuss the issues in the individual appeals below.

The residual jurisdiction of the Court

93. Although it is now common ground in both appeals that the court retains jurisdiction to consider questions of unfairness and redress under sections 140A and 140B of the CCA even after the parties have compromised any claims they might have under those sections, there remain at least differences of emphasis about how the court should approach matters in such circumstances. For my part, I am content to adopt and endorse what was said by Nugee J in *Holyoake* at [500]-[504] as follows:

> "500. Mr Lord's third submission was that the Settlement Deed was a bona fide compromise of the CCA claims and if it could be unpicked, it would never be possible to settle a CCA claim. That cannot have been intended by the legislature. There appears to be no relevant authority on the CCA itself, but he referred, by way of analogy, to *Binder v Alachouzos* [1972] 2 QB 151. The plaintiff had sued the defendant on a number of loans, the defendant defending the action on the grounds that the plaintiff was an unregistered moneylender. The action was compromised shortly before trial, the defendant agreeing to abandon the contention that the plaintiff was a moneylender and to pay the plaintiff various sums. When he defaulted and the plaintiff sued him on the compromise agreement, the defendant contended that it was not binding, again relying on the Moneylenders Acts. The Court of Appeal held that he was bound by the agreement. Lord Denning MR said that the Moneylenders Acts were for the protection of borrowers and the judges would not therefore allow a moneylender to use a compromise as a means of getting round the Act; but it was important that the courts should enforce compromises agreed in good faith between lender and borrower (at 158A-B, D-F):
>
> > "If the court is satisfied that the terms are fair and reasonable, then the compromise should be held binding. For instance, if there is a genuine difference as to whether the lender is a moneylender or not, then it is open to the parties to enter into a bona fide agreement of compromise. Otherwise there could never be a compromise of such an action. Every case would have to go to court for final determination and decision. That cannot be right….
> >
> > In my judgment, a bona fide compromise such as we have in the present case (where the dispute is as to whether the plaintiff is a moneylender or not) is binding. It cannot be reopened unless there is evidence that the lender has taken undue advantage of the situation of the borrower. In this case no undue advantage was taken. Both sides were advised by competent lawyers on each side. There was a fair arguable

> case for each. The case they reached was fair and reasonable. It should not be reopened."

Phillimore and Roskill LJJ agreed. Phillimore LJ said that it was plain that it was a bona fide compromise, the terms of the agreement were not to be described as colourable, and the court (at 159D):

> "ought to be very slow to look behind an agreement reached in circumstances like these."

Roskill LJ said that while it has always been the policy of the courts not to allow the Moneylenders Acts to be evaded (at 160B-C):

> "it is the law of this country, as Lord Denning MR has said, where there is a bona fide compromise of an existing dispute and that compromise includes a compromise of what, as Mr Joseph said, is basically an issue of fact, namely whether there had in fact been unlawful moneylending, especially where the compromise has been reached under the advice of counsel and solicitors, that that compromise is enforceable against the party seeking subsequently to repudiate it."

501. There is an obvious danger in holding that any agreement settling CCA claims is effective to oust the Court's powers under ss. 140A-C of the CCA, as it would open the way to lenders routinely requiring borrowers to settle any possible CCA claims, which would run the risk, as Mr Stewart submitted, of driving the proverbial coach and horses through the protection afforded by the CCA.

502. Moreover, in *Binder* the Court of Appeal appears to have laid emphasis on the fact that what was involved was a bona fide compromise of a genuine issue of fact as to whether the Moneylenders Acts applied at all. That principle has been applied to other statutory provisions: cf Foskett on Compromise (8th edn) at §7-32 (although parties cannot contract out of the protection of the Rent Acts, that does not prevent a bona fide compromise of a genuine dispute of fact as to whether a statutory provision applies); *A-G v Trustees of the British Museum* [2005] EWHC 1089 (Ch) at [28] per Morritt V-C (a bona fide compromise could be made of the question whether a statutory prohibition on disposal of objects vested in the trustees as part of the museum's collection applied); and *FPH Law v Brown* [2016] EWHC 1681 (QB) at [29] per Slade J (a bona fide compromise of an issue as to the enforceability of a CFA). But if that is the principle, it does not directly assist CPC. There was no issue, or none at any rate that has been identified, as to whether the agreements preceding the Settlement Deed were credit agreements such that the CCA applied. What was compromised

> was not any genuine issue of fact which went to the applicability of the CCA. What was compromised was any claim that Mr Holyoake had under the CCA.
>
> 503. I proceed therefore on the basis that the Settlement Deed does not act as a jurisdictional bar to the Court considering whether the relationship between the parties was unfair, both in the period up to and including the entry of the Deed and in the period thereafter.
>
> 504. On the other hand that does not mean the Settlement Deed is just to be ignored as if it did not exist. The policy considerations referred to in Binder – that it is the policy of the Court to encourage good faith compromises, and to enforce compromises when they are made – seem to me to continue to apply. In considering whether the relationship between the parties is unfair, or in considering what order, if any, to make in the exercise of the discretion in s. 140B, it seems to me highly relevant that the parties have reached a compromise of that issue, and for this purpose the matters referred to by the Court of Appeal in *Binder* – was there a genuine dispute, was there a fair arguable case on each side, was the compromise bona fide or were its terms colourable, are the terms fair and reasonable, has the lender taken undue advantage of the borrower, were both sides advised by competent lawyers – are just as applicable. Roskill LJ gave an example at 160D-E of a liquidator seeking the sanction of the court to a compromise where there is a moneylending defence:
>
>> "Is the court to investigate the whole matter, or can it look at the matter broadly and see whether a bona fide compromise should be arrived at or has been arrived at? In such a case it seems to me clear that the court should encourage and when appropriate enforce any bona fide compromise arrived at, especially one arrived at under legal advice."
>
> That is not directly applicable but is consistent with the idea that the Court should look at the matter broadly to see if a bona fide compromise has been reached on legal advice, and if it has should be very slow to go behind it."

94. I agree. I would only add that it is for the court that is looking at the matter to determine what weight (if any) to attribute to particular factors as they apply to the facts of the case. This applies as much to the obtaining of legal advice as to any other factor. There are doubtless some compromises whose terms or consequences cannot properly be understood by a lay party without having detailed legal advice. There is, however, no reason to assume that legal advice is required in every case of compromise. Two factors will be highly relevant: first, the complexity and clarity (or otherwise) of the terms of the contemplated compromise and its consequences; and, second, whether the party has access to any necessary advice on the contemplated compromise from people other than lawyers.

Harrop v Skipton: the appeal

Issues raised

95. Mr Harrop's grounds of appeal are again founded on (a) whether there was an effective compromise of his complaint and, if so, what was compromised, and (b) whether, if there was a contract of compromise, the court retained jurisdiction to assess and determine whether the relationship between Mr Harrop and Skipton had been unfair and to make an order to redress any unfairness that was found.

96. In summary, Ground 1 challenges the Deputy District Judge's conclusion that there was no real prospect of success on Mr Harrop's case that the acceptance of the sum offered and paid by Skipton did not constitute a contract of compromise between the parties in full and final settlement of any claim the Claimant may have arising from an unfair relationship between Mr Harrop and Skipton under section 140A of CCA. The Grounds raise seven reasons in support of Ground 1, which I summarise briefly as follows:

    i) Once Skipton concluded that it had failed to disclose the anticipated amount of commission and that it would not seek to rebut the presumption that the amount of commission gave rise to an unfair relationship, it became obliged to pay a sum calculated in accordance with "the specific formula" set out in DISP App 3.7A.2E. Skipton was therefore obliged to pay the Claimant the sum subsequently paid;

    ii) The Judge was wrong to find that the offer made in the Redress Letter was in full and final settlement of the totality of the claims put forward (mis-selling and excess commission) by Mr Harrop. He ought to have held that Skipton's Redress Letter constituted an admission that the FCA obliged them to refund to Mr Harrop the sum offered, calculated in accordance with the FCA's formula;

    iii) The Judge was wrong to find that the existence of an obligation on the Defendant to pay the sum paid required that Mr Harrop should be entitled to sue for such sum;

    iv) As Skipton was obliged to pay the sum paid, its agreement to pay and/or the payment of the sum could not constitute consideration for a contract of compromise;

    v) The Judge should have found that the reference by Skipton to the sum being "due" to Mr Harrop was an admission of liability for that sum;

    vi) The Judge should have found that the effect of such an admission was that there was no dispute regarding the Claimant's entitlement to the sum paid. Therefore, payment of such admitted sum could not amount to consideration for the release of Skipton from any other potential liability to Mr Harrop;

    vii) The Judge should have found that the arguments in (iv) to (vi) above were not precluded by a claim under section 140A being a claim for an unliquidated sum because Skipton had become obliged to pay a liquidated sum calculated in accordance with DISP and/or by virtue of the terms of Skipton's Redress Letter.

97. Ground 2 has been amended (and Ground 2.1 has been abandoned) in the light of the decision of the Supreme Court in *Smith*. Mr Harrop now accepts that, while his mortgage was redeemed and the PPI cancelled in May 2014, the compromise made in March 2018 was a related agreement to the original Credit Agreement within the meaning of section 140C(4)(b) of CCA. Accordingly, Mr Harrop accepts and asserts that the existence of the compromise, the circumstances in which it was made and the fairness of its terms fall to be considered when making a determination of unfairness under section 140A as well as when deciding whether to award relief under section 140B.

98. Ground 2.2 is a broad assertion that the Judge should have found that the relationship was unfair to Mr Harrop owing to Skipton's failure to disclose the amount of commission. Ground 2.3 is that the Judge was wrong to uphold the Deputy District Judge's finding that there were no real prospects of success in persuading the court at trial to grant relief notwithstanding the compromise. Seven lines of argument are identified in support:

i) The fact that Mr Harrop was advised by a claims management company (but not by solicitors) was neither determinative or even materially probative of the question whether the terms of the compromise were fair and reasonable;

ii) The Deputy District Judge and the Judge should have conducted an analysis of the relief sought (repayment of all premiums and compensatory interest on the basis that Mr Harrop would not have bought the PPI but for the failure to disclose rates of commission) and whether unfairness remained after payment of a sum that fell considerably short of the claimed relief. Had they done so they should have concluded that Mr Harrop had reasonable prospects of proving unfairness and obtaining relief under section 140B because the unfairness had not been sufficiently remedied by the payment that Skipton had made;

iii) The fact that Skipton's offer was in accordance with a calculation pursuant to the provisions of DISP App 3 should not have led the courts below to conclude that there was no real prospects of success in arguing that the terms of the compromise were not fair and reasonable in all the circumstances of the case: "[the courts below] afforded excessive deference to DISP";

iv) The courts below erred in not taking into account the costs incurred by Skipton in distributing the PPI. Mr Harrop submits that evidence that a party in Skipton's position could cover its costs and make a reasonable return of profit from a commission equivalent to 16% of the premium was relevant when Skipton had, even after the payment to Mr Harrop, retained 50% "which sum might be substantially more than such costs";

v) While accepting that Skipton was not obliged to disclose its distribution costs, the Judge should have found that there were real prospects of success in arguing that, given that average distribution costs were 16% of premiums received, the terms of the compromise between Mr Harrop and Skipton (based on the 50% tipping point) did not cure the unfairness in the relationship between them;

vi) The Judge was wrong to uphold the Deputy District Judge's approach as set out at [34] of her judgment where she said that she approached the argument that

the whole FCA scheme results in inherent unfairness with "more than a degree of caution" and that, if that were the case, the logical outcome would be that it was "impossible in any consumer case, where the regulator's best practice guidance is followed, to conclude a valid contract of compromise with any certainty";

vii) The Judge should have found that there were real prospects that the court would find that the terms of the compromise were not fair and reasonable, and thus there were real prospects, that the court would exercise its powers to grant Mr Harrop relief under section 140B.

99. As I have said, it is now common ground that the Court retains jurisdiction under sections 140A and 140B of CCA; and there is general consensus that the principles enunciated by Nugee J in *Holyoake* are well founded.

Discussion and Resolution – Ground 1

100. I have already explained why, in my judgment, the Appellants' approach to the provisions of DISP is fundamentally flawed. DISP App 3 provided regulatory guidance on achieving best practice in support of the mandatory (regulatory) rule in DISP 1.4.1R. As explained above, by this route DISP provides a systemic response to individual claims of section 140A unfairness, albeit with built-in flexibility depending upon all the circumstances of the case: see [65], [68] above. As such, it provides a process that is intended to lead to a fair outcome by a type of alternative dispute resolution designed to marry best practice with the objective of reducing pressure on the Financial Ombudsman Service and the likelihood of resorting to litigation: see [66] above. Even where a respondent (for whatever reason) decides to adopt the default positions under the process, that does not of itself give rise to an obligation to pay a particular sum: see [71]-[76] above.

101. The Judge held that the Deputy District Judge had not been wrong to conclude that "by accepting the offer contained in Skipton's Redress Letter" and the redress amount, Mr Harrop compromised his claim against Skipton under the Act." Whether that finding was justified depends upon the terms of the correspondence, which I have set out at [6]-[16] above.

102. Mr Harrop's Claim Letter alleged mis-selling and then laid the ground for a claim alleging section 140A unfairness under a separate heading that referred specifically to the section. It would immediately be apparent to both Mr Harrop, his advisers and Skipton that there was at the least a potential claim that would be advanced if, as expected, the information provided by Skipton justified it. The "Redress sought" was apt to cover both the allegations of mis-selling and the potential claim for section 140A unfairness. That was supported both by the reference in the letter to FRS taking appropriate remedial action "via the Courts or through the Financial Ombudsman Service" and by the form of authority authorising FRS to refer Mr Harrop's claim to the Financial Ombudsman Service.

103. Skipton's Redress Letter addressed the allegations of mis-selling and the issues concerning commission and profit share that FRS had raised. The structure and terms of the letter were clear. The allegations of mis-selling were refuted; and what came after was all directed to the potential unfairness claim based on non-disclosure of

commission and profit share. Accordingly, having set out the offer of £1,095.75 specifically in relation to the non-disclosure of commission, where in the Conclusion section Skipton said that they could not uphold Mr Harrop's complaint about mis-selling of MPPI and, in the next paragraph, that they believed they had provided a fair outcome to Mr Harrop's complaint, it was plain that they were not making any offer in relation to the mis-selling allegations but were prepared to offer £1,095.75 in respect of the non-disclosure claim, which was a claim under section 140A as identified in Mr Harrop's Claim Letter. In other words, the offer did not relate to the mis-selling allegations.

104. The clarity of this distinction is important when considering FRS's response to Skipton's Redress Letter because they accepted "your offer in full and final settlement of his claim for his mis-sold [PPI]". If it were not for the clarity of the distinction that had been made by Skipton, this response could have been taken either as a reference exclusively to Mr Harrop's claim based on the five allegations of mis-selling or to every aspect of complaint that had been included in Mr Harrop's Claim Letter. However, it was neither of these since no offer had been made that comprehended or related to the claim based on the five allegations of mis-selling.

105. Equally, the acceptance form signed by Mr Harrop related solely to the offer that Skipton had made in respect of his section 140A claim since there was no other offer to accept.

106. What then did Mr Harrop and Skipton purport to settle? In my judgment this question admits of only one possible answer: they settled Mr Harrop's claim under section 140A for unfairness based on non-disclosure of (excessive) commission and profit share foreshadowed in Mr Harrop's Claim Letter, directly addressed by the offer contained in Skipton's Redress Letter. That offer was accepted in full and final settlement of that complaint by FRS's letter in response and Mr Harrop's signing the acceptance authority. Whether in the early stages of the negotiation the dispute about section 140A unfairness should be characterised as an actual or a potential dispute does not matter. It is plain beyond argument to the contrary that both parties understood what was being addressed and settled: it was the claim arising from Skipton's non-disclosure of commissions and profit share in respect of which Mr Harrop had claimed in his Claim Letter (as he has subsequently claimed in these proceedings) to be returned to the position he would have been in had he not been sold the policy, including a full refund of the premium, interest charged on the premium and statutory interest from inception of the policy.

107. It is unrealistic to attempt to distinguish between the claim being advanced by FRS and the Section 140A claim that Mr Harrop wishes to pursue in the present proceedings. They are one and the same. They are an unliquidated claim to remedy the unfairness caused by Skipton's non-disclosure of commission and profit-share. If there was otherwise any doubt about this (which there is not) it would be removed by the facts that (a) FRS headed the relevant section of Mr Harrop's Claim Letter with a specific reference to section 140A, (b) non-disclosure of commission and profit share was, after *Plevin*, a (if not *the*) paradigm basis for a claim pursuant to section 140A and 140B, (c) Skipton responded with reference to the DISP scheme that was specifically designed to be applicable to such claims, and (d) the factual basis for the claims was the same, as is clear from the terms of the Claim Form and Particulars of Claim: see [18]-[19] above.

108. The exchange of correspondence cannot, in my judgment, be interpreted as anything other than an offer to compromise the section 140A claim by the payment of the sum of £1,095.75. That sum was significantly less than the full return of premium and interest that Mr Harrop's Claim Letter had sought; and Skipton described it as "a fair outcome" while inviting Mr Harrop to let them know if they had missed anything. Taken overall, the language of the letter was the language of compromise by consensual offer and acceptance of a lesser sum than demanded in the context of an unliquidated claim under section 140A. That it was understood to be an offer of compromise and settlement was made clear by FRS' response that they were instructed "to accept your offer in full and final settlement of this claim." The essential character of Skipton's offer to settle is not subverted by the use of the word "due", for the reasons I have given earlier: see [80] above. The sum offered and paid was good consideration for the agreement, also for the reasons I have given: see [83]-[85] above.

109. I would therefore reject Ground 1 of Mr Harrop's appeal.

Discussion and resolution – Ground 2

110. Ground 2 involves a full-frontal attack on the reasoning of the Deputy District Judge. The kernel of her reasoning was at [31]-[34], where she said:

> "31. It is agreed and it is right that the court retains a jurisdiction to determine that the relationship was unfair and to provide additional redress even where there has been a valid contract of compromise in circumstances where unfairness means that the court should exercise its discretion to do so (under s.140A to C of the Consumer Credit Act). Here, the argument is that the terms of any purported settlement are argued not to be fair and reasonable because the amount was manifestly insufficient to remedy the unfairness and that the FCA's position that the bank should be entitled to retain 50 percent is of itself unfair and indefensible and that the undisclosed commission was so large that the failure to disclose could never be described as fair.
>
> 32. The fact that the court has a power to look beyond any agreement in these limited consumer circumstances does not mean that the court will or should ride roughshod over a valid contract of acceptance or compromise between two parties. The power exists to ensure there is a mechanism to redress unfairness and exists to protect consumers. The Claimant argued this point well but, in my view, I cannot find that the FCA methodology, when applied, produces an inherently unfair result that means the court will likely look behind those circumstances in this case. In my view, the FCA methodology is not an absolute. It creates only a rebuttable presumption for its members to apply and there is nothing requiring any Claimant to accept the resultant figure.
>
> 33. Here, the indicators of whether the agreement was fair are that the Claimant was, in my finding, provided with a very detailed and clear explanation of the bases of the calculation used by Skipton. The Claimant had the benefit of a claims

> management company/advisors at the time who professed to have expertise in this area. The Claimant was informed that he did not have to accept the sum and had the right to take the matter to the ombudsman or court and only after all of that information was provided was settlement entered into and so standing back and looking at the process generally in this case, it was, in my view, patently fair. The Claimant's representatives/agents could have asked if the money could be accepted in part payment but did not. They accepted the only offer put forward without qualification until a very long time later. There was no proximate attempt to say that the compromise was not final.
>
> 34. In terms of the argument that the whole FCA scheme results in inherent unfairness, I have to approach that argument with more than a degree of caution. If this were the case, then the logical outcome would be that it is impossible in any consumer case, where the regulator's best practice guidance is followed, to conclude a valid contract of compromise with any certainty. That cannot be right. The correct approach, in my view, is to understand that the FCA scheme provides a broad brush method for addressing a built in presumption of unfairness. There is nothing to prevent banks from offering more or rebutting that presumption and there is nothing preventing the Claimant from rejecting that approach if, in their circumstances, they believe the FCA model to be inadequate or inequitable redress and the measure of fairness must be looked at as a whole based on the entire facts of the case, as I believe I have done here. There is no requirement in my view for the bank to go so far as to disclose the actual costs incurred in assisting with the provision of MPPI, which is what was argued."

111. Certain points will be apparent in the light of what I have already said in this judgment. First, viewed overall, the Deputy District Judge's approach was consistent with the principles explained by Nugee J in *Holyoake*. Second, the Deputy District Judge was correct to say that "the FCA methodology is not an absolute", and that the FCA scheme "provides a broad brush method for addressing a built in presumption of unfairness." She was also correct to point out that there is nothing to prevent financial institutions from offering more or rebutting the presumptions and that there is nothing preventing a claimant from rejecting the FCA scheme approach if, in their circumstances they believe the FCA model to be inadequate or inequitable redress. In taking the point as she did, she was doing no more than reflecting properly the balance between the obligations of those providing regulated financial services to provide a level of care that is appropriate, on the one hand, and the general principle that consumers should take responsibility for their decisions: see [57] above.

112. The Judge broadly accepted the Deputy District Judge's approach. Specifically, he accepted her reasoning in the passage of her judgment that I have set out above.

113. Before addressing the individual strands of Mr Harrop's submissions, there are two features that, to my mind, are important to be borne in mind at all times. First, as the Deputy District Judge recognised, the FCA scheme was created as a systemic form of

Alternative Dispute Resolution after extensive consultation and having taken into account a wide range of views, weighed them and come to a final "package": see [65], [66], [67], [67], [101] above. For a complainant who is not satisfied by what it provides, it leaves open the twin routes of an appeal to the Financial Ombudsman or litigation. Though it has built in flexibility, it does not pretend to replicate the more detailed, time-consuming and expensive procedures and approach of litigation. Those differences are an integral part of the reasoning behind the package. Second, as the Deputy District Judge correctly noted, Mr Harrop was informed in the clearest of terms (a) how the offer had been calculated, (b) that he did not have to accept it, (c) the availability of the Financial Ombudsman, and (d) that accepting the offer would be "in full and final settlement of [his] complaint". Mr Harrop has not identified any respect in which he required advice about the terms of the proposed settlement and its consequences. This is not surprising given the clarity of what was being proposed and that he had access to FRS should he have been in any doubt. Quite apart from the extra layer of cost that it was likely to involve, I am far from persuaded that advice from qualified lawyers or any advice beyond what a regulated claims management company should be competent to give was needed or even desirable.

114. The fact that Mr Harrop was advised by a claims management company (but not by solicitors) is not determinative on its own, but it is relevant to be taken into account when determining whether the settlement was fair and reasonable and what impact that should have on the overriding question whether the relationship between Mr Harrop and Skipton was unfair within the meaning of section 140A. It is material because it removes any real basis for asserting or speculating that Mr Harrop may not have understood what he was doing or that Skipton was using the compromise as a means of getting round the CCA. If he is to be taken as having full understanding of what he was doing and that it involved a full and final settlement of the section 140A claim that he had been pursuing through FRS, there is no obvious reason why the court should look askance at a voluntary and consensual settlement which meant that he recovered a sum that was the product of a package developed after widespread consultation and detailed consideration of the competing interests of consumers and the financial services industry, as explained in PS17/3. Although not determinative, Skipton are entitled to place some weight upon its adoption of the DISP App 3 approach as being some evidence of its compliance with the standard of commercial conduct reasonably to be expected of a respondent in such circumstances: see *Plevin* at [17]. I am unable to see any rational basis for a submission that the settlement was unfair or unreasonable in circumstances where Mr Harrop knew exactly how the offer had been calculated and that he was not obliged to accept it but could adopt the route of the Financial Ombudsman or litigation. As the Deputy District Judge noted, he did not even suggest that he would take the offered sum as a payment on account: that qualification only came much later, long after the settlement had been concluded.

115. On the basis that the settlement was voluntary and fair, it is material when considering the overarching question whether the relationship between Mr Harrop and Skipton was unfair within the meaning of section 140A for two related reasons. First, it alters the balance of the relationship which must now be assessed giving due weight to the settlement. Second, it is the general policy of the law to encourage settlements: see *Mionis v Democratic Press SA* [2018] QB 662 at [88]-[89] per Sharp LJ. It may also be said that the objectives of the FCA scheme include the promotion of settlements to

reduce the impact of long-tail PPI claims on the Financial Ombudsman service and the courts: see [68] above.

116. The guidance from *Holyoake* supports the view that a settlement should not be set aside or superseded except for good reason: see [504] of *Holyoake* set out at [93] above. It is not possible to assert that there was no genuine dispute when Mr Harrop was seeking return of all his premiums plus interest and Skipton was contending for far less on the basis of the FCA scheme package. While there were more or less "routine" points to be made on both sides, Mr Harrop's case has the feature of his successful claim of £670 in 2005: it is at least fairly arguable that this should weigh in the balance against his proposal that he should recover all his premiums plus interest. There is no basis upon which it could be asserted that the compromise was not bona fide or its terms colourable. Given the nature of the FCA scheme, the transparency of the explanation provided by Skipton, and the DISP-based rationale for the figure that was offered and voluntarily accepted, I would accept that the courts below were entitled to conclude that the terms of the compromise were fair and reasonable; and, for what it is worth, I would come to the same conclusion. There is no question of Skipton having taken undue advantage of Mr Harrop in relation to the settlement. Mr Harrop was advised by FRS and, for the reasons I have given above, I would attribute no weight to the fact that he had not been advised by lawyers.

117. The submission that the courts below should have taken into account the costs incurred by Skipton in distributing the PPI is based upon a misunderstanding of the nature of the process that was undertaken. The FCA gave detailed consideration to the question of incurred costs and whether they should be factored in to the package solution that was proposed; and it concluded that they should not: see [67] above, with particular reference to the last two bullet points. That conclusion was integral to the package solution that DISP offered to complainants such as Mr Harrop. If a complainant wished to do so, they could litigate the issue; but what has been described as "the DISP process" and offer of early free-to-the-consumer alternative dispute resolution was not dependent upon costs incurred by the individual respondent.

118. For essentially similar reasons, the Deputy District Judge's approach to the suggestion that the whole FCA scheme results in inherent unfairness in [34] of her judgment was correct. As is evident from the passages of PS17/3 set out above, there were strongly held divergent views on where the tipping point should be pitched. In the event, having considered all the arguments, the FCA pitched it at 50% for the reasons they gave. If, as Mr Harrop would contend, that was too high a bar to set, then the remedy was for complainants to reject offers of settlement made on that basis. If that became widespread, the FCA scheme would fail in its objectives. There is no evidence before us to suggest that has happened. Individual cases where bona fide settlements have voluntarily been concluded are not the appropriate vehicle for an assertion on a case by case basis that the FCA scheme is inherently unfair.

119. In these circumstances, looking at the matter broadly, the court should be very slow to go behind the settlement. That, in my judgment, is how both the Deputy District Judge and the Judge below approached the jurisdiction issue. In my judgment the Deputy District Judge and the Judge below were right to conclude that there were no real prospects that the court would conclude that the terms of Mr Harrop's settlement were not fair and reasonable or, taking all relevant matters into account, that the court would grant Mr Harrop relief under section 140B.

120. I would therefore reject Ground 2 of Mr Harrop's appeal.

121. Accordingly, I would dismiss Mr Harrop's appeal.

Self v Santander: the appeal

Issues raised

122. Ground 1 is that the Judge was wrong to find that either Santander's offer to pay redress to Mrs Self in its Redress Letter or its subsequent payment of the agreed redress amounted to consideration for a waiver of further claims for two main reasons:

    i) Santander was already under a duty to offer and/or pay the redress sum pursuant to DISP; and

    ii) Santander did not dispute and/or admitted its liability to pay the redress sum to Mrs Self or her entitlement to it.

123. Ground 2 is that the alleged waiver did not cover a civil claim such as the present: it was limited to complaints pursuant to DISP. *Arrale* is said to be indistinguishable from the present case in that "where a document states that a payment is made in discharge of a particular claim, which is followed by general words purporting to release and discharge all claims, then those general words are to be referred to the particular claim and limited to it".

124. Ground 3 is that the Judge erred in holding that the compromise "cured" the pre-existing unfairness in the relationship between Santander and Mrs Self.

Discussion and resolution – Ground 1

125. I have set out the terms of the correspondence leading to the payment to Mrs Self of the settlement sum of £830.84 at [26]-[37] above. In contrast to Mr Harrop's Claim Letter, which laid the ground for a claim under section 140A, Mrs Self's Claim Letter, under the heading "Paragon v Plevin – Commission Complaint Issue" went further and alleged a failure to disclose the amount of commission and that this failure qualified Mrs Self for relief under section 140A. It also stated that she was seeking repayment of all premiums and associated interest paid together with statutory interest: see [27] above.

126. As in the case of Mr Harrop and Skipton, Santander distinguished between Mrs Self's allegations of mis-selling and her section 140A claim. They refuted the various allegations of mis-selling that had been made. Neither Mrs Self nor UC4M responded to that rejection of the mis-selling claim. When Santander sent its Redress Letter in February 2021, the only mention of the mis-selling claim was to repeat that Mrs Self's claim had not been upheld. So far as this court is aware, there was no further mention of the mis-selling claim from either side.

127. The parties' treatment of the section 140A claim was different, with Santander's separate letter on 27 April 2018 being a holding letter until they had considered the question of redress in respect of undisclosed commission. That led eventually to Santander's Redress Letter. Having referred to the rejection of the mis-selling complaint, the letter then went on to consider "whether there was an unfair relationship

arising out of the agreement" under the CCA because of non-disclosure of commission. This was, self-evidently, a return to Mrs Self's section 140A claim. The letter was precise in setting out that the basis for the formulation of its offer was the rules and guidance laid down by the CCA, the period in respect of which the offer was being made, and how Santander had approached the calculation that led to the figure they offered. In one respect the explanation was less full than that in Mr Harrop's case because Santander did not provide a schedule of monthly payments broken down to show premium and commission. But the basis of the offer figure was clear. The letter also made clear that the offer was made and, if accepted, would be in full and final settlement "of this and any other claims" that Mrs Self may have against Santander. It drew Mrs Self's attention to the fact that it was Santander's "final response" to her complaint (which in context could only mean her section 140A complaint) and to the fact that if she was not happy with the outcome she had the right to refer her complaint to the Financial Ombudsman.

128. The Customer Acceptance Form also made plain (twice) that acceptance of the payment would be in full and final settlement of her non-disclosure of commission complaint. It would, in my judgment, be far too legalistic to attach any significance to the fact that the form referred both to her complaint (with a small c) and "the Complaint" (with a capital C): her mis-selling complaint was now past history. The section entitled "Frequently Asked Questions – Store Cards" provided further relevant information about the basis for Santander's response, all of which related to non-disclosure of profit and commission: see [33]-[35] above. Mrs Self (or her advisers) could have asked for a breakdown of the actual level of the commission or profit share but did not do so. It can only be assumed that she was content to settle with Santander without access to that level of detail. By signing the Customer Acceptance Form, she confirmed that she knew that she was accepting Santander's offer in full and final satisfaction, as stipulated by Santander's Redress Letter and agreed by the terms of the form.

129. Mrs Self's submission that there was no consideration because Santander was already under a duty to offer and/or pay the redress sum pursuant to DISP is formulated in much the same way as Mr Harrop's, relying upon *Arrale:* she alleges that there was a pre-existing obligation because there was a duty to offer redress calculated in accordance with DISP App 3 and, subsequently, to pay redress once the offer had been accepted. The submission fails for the same reasons as Mr Harrop's: see [66]-[90] above.

130. Nor can I accept Mrs Self's submission that Santander admitted or did not dispute its liability to pay her the redress sum or her entitlement to it. For the reasons I have set out earlier, there clearly was an actual dispute. Mrs Self alleged that she qualified for relief under section 140A and wanted repayment of all premiums and associated interest; Santander offered only a fraction of all her premiums calculated on the basis of a 50% tipping point in accordance with DISP App 3. Whether Santander admitted liability to pay Mrs Self the redress sum depends on the proper interpretation of their correspondence. In Mrs Self's favour is that Santander used the word "due" both in their holding response on 28 April 2018 and in their redress letter. However, viewed overall and in context, these cannot be taken as admissions of legal entitlement: see [80] above. As Santander submitted, "there cannot be an admission of liability where no legal obligation exists and a party cannot unilaterally create a legal liability." The overwhelming sense of the Santander Redress Letter is that Santander was offering to settle an unliquidated claim on terms calculated by reference to DISP. That being so,

there is no impediment to the offer or payment of the redress sum being good consideration: see [83]-[84] above.

131. I would therefore reject Ground 1 of Mrs Self's appeal.

Discussion and resolution – Ground 2

132. Mrs Self submits that the only contractual document is Mrs Self's signed Customer Acceptance Form and that both her original Claim Letter and Santander's Redress Letter are merely background materials having limited, if any, relevance to the construction of the Customer Acceptance Form. I do not agree. The agreement between the parties was concluded by (a) the offer made in Santander's Redress Letter and (b) Mrs Self's acceptance of that offer by her signed Customer Acceptance Form.

133. Mrs Self goes on to submit that the waiver in the Customer Acceptance Form is limited to the claimant's complaint, which is a reference to the DISP process, and that there is no mention of excluding any future civil claim. This submission is, to my mind, unarguable. It would be misconceived even if it were right that the only contractual document were the signed Customer Acceptance Form. The form states that Mrs Self accepts the payment "in full and final settlement of my non-disclosure of commission complaint": see [32] above. Her non-disclosure of commission complaint was her complaint under section 140A that Santander's levels of non-disclosed commission rendered the relationship unfair and qualified her for relief pursuant to section 140B. Her complaint was nothing to do with the "DISP process", as she submits. The DISP process was merely the process by which she had come to settle her section 140A complaint. The Frequently Asked Questions section of the Customer Acceptance Form also made clear that what was being addressed was her non-disclosure complaint, because it fell squarely within the second category of unfair commission case i.e. RND cases where the section 140A unfairness of the relationship was based on the recurring failure to disclose commission or profit share: see [33] above. Treating the Santander Redress Letter as a contractual document merely serves to confirm what is plain from the terms of the Customer Acceptance Form alone. Most obviously, the Santander Redress Letter stipulated:

> "In your case, the amount we received as commission and profit share (which we'll refer to simply as 'commission') was more than 50% of the premiums you paid. Therefore we'd like to offer you £830.84 in full and final settlement of your complaint and any claim that you have against [Santander] … in respect of RND commission."

134. Thus what was settled was precisely the claim that Mrs Self now wishes to pursue, namely her section 140A claim based on the unfairness of the relationship because of Santander's failure to disclose commission or profit share.

135. I would therefore reject Ground 2 of Mrs Self's appeal.

Discussion and resolution – Ground 3

136. The Deputy District Judge recognised that it was open to him to set aside the compromise and vary its terms but was not persuaded that he should do so. He did not

expressly or clearly identify what he was required to do in an application pursuant to sections 140A and 140B and did not identify that the burden of proof rested on Santander. However, the Judge came to the conclusion that he had followed the *Holyoake* approach of looking at the matter broadly to see if a bona fide compromise had been reached, and if it had, that the court should be very slow to go behind it. He identified that the Deputy District Judge had taken nearly all of the relevant features into account. In doing so the Judge paid close attention to *Holyoake* and concluded, at [38] of his judgment:

> "38. Ultimately, however, I have reached the conclusion that I should dismiss this Ground of Appeal. Although· the Learned Deputy District Judge did at least arguably fail in material respects apparently to articulate or apply the correct approach in principle, as I have explained above, it is trite law that appeals are against Orders and not judgments or reasons. In my judgment, the Learned Deputy District Judge's ultimate conclusion on the point was not wrong, even if it could, with the benefit of hindsight, have been reasoned modestly differently. Further, I am satisfied that, applying the correct principles set out above myself, the facts in this case inevitably require that the same conclusion be reached as was in fact reached by the Learned Deputy District Judge. In fact, as set out above, the Learned Deputy District Judge himself referred to nearly all of the important matters in reaching his conclusion."

137. The Judge's reasoning started with an acceptance that the levels of commission and profit share in this case were at an extremely high level. However, applying the principles derived from *Holyoake*, he continued :

> "However, in my judgment, the compromise between the parties in the form of the signature and return of the CAF and the subsequent payment of the Purported Settlement did "cure" that historical unfairness and render the relationship a fair one. The Respondent has satisfied me ultimately that the parties' relationship is fair. Having regard to Holyoake there was, in my view, looking at the matter broadly, a bona fide compromise. It was not reached on legal advice, but it was, as the Learned Deputy District Judge correctly identified, reached with assistance from a regulated claims management company. I consider the terms of the compromise to be fair and reasonable. The Respondent applied DISP App 3 in a fair and proper way in my view. DISP App 3 was a scheme set up by the FCA to seek to achieve broadly fair results across a range of cases. The mere fact that the Commission and Profit Share was "higher than usual" (my words) did not render that approach unfair or unapplicable. The Respondent did not take unfair advantage of the Appellant. I accept that the Respondent's case would be stronger if it had openly and squarely said at the time of the Offer of Redress Letter what the actual level of the Commission and Profit Share was. However, the Appellant did have the benefit of

> advice and assistance and nothing that the Respondent did, with respect to the settlement, was "sharp" or discreditable. … . [T]here was, in my view, an objectively clear compromise which either she, as a lay person, did understand, or ought reasonably to have understood at the time."

138. Mrs Self's first submission is that there was no bona fide compromise. That seems to me to be an impossible submission given the level of transparency in Santander's explanation of its position as set out in its Redress Letter and the Customer Acceptance Form. I have explained why the provisions of DISP did not give rise to a legal obligation to pay the settlement sum; but the fact remains that, in making its offer, Santander was complying with best practice as indicated by DISP and offering to settle at a level that was supportable by reference to DISP App 3. There was undoubtedly a dispute and, for the reasons I have given, Mrs Self had no entitlement to any particular sum in satisfaction of her unliquidated claim. I reject the submission that Santander's Redress Letter purported to offer to pay redress that was due to the claimant so as to render it colourable. I also reject the submission that Santander took unfair advantage of Mrs Self. The terms of their offer were expressed in a manner that should have been clear to a lay person and, for good measure, were copied to her paid specialist advisers UC4M. For the reasons I have given, it was open to Santander to offer to settle at the level and on the terms that they did: see [79]-[80], [84] above. Given the level of transparency and clarity about the basis of the offer, I also reject the submission that the failure to provide a monthly breakdown or to disclose precisely the percentage levels of Santander's commission and profit share rendered the relationship unfair: as I have said, Mrs Self or her advisers could have asked for such a breakdown had they thought it important but chose not to do so.

139. Mrs Self produced a witness statement, which the Judge took into account, in which she said that she regarded the sum that she accepted as a payment on account. That is simply impossible to accept on any objective basis: at best it must be retrospective reconstruction. The terms of the offer and acceptance were crystal clear and, as with Mr Harrop, I reject the suggestion that she needed legal advice or that a failure to obtain legal advice rendered the settlement into which she entered vulnerable to being re-opened.

140. Looking at the matter broadly, I conclude that the parties reached a bona fide settlement and that, although she did not obtain legal advice, the compromise was entered into in circumstances where she had access to paid specialist advice from UC4M. In those circumstances, the court should be very slow to go behind the compromise. That does not automatically mean that the relationship between Mrs Self and Santander was fair. However, in the circumstances of this case, the Deputy District Judge was entitled to reach the conclusion that he did and the Judge was entitled to uphold his decision for the reasons he gave. I would reach the same conclusion as the Judge and the Deputy District Judge and hold that Santander has discharged the burden of showing that the relationship was fair. In reaching this conclusion I would rely upon essentially the same features as applied in the case of Mr Harrop and Skipton. The fact that Santander followed the guidance set out in DISP (and DISP App 3 in particular) is a significant, but not determinative consideration, for the reasons I have explained earlier in this judgment.

141. I would therefore reject Ground 3 of Mrs Self's appeal.

142. Accordingly, I would dismiss Mrs Self's appeal.

Lady Justice Asplin

143. I agree.

The Chancellor

144. I also agree.