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Judgment: approved by the Court for handing down | *Delivered:* **14/11/2019**

(subject to editorial corrections)*

2009 No 10230

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

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BETWEEN:

SWIFT ADVANCES PLC

Respondent;

and

KEITH SCOTT AND ELIZABETH MARY MYTHEN

Appellants.

_____

HORNER J

[1] At the request of the parties I gave judgment on the primary issue of whether the Credit Agreement entered into between Swift Advances Plc ("the Lender") and Keith Scott and Elizabeth Mary Mythen ("the Borrowers") was an agreement regulated under the Consumer Credit Act 1974 ("the Act"). Following the handing down of that judgment I have been asked to deal with the remaining issues which exist between the Borrowers and the Lender, namely whether Sections 56 and/or 75 of the Act apply and whether the relationship between the Lender and the Borrowers was an unfair relationship under 140A of the Act and, if so, what relief the Borrowers are entitled to under Section 140B.

[2] The facts forming the background against which this dispute is played out are set out in my earlier judgment: see [2018] NICh 28. I do not propose to rehearse them, save to say:

(a) The Borrowers took out a total loan of £28,500 from the Lender, comprised of £25,000 to pay off credit card debts and to make renovations to their home at 14 Hazel Grove, Castlederg: and

(b) The balance of the loan was used by the Borrowers to pay a Personal Protection Insurance (PPI) policy for a premium of £3,500.

(c) This policy was patently inappropriate to the Borrowers' needs. Further it provided the credit broker, Ocean Finance ("the broker") who arranged the credit agreement, with a very substantial commission which was not disclosed to the Borrowers.

[3] An issue arose as to whether or not the broker had told the Borrowers that the taking out of PPI was a pre-requisite to their obtaining a loan which was to be secured on their home which was otherwise unencumbered. For the reasons which appear, I do not need to reach a decision on that issue.

Decision

[4] I consider that Section 56 of the Act applies only to regulated agreements. I have found that this was not a regulated agreement and that therefore the court need not concern itself with any antecedent negotiations and the liability of the Lender for the actions of the broker. In any event Section 56 does not make the Lender responsible for antecedent negotiations undertaken by a broker as this case does not fall into the ambit of section 56 (1) (b) or (c).

[5] Secondly I do not consider that the Borrowers can call in aid Section 75 which provides that:

> "If a debtor under a debtor-creditor-supplier agreement falling within Section 12(b) or (c) has … any claim against the supplier in respect of the misrepresentation of breach of contract, he shall have a like claim against the creditor, who, with the supplier, shall accordingly be jointly and civilly liable to the debtor."

[6] Section 12 provides the circumstances in which a debtor-creditor-supplier agreement is a regulated consumer agreement and does not apply to this transaction. Accordingly the Borrowers cannot call in aid Section 75. In any event the antecedent negotiations were carried on by the broker, not the supplier of the PPI. It was the broker, not the supplier of the PPI who claimed it was a condition precedent for receiving a loan.

[7] However I am satisfied that there was an unfair relationship between the Borrowers and the Lender arising out of the agreement. My reasons for so concluding are as follows:

(i) The policy was singularly ill-suited to their needs, being for 5 years which did not cover the full term of the loan which was 10 years; and

(ii) More importantly there was a substantial undisclosed commission paid to the broker. I have no doubt from hearing the evidence that the PPI policy was

sold and credit provided for its purchase not to help the Borrowers but to earn a large, substantial and unmerited commission for the broker.

[8] In *Hurstanger v Wilson & Anor* [2007] EWCA Civ 229 Tuckey LJ said at paragraph [34]:

> "The broker could only have acted in this way if the defendants had consented to his doing so *with full knowledge of all material circumstances and of the nature and extent of [his] interest*: Bowstead and Reynolds on Agency, 18th Ed (2006), Article 44 para 6-055 – duty to make full disclosure. An agent who receives commission without the informed consent of his principal will be in breach of fiduciary duty. A third party paying commission knowing of the agency will be an accessory to such a breach. Remedies for breach of fiduciary duty are equitable: they of course include rescission and compensation."

Master Ellison followed this reasoning in his decision in *Melbourne Mortgages Ltd v Gerard Berry* [2013] NI Master 3.

[9] In *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61 the Supreme Court had to adjudicate in respect of circumstances where a widow refinanced her liabilities by taking out a loan with the defendant of £34,000 and also paid a PPI premium of £5,780. 71.8% of the premium was taken in commissions before it was remitted by the lender to Norwich Union. Neither the amount of the commission nor the identity of the recipient was disclosed. Lord Sumption giving judgment for the Court said at paragraph 10:

> "Section 140A (of the Act) 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. In a case like the present one, where the terms themselves are not intrinsically unfair, this will often be because the relationship is so one-sided as substantially to limit the debtor's ability to choose. Secondly, although the court is concerned with hardship to the debtor, sub-section 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 the legitimate interests of the creditor. Thirdly the alleged unfairness may arise from one of the three categories of cause listed at sub-paragraphs (a) to (c). 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 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.'"

[10] At paragraph [20] Lord Sumption goes on to say:

> "[20] … 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 here."

[11] Finally at paragraph [41] Lord Sumption concludes:

> "My conclusion that the non-disclosure of the amount of the commissions made Paragon's relationship with Mrs Plevin unfair is enough to justify the reopening of the transaction under Section 140A. It is however, the only basis on which the transaction can be reopened. It follows that the appeal must dismissed, although for reasons different from those given by the Court of Appeal, but that the case must be remitted to the Manchester County Court to decide what if any relief under Section 140B should be ordered unless that can be agreed."

[12] It was argued on behalf of one the Borrowers, albeit somewhat tentatively, that the interest charged on the loan was so high as to make the relationship itself unfair. But this was prime lending and it was a submission which was never

developed by either of the Borrowers. I reject it because of the nature of the lending involved, the interest charged was bound to be higher than normal: e.g. see *Mohamad Khodari v Fahad Al Tamimi* [2008] EWHC 3065 (QB).

Relief under Section 140B

[13] Section 140B of the Act provides that the powers of the court in relation to unfair relationships are as follows:

> "(1) An order under this section 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 his surety by virtue of the agreement or any related agreement (whether paid by 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;
>
> (c) reduce or discharge any sum payable by the debtor or by his surety by virtue of the agreement or related agreement …"

[14] Therefore the court has a wide discretion as to what relief it should grant. That discretion has been exercised in a number of different ways. I have duly considered most of those reported cases in which the court has exercised its discretion under this provision.

[15] In this case the Borrowers have had the benefit of the loan and used it no doubt to pay off their credit card debts and to renovate their house as per their original intentions. They have had no benefit from the PPI which was mis-sold to them. I am satisfied that the Borrowers would not have taken out the PPI if they had known of the commission to be paid to the broker never mind that it only covered part of the period of the loan. In all the circumstances and looking at the various ways in which other courts have acted, I consider that the Borrowers should be excused any liability in respect of the PPI premium. Accordingly their only liability is for the loan of £25,000 plus the interest which has accrued due on that agreement to date. Therefore they have no obligation to pay the £3,500 premium or any interest which has accrued due in respect of that sum.

[16] I will hear the parties on what the appropriate order for costs should be when they have had time to consider this judgment and I have had an opportunity to consider any Calderbank offers etc.