Neutral Citation Number: [2021] EWCA Civ 1832

Case Nos: B2/2021/0154 & B2/2021/0887

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM PLYMOUTH DISTRICT REGISTRY
HIS HONOUR JUDGE GORE QC
F05YM581
ON APPEAL FROM NORTHAMPTON COUNTY COURT and FAMILY COURT
HIS HONOUR JUDGE MURDOCH
F07YM941

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/12/2021

Before :

LADY JUSTICE MACUR
LORD JUSTICE COULSON
and
LORD JUSTICE BIRSS

- -

Between :

KAREN SMITH **DEREK BURRELL**	**Respondents**
- and -	
THE ROYAL BANK OF SCOTLAND PLC	**Appellant**

- -

John Taylor QC and Giles Robertson (instructed by **Pinsent Masons LLP**) for the **Appellants**
Robert Weir QC and Jonathan Butters (instructed by **Cheval Legal Ltd**) for the **Respondents**

Hearing date: 14 October 2021

- -

Approved Judgment

Lord Justice Birss:

1. These two appeals relate to claims for compensation under the Consumer Credit Act 1974 arising from payment protection insurance ("PPI") policies taken out at the same time as agreements for credit cards from the Royal Bank of Scotland ("RBS"). The issues in this appeal are about how the Act in its form as amended on 6 April 2007 applies to cases in which the PPI policy was terminated before the amendments to the Act came into force. There are numerous PPI cases coming before judges in the County Court at the moment. We were told that different courts have reached different conclusions on this issue and therefore authoritative guidance is required.

2. The appeals involve two claims against RBS, one brought by Karen Smith and the other by Derek Burrell. By agreement, the oral argument before this court focussed entirely on the case brought by Ms Smith, which was heard at first instance by DJ Stone and then on appeal by HHJ Gore QC.

The sequence of events relating to Ms Smith

3. In January 2000 Ms Smith's application for a credit card from RBS was successful. From that point on she had a credit card agreement with RBS. At the same time Ms Smith also entered into a separate insurance contract with the Direct Line insurance company. This insurance contract was the PPI contract. It insured her payments under the credit card in case of death/illness or unemployment. Monthly PPI premiums were charged to her credit card as a percentage of the outstanding balance. Each monthly credit card statement included an entry stating the cost of the PPI for that month. Ms Smith was also liable to pay interest on unpaid monthly balances, including the PPI premiums.

4. The only document signed by Ms Smith when she applied to enter the credit agreement was the RBS application form. On the form Ms Smith ticked a box on the form next to the words "We strongly recommend you take out this cover. For cover just tick this box." By that mechanism Ms Smith entered into the PPI contract.

5. In fact, and unknown to Ms Smith at the time, RBS received commission payments on the PPI policy premiums. We know the value of these commissions was larger than 50% of the premium but RBS has never said how much they actually were.

6. Ms Smith terminated the PPI policy in March 2006. The last payment made under the PPI policy was in April 2006.

7. On 6 April 2007 the amendments to the 1974 Act by the Consumer Credit Act 2006 came into effect. There was a transitional period (see below) which ended in April 2008. Broadly stated, the amendments repealed the existing law which had given consumers the right to bring claims for extortionate credit bargains and replaced it with a new law based on bringing a claim for an unfair credit relationship. The new law would apply to an existing credit agreement if it remained in force after the end of the transitional period. The new law would not apply to a credit agreement which was a "completed agreement" (see below) by the end of the transitional period.

8. The credit agreement between Ms Smith and RBS was cancelled in 2015.

9. Meanwhile, in November 2014 the Supreme Court decided the case of ***Plevin v Paragon Personal Finance*** [2014] UKSC 61. It is common ground before us that the effect of this decision is that, assuming the relevant parts of the Act apply (which the bank disputes), the relationship between the bank and Ms Smith during the time when she paid PPI premiums was unfair. The nature of the unfairness was explained by Lord Sumption in ***Plevin*** at paragraph 18:

> 18 I turn therefore to the question whether the non-disclosure of the commissions payable out of Mrs Plevin's PPI premium made her relationship with Paragon unfair. In my opinion, 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. Mrs Plevin's evidence, as recorded by the recorder, was that if she had known that 71.8% of the premium would be paid out in commissions, she would have "certainly questioned this". I do not find that evidence surprising. The information was of critical relevance. Of course, had she shopped around, she would not necessarily have got better terms. As the Competition Commission's report suggests, this was not a competitive market. But Mrs Plevin did not have to take PPI at all. Any reasonable person in her 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.

10. In other words the customer did not have to take out the PPI policy at all. The unfairness arose from the failure to disclose the existence and scale of the PPI commission, which was information which, had they been given it, would have led any reasonable person in that position to question whether the insurance represented value for money, and whether it was a sensible transaction to enter into at all.

11. In February 2018 Ms Smith received £529.80 from RBS under the redress scheme mandated by the Financial Conduct Authority. This sum repaid part of the commission and interest.

12. On 19 August 2019 Ms Smith's county court claim was issued. It sought repayment of all PPI premiums she paid between January 2000 and April 2006 with interest.

13. The claim came before DJ Stone sitting in Bodmin on 21 January 2020. Mr Taylor QC who appeared before us for the appellant bank also appeared before DJ Stone. Ms Smith was there represented by Mr Butters of counsel, who was led by Mr Weir QC before this court. In a reserved judgment given on 9 March 2020 DJ Stone upheld Ms Smith's claim, making an order requiring RBS to pay £1,346.29 to Ms Smith as well as costs. That sum represented the whole of the PPI premiums paid (with interest) less the sum already awarded by the FCA under the redress scheme. Irrespective of the outcome of this appeal, I would like to pay tribute to DJ Stone's judgment. It is a model of precision, and clear and concise handling of the issues. The bank appealed and that came before HHJ Gore. He dismissed the appeal. The matter comes before us as a second appeal, with permission given by Asplin LJ.

The facts of Mr Burrell's case

14. The relevant facts of Mr Burrell's case can be stated shortly. The credit card agreement, together with PPI policy, was entered into in 1998. There is no material difference between the agreements and circumstances at this stage between Ms Smith and Mr Burrell. The PPI policy was cancelled in March 2008. The credit card agreement continued into 2019. A payment by RBS under the FCA scheme was made in 2017 and the claim was issued in August 2019. The Court (DDJ Crow) found for Mr Burrell and that conclusion was upheld on appeal by HHJ Murdoch. In terms of the grounds of appeal the issues are the same as for Ms Smith.

The legislation

15. The relevant sections of the 1974 Act are s140A to s140C. Section 140A is as follows:

> **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).
>
> (3) For the purposes of this section the court shall (except to the extent that it is not appropriate to do so) treat anything done (or not done) by, or on behalf of, or in relation to, an associate or a former associate of the creditor as if done (or not done) by, or on behalf of, or in relation to, the creditor.
>
> (4) A determination may be made under this section in relation to a relationship notwithstanding that the relationship may have ended.
>
> *[…]*

16. This section provides the conditions to be satisfied in order for the Court to have power to make one of the remedy orders in s140B. There must be a finding that the relationship between the creditor and the debtor is unfair (s140A(1)) and the unfairness must arise from one or more of the bases specified in sub-sections (a) to (c). The relationship concerned is the one arising out of the credit agreement itself or arising out of the credit agreement taken together with any related agreement. The terms creditor, debtor, credit agreement and related agreement are all defined in s140C. There is no need to set out those definitions. In the present case the respondents are debtors and RBS is the creditor. It is (now) common ground that the relevant credit card agreements are "credit agreements" and the PPI contracts are "related agreements" within the Act. Each PPI contract is a related agreement because they fall within s140C(4)(b) as a "linked transaction" to the main agreement.

17. Section 140B provides (so far as relevant):

> **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;
>
> (c) reduce or discharge any sum payable by the debtor or by a surety by virtue of the agreement or any related agreement;
>
> (d) direct the return to a surety of any property provided by him for the purposes of a security;

> (e) otherwise set aside (in whole or in part) any duty imposed on the debtor or on a surety by virtue of the agreement or any related agreement;
>
> (f) alter the terms of the agreement or of any related agreement;
>
> (g) direct accounts to be taken, or (in Scotland) an accounting to be made, between any persons.
>
> (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;
>
> (b) at the instance of the debtor or a surety in any proceedings in any court to which the debtor and the creditor are parties, being proceedings to enforce the agreement or any related agreement; or
>
> (c) at the instance of the debtor or a surety in any other proceedings in any court where the amount paid or payable under the agreement or any related agreement is relevant.
>
> *[…]*
>
> (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.

18. The remedies available include a power to order the creditor to repay any sum paid by the debtor by virtue of the credit agreement or any related agreement.

19. There is no need to set out the terms of definition section 140C beyond noting that the section includes provisions which bring in credit agreements consolidated by the main credit agreement (s140C(4), (7) and (8))

20. The relevant transitional provisions are paragraphs 14 and 16 of Schedule 3 to the 2006 Act. Paragraph 14 is as follows:

> *Unfair relationships*
>
> 14 (1) The court may make an order under section 140B of the 1974 Act in connection with a credit agreement made before the commencement of section 20 of this Act but only—
>
> (a) on an application of the kind mentioned in paragraph (a) of subsection (2) of section 140B made at a time after the end of the transitional period; or

> (b) at the instance of the debtor or a surety in any proceedings of the kind mentioned in paragraph (b) or (c) of that subsection which were commenced at such a time.
>
> (2) But the court shall not make such an order in connection with such an agreement so made if the agreement—
>
> (a) became a completed agreement before the commencement of section 20; or
>
> (b) becomes a completed agreement during the transitional period.
>
> (3) Expressions used in sections 140A to 140C of the 1974 Act have the same meaning in this paragraph as they have in those sections.
>
> (4) In this paragraph "the transitional period" means the period of one year beginning with the day of the commencement of section 20.
>
> (5) An order under section 69 of this Act may extend, or further extend, the transitional period.

21. This provision works in the following way. Section 20 of the 2006 Act (referred to at para 14(1)) is the section which amends the 1974 Act to replace the old extortionate bargain provisions with the new unfair relationship provisions in ss140A-140B. For some reason s140C is brought in by a different section (s21) of the 2006 Act. The date of commencement of ss20 -21 is 6 April 2007. A transitional period of one year is set up to run from that date (para 14(4)). By paragraph 14(1) the powers in s140B can be exercised in connection with a credit agreement made before 6 April 2007 but only in proceedings brought after the end of the transitional period (i.e. after 6 April 2008). By paragraph 14(2) this will not apply to a credit agreement which becomes a "completed agreement" before the end of the transitional period. Completed agreement is defined in paragraph 1 of Sch 3. Essentially once no sum is payable under the agreement then it is a completed agreement.

22. Paragraph 16 is as follows:

> 16 (1) It is immaterial for the purposes of section 140C(4)(a) to (c) of the 1974 Act when (as the case may be) a credit agreement or a linked transaction was made or a security was provided.
>
> [*ss(2) and (3) relate to orders made during the transitional period and are irrelevant*]
>
> (4) In relation to an order made under section 140B after the end of the transitional period in connection with a credit agreement—

> (a) references in subsection (1) of that section to any related agreement shall not include references to a related agreement to which this sub-paragraph applies;
>
> (b) the reference to a security in paragraph (d) of that subsection shall not include a reference to a security to which this sub-paragraph applies; and the order shall not under paragraph (g) of that subsection direct accounts to be taken, or (in Scotland) an accounting to be made, between any persons in relation to a related agreement to which this sub-paragraph applies.
>
> (5) Sub-paragraph (4) applies to a related agreement or a security if—
>
> (a) it was made or provided before the commencement of section 21; and
>
> (b) it ceased to have any operation before the end of the transitional period.
>
> (6) Expressions used in sections 140A to 140C of the 1974 Act have the same meanings in this paragraph as they have in those sections.
>
> (7) In this paragraph "the transitional period" means the period of one year beginning with the day of the commencement of section 21.
>
> (8) An order under section 69 of this Act may extend, or further extend, the transitional period.

23. Sub-paragraph 16(1) is concerned with the provisions in the definition section 140C which define related agreements. The sub-paragraph provides that it is immaterial for the purposes of that definition when the credit agreement or the linked transaction was made. Thus in this case the PPI agreements are "related agreements".

24. Sub-paragraphs 14(4) and (5) relate to orders made after the transitional period. Starting with paragraph 14(5), this provides that sub-paragraph 14(4) applies to a related agreement which was made before 6 April 2007 and also ceased to have operation before the end of the transitional period (6 April 2008). Thus it is common ground this provision applies to the PPI agreements in the present case since they both started before 6 April 2007 and ended before 6 April 2008. By sub-paragraph 14(4) the remedies provisions in s140B must be read as not including any references to any related agreements to which the sub-paragraph applies. So in the present case it is also common ground that the remedies provisions must be read in that way in this case. The parties disagree about the full implications of this but the essentials of this scheme are not in dispute.

25. It is plain that the reason for the extra wording in sub-paragraph 14(4) after (a) and (b), which refers to accounts in 140B(1)(g), is there to make clear that an account

under s140B(1)(g) is not to be ordered in relation to such an excluded related agreement. The wording is necessary because s140B(1)(g) did apply to related agreements but on its face did not include an express reference to them.

26. The relevant section of the Limitation Act 1980 is section 9, as follows:

> **9 Time limit for actions for sums recoverable by statute.**
>
> (1) An action to recover any sum recoverable by virtue of any enactment shall not be brought after the expiration of six years from the date on which the cause of action accrued.
>
> (2) Subsection (1) above shall not affect any action to which section 10 of this Act applies.

Conclusions of DJ Stone (and HHJ Gore)

27. There were a number of issues before DJ Stone which no longer matter. The relevant issues for this appeal were: (i) the unfairness of the relationship, (ii) RBS's submission that the transitional provisions meant that Ms Smith had no cause of action, and (iii) RBS's submission that the claim was barred by the Limitation Act. The judge also noted (judgment paragraphs 30-31) that for limitation Ms Smith was not relying on any point that time did not start to run by s32 of the Limitation Act as a result of the bank's concealment of the commissions.

28. On the issue of unfairness DJ Stone held, following ***Plevin***, that the relationship between Ms Smith and RBS was unfair. He also held that that unfairness persisted for the duration of the parties' relationship which ended in 2015. The relevant parts of his judgment are these:

> 16. Mrs Smith alleges her relationship with the Bank for the purposes of sl40A(l)(c) of the Act is unfair because the Bank failed to tell her before she entered into the PPI policy that the Bank would receive commissions. In light of sl40B(9) of the Act the Bank then bears the burden of proving that the relationship is not unfair.
>
> 17. Whilst the Bank's pleaded defence is that the relationship between it and Mrs Smith is not unfair, it has provided no evidence to support its position and at the hearing Mr Taylor did not seek to persuade me of the fairness of the relationship.
>
> 18. It remains for the court to determine whether the relationship is unfair in light of the evidence. There is no dispute that the Bank failed to tell Mrs Smith that it would receive commissions in respect of PPI premiums. In *Plevin v Paragon Personal Finance Limited* [2014] Lord Sumption said at para 18 as follows:
>
> *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.*
>
> 19. Mrs Plevin was told by the lender that some commission would be payable; Mrs Smith was not. The Bank provided no information to Mrs Smith that would enable her to discern that it would be receiving commission. She was kept in total ignorance, but the Bank knew that it would be taking commission and it knew the extent of that commission. It follows that the inequality of knowledge was total and as a result of course the relationship was unfair.
>
> 20. That unfairness persisted for the duration of the parties' relationship, which ended in 2015 when the Credit Agreement came to an end. Whilst it must now be apparent to Mrs Smith that commission was paid, and that the commission was more than 50% of the premiums paid (because the sum paid to Mrs Smith under the FCA Redress scheme was apparently calculated to reflect commissions paid in excess of 50%), the Bank has still even now not told her what percentage of the PPI payments she made was paid to it as commission.

29. Note that the finding at paragraph 20 goes further than what is now common ground because RBS only accepts that the relationship was unfair while the PPI agreement was in force; and note also that the citation from ***Plevin*** does not include the whole of Lord Sumption's paragraph 18. I will return to that below.

30. On the topic of the transitional provisions and no cause of action, the point made by RBS was that since the PPI agreement, as a related agreement, ended before the end of the transitional period, paragraph 16(4) applies. Thus the remedies available in s140B do not include repayment of sums paid under that agreement. Thus, contended RBS, Ms Smith has no cause of action. However DJ Stone, while accepting that an order under 140B could not be made in relation to payments made solely under such a related agreement (see ***Soulsby v Firstplus Group*** [2010] CTLC 177 (Judge Langan QC)), rejected the submission that in the present case Ms Smith had no cause of action. That was because all the sums paid towards the PPI policy were not only paid by virtue of the PPI policy but were also paid by virtue of the credit agreement itself, which was unaffected by the transitional provisions. The relevant parts of his judgment are paragraphs 27-29. Paragraph 27 contains a full analysis of the facts. There is no need to set them out. The conclusions at paragraphs 28-29 are:

> 28. Taking those findings together, I find that all sums paid towards the PPI policy were paid by virtue of the Credit Agreement: the PPI Agreement could not be entered into (incurring the monthly premiums) except by virtue of a tick in the box on the Credit Agreement application form; the PPI Agreement could only subsist for so long as the Credit Agreement endured; the resulting monthly PPI premiums could only be calculated by reference to the liability incurred under the Credit Agreement; and Mrs Smith could only pay for the monthly PPI premiums by making payments in accordance with the Credit Agreement.
>
> 29. It follows that Mrs Smith paid the monthly PPI premiums by virtue of the PPI Agreement, and also paid those same sums by virtue of the Credit Agreement. Schedule 3 to the Consumer Credit Act 2006 does not therefore affect the court's ability to make an order for repayment of the sums Mrs Smith paid by virtue of the Credit Agreement

31. The final issue was limitation. This was dealt with in paragraph 32 to 50 of the judgment. It was common ground that s9 of the Limitation Act was the relevant provision. The issue was the point at which the cause of action could be said to have accrued. DJ Stone held that the judgment of George Leggatt QC (as he then was) in ***Patel v Patel*** [2009] EWHC 3264 QB was binding on him and, at paragraph 66, was authority for the proposition that the cause of action under s140A was a continuing one which accrues from day to day and an application for relief under s140B can be made at any time during the currency of the relevant relationship. Therefore time started to run when the relationship ended in 2015 and so the limitation defence had to fail (DJ Stone paragraph 39). RBS cited a number of authorities to DJ Stone such as ***Hill v Spread Trustee*** [2007] 1 QB 702 (itself citing ***Letang v Cooper*** [1967] 1 QB 232) for the well known proposition that a cause of action is complete when all the facts which would be necessary to prove, if traversed, in support of the right to a judgment of the court, can be pleaded. Therefore it was submitted that the cause of action accrued when the premiums were paid, and the last one of those was in 2006. However the judge rejected the submission based on ***Hill v Spread Trustee*** paragraph 45 making two points: (a) that it was not the payment which gives rise to the cause of action but the unfairness of the relationship; and (b) the requirement of s140A is to determine whether the relationship "is" unfair (present tense) rather than whether it was or became unfair (past tense). The judge concluded:

> 47. Where the relationship has ended then inevitably that continuum is broken: there can be no continuing unfairness if there is no continuing relationship. As a result time for limitation purposes must then start to run. When assessing whether the relationship is unfair, that can only mean whether it was unfair at the point that it ended, being the most recently available point at which the court can make that assessment.
>
> 48. Mr Taylor suggests in his written argument that such an outcome is "absurd" because it means that payments made literally decades ago under the PPI policy would not become time-barred until 6 years after the Credit Agreement ended.

> Perhaps more absurd would be to suggest that if during their relationship the Bank continued to keep Mrs Smith in total ignorance for long enough after cancellation of the PPI policy that she would, as a result of that ignorance, be deprived of a cause of action, and that that Bank would benefit accordingly.
>
> 49. As an aside, I observe that if the Bank had not continued to keep her in total ignorance, and had written to her more than 6 years before the commencement of proceedings setting out the commissions it had received, then it would be open to a court either to conclude that after that period of time the relationship is now at the point of determination no longer unfair; or that it should be slow when exercising its discretion as to remedy to order the return of the sums paid.
>
> 50. As it is, the Bank's limitation defence cannot succeed.

32. On appeal before HHJ Gore QC, the judge upheld the conclusion reached by DJ Stone on the basis of two pleading points taken by Judge Gore of his own motion. He also went on to uphold the District Judge's substantive conclusions as well. The pleading points were Ground 1 of the appeal in Smith but on this appeal counsel for the respondents does not seek to rely on them.

The arguments on appeal

33. RBS advances two grounds of appeal. The first (strictly Ground 2) is that when the effect of the transitional provisions are applied correctly, Ms Smith has no cause of action at all. The second (Ground 3) is that in any event Ms Smith's claim is time barred by s9 of the Limitation Act. These two grounds are essentially the same as the two major points addressed in the courts below although the arguments on the first one in particular have shifted somewhat. The respondents dispute each ground. I will summarise the parties' rival arguments on both aspects of the case first because there is some overlap between them.

34. The case for RBS on the first submission is as follows. If a related agreement ends before or during the transitional period, the unfair relationship provisions do not apply to it. The PPI Policy was entered into and ended before the end of the transitional period and therefore no order can be made in respect of monies paid "by virtue" of the PPI Policy. Only the credit card agreement is subject to ss140A-C as it continued after 6 April 2008. No allegations were made by Ms Smith or Mr Burrell that the relationship arising out of the credit card agreement is unfair. It goes against the policy underlying the transitional provisions, which is not to allow repayment claims in respect of agreements that ended before ss.140A-C came into force, to say that the PPI payments were made 'by virtue of' the credit card agreement. The purpose of the transitional period was to give the industry time to adjust so that unfair agreements were ended and those carrying on complied with the new law. If what is 'in connection with a related agreement' can simply be re-characterised as 'in connection with the main agreement', then Sch 3 para 16 has no effect at all.

35. RBS contends that this submission is consistent with the general presumption that legislation does not have retrospective effect unless that construction appears very

clearly or arises by necessary and distinct implication (***Ingle v Farrand*** [1927] AC 417 at 428). If the legislation is intended to have some retrospective effect, it should not be given any greater retrospective effect than necessary to achieve the legislative intention (*Bennion on Statutory Interpretation* paragraphs 7.13-7.14). This indicates that the respondent's construction of the transitional provisions is wrong. The Explanatory Notes accompanying the 2006 Consumer Credit Bill state at paragraph 112 that ss137-140 CCA 1974 will continue to apply to agreements that have been completed before the end of the transitional period. The Questions and Answers on the Consumer Credit Bill given by the DTI affirm this position as well as did the Minister, Lord Sainsbury, on 8 November 2005 at the Committee stage of the Bill in the House of Lords. Even the judge's finding that the PPI premiums were payable virtue of both the PPI Policy and the credit card agreement, still involves finding that they are payable by virtue of the PPI Policy and thus ought to be irrecoverable.

36. The submissions to the contrary are as follows. Sch 3 para 14 provides for the retrospective operation of the ss140A-C regime. The credit agreements in this case endured beyond 6 April 2008 and the claims were brought appropriately by the debtors/claimants. The relationships arising out of the credit agreements considered with the PPI Policy (a related agreement) were held to be unfair. There is no appeal against the finding of an unfair relationship. The bank's case depends on holding that the transitional provisions strike the reference to a related agreement out of s140A as well as s140B. However they do not. Paragraph 16 only deletes the reference to a related agreement from s140B and not s140A, meaning the PPI Policy may still be taken into account in the unfairness assessment. An invitation for the court to strike down words in a statute and to interpret the scope of protection restrictively runs counter to the legislative purpose to protect consumers (***Forthright Finance Ltd v Ingate*** [1997] 4 All ER 99 at 106). The extortionate credit bargains regime was regarded as having been too technical and setting the bar for judicial intervention too high (***Plevin*** in the Court of Appeal at [52]).

37. The respondents also contend that it is wrong to say the relationship ceased to be unfair when the PPI agreement ended because the court may not compartmentalise the relationship into parts – it must consider the "whole of the relationship" and "all relevant factors". This is supported by the judgment of Kitchin LJ in ***Scotland v British Credit Trust Ltd*** [2014] EWCA Civ 790 at [78]. ***Scotland*** is also significant for upholding part of the reasoning in ***Patel*** (***Scotland*** at [82]). Regarding the remedy under s.140B, the court had the power to require the defendant to repay any sum paid by the claimant by virtue of the credit agreement. The court found that the premiums and interest were paid by virtue of the credit agreement. RBS's contention that the payments were made only by virtue of the PPI agreements is wrong in fact and unsustainable in law. In terms of the correct approach to statutory construction, there is no material ambiguity and this case is not one in which ***Pepper v Hart*** [1993] AC 593 is engaged. Therefore Hansard is inadmissible. The Explanatory Notes and Q&A are admissible to identify the policy of the legislation and they support the respondents' case not the appellant's. If RBS wished to take advantage of the transitional period it could have terminated the credit agreements and started new credit agreements on the basis of a fair relationship.

38. Turning to the second, limitation, issue, the case for RBS is as follows. The date when a cause of action for recovery of a sum under the Limitation Act accrues is

when all the facts necessary to make that claim have occurred. In this case that is on the date the payment was made. This general proposition is supported by ***Central Electricity Board v Halifax Corporation*** [1963] AC 785 at 806, ***Letang v Cooper***, ***Hill v Spread Trustee Co Ltd***, and ***Re Farmizer (Products) Ltd*** [1977] BCC 655. Reference is also made to ***Nolan v Wright*** [2009] 2 All ER (Comm) 503 which held that the limitation period for a cause of action to recover payment under the extortionate credit bargain regime was held to accrue on the date payment had been made. The *Encyclopaedia of Consumer Credit Law* (Eds Lomnicka and Guest) supports the view that the 6-year limitation period to recover money under ss140A-C accrues on the date payment is made. This result is consistent with policy: contracting parties need to know when the potential liability comes to an end so they can move on with certainty. The question is when Ms Smith could have first pleaded the necessary facts and the answer is that the necessary facts could have been pleaded when the payment(s) were made. If the failure to tell the respondents about the commission is relevant to limitation, it is relevant to s32 of the Act and should not affect the principled analysis of the accrual of the cause of action under s9.

39. In relation to ***Patel***, RBS contends that it was not concerned with s9 of the Limitation Act but with s8 and is irrelevant. If, to the contrary, ***Patel*** is relevant then it was wrong to hold that a cause of action accrues continuously for a potentially indefinite period until the end of the credit card agreement. Such a finding is contrary to binding authority such as ***Central Electricity Board***, ***Hill v Spread Trustee*** and ***Re Farmizer***. ***Patel*** can also be distinguished because, unlike in this case, all the relevant facts in ***Patel*** giving rise to the cause of action arose much later (some even arose during trial). ***Scotland*** is irrelevant because limitation was not argued in that case. The fact the court has regard to all matters it considers relevant is no reason for a case not to be time-barred if those matters and the sought-after remedy concern a period of time outside the limitation period. Different causes of action can arise (each time-barred at different times) following conceptually different instances of unfairness with different remedies sought for each. The respondents' argument is that in effect accrual of the cause of action can be postponed indefinitely as on each day a relationship and its fairness is a different 'fact' to what it was on the previous day.

40. In reply, the respondents argue that it is the end of the relationship that fixes the cause of action. In ***Scotland*** it was there held that considering the whole relationship necessarily meant that even where the relationship started before what was the relevant limitation period in that case (12 years under s8 of the 1980 Act), the court was not precluded by the limitation period from taking into account matters which occurred more than 12 years before (***Scotland*** [82]). It follows from this, and from the fact that the fairness of the relationship is determined at the end of the relationship (s140A(4)) (or at trial in the case of an ongoing relationship), that the limitation period runs from the end of the relationship or the date of trial in the case of ongoing relationships. As a prior judgment of the Court of Appeal, ***Scotland*** is binding. ***Patel*** is relevant despite being a case in which s8 of the Limitation 1980 Act was considered, since the trigger for the limitation periods of s8 and s9 are the same. Although ***Patel*** can be distinguished on the facts, it is relevant and persuasive on the matter of accrual of the cause of action under s.140A despite the remedy not being a money remedy (as in this case). ***Wood v CFBL*** [2019] EWHC 2205 (Ch), a High Court case, applied ***Patel*** to a ss140A-C claim for recovery of money (to which s9 of the 1980 Act applies.)

Assessment

41. The place to start is to construe the legislation as whole, in the light of the policy behind it, in order to determine how the claims provided for are intended by the legislator to work.

42. As Lord Sumption explained in ***Plevin*** at [10], s140A is deliberately framed in wide terms and 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. In the same case, when it was before the Court of Appeal, Briggs LJ (as he then was) explained at [52] that the unfair relationship regime established by ss140A-B replaced the earlier extortionate credit bargain regime, which was regarded as having been too technical, and as having set the bar for court intervention too high. Also relevant is the judgment of Kitchin LJ in ***Scotland*** at [25] which made the same point, explaining that the new scheme was intended to provide consumers with enhanced protection. These explanations are relevant to understand the amendments and were not contradicted by anything in the Supreme Court in ***Plevin*** (***Scotland*** was cited in argument in ***Plevin***).

43. Section 140A(1) is clear in its own terms that what has to be unfair is the relationship between debtor and creditor and not simply the credit agreement itself (see ***Patel*** at [63]). A number of the points made by RBS in this case were put as if the law was concerned with an unfair agreement, but that is not the right approach.

44. In my judgment the decision in ***Scotland*** is of assistance in determining the outcome of this appeal because it explains the wide scope of the fairness assessment under s140A, particularly in the light of s140A(2), and how that assessment is not limited in time. The situation in ***Scotland*** was that the claimants had taken out a loan with a finance company BCT. The loan was to fund the purchase of double glazing and also to fund a PPI policy. The loan had been taken out more that 6 years before the proceedings were commenced. The double glazing supplier's salesman had made misrepresentations to the claimants about the PPI policy and the claimants, in proceedings against BCT, sought to rely on these to show the relationship between themselves and BCT was unfair. The trial judge accepted that submission and made orders for repayment of the loan repayments referrable to the PPI policy and varying the loan agreement to excuse the claimants from repaying the rest of the loan so far as it related to the PPI policy. On appeal BCT argued that the court had been wrong to take the misrepresentations into account within the scope of the fairness assessment (see [69]). One argument was that a claim in misrepresentation was time barred by the Limitation Act and so to take the misrepresentation into account in a fairness assessment under s140A would be unfair. A particular aspect of the unfairness relied on arose from the tri-partite nature of the circumstances. It was argued that upholding the debtor's claim under s 140A on the basis of a misrepresentation by the supplier, but after the expiry of the limitation period in respect of the claim for misrepresentation, would leave the creditor BCT in the position that it has no available recourse against that supplier. The Court of Appeal rejected this submission at paragraph [82] as follows:

> "[82] I am not persuaded that the issue of limitation is a reason to construe s 140A so as to exclude from the fairness assessment what would otherwise be relevant

> misrepresentations attributable to the creditor. The claim for an order under ss 140A, 140B is made on the basis that the relationship between the creditor and the debtor is unfair to the debtor because of one or more of the matters set out in s 140A(1) and having regard to all matters which the court thinks relevant. The focus of the inquiry is therefore the relationship between the parties and if, as here, it is a relationship which continues to subsist then the court must have regard to all matters it considers relevant even if some of them occurred more than 12 years before the date of the claim (this being the limitation period for an action on a specialty). As Mr George Leggatt QC (as he then was) observed when sitting as a deputy judge of the High Court in *Patel v Patel* [2009] EWHC 3264 (QB), [2010] 1 All ER (Comm) 864 (at [64]):
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> 'It would, however, be an artificial and unsatisfactory exercise if, in determining what is fair to the debtor, the court were permitted to have regard only to matters which occurred in the 12 years before the debtor's application was made and was required to shut its eyes to agreements between the parties and other relevant matters which occurred before that time. Such a partial inquiry into the course of the relationship between the creditor and the debtor would also be contrary to s 140A(2), which provides that the court "shall have regard to *all* matters it thinks relevant" (my emphasis)—impliedly without limitation in time. In my opinion the possibility of such a time-limited assessment does not arise on the proper interpretation of the statutory provisions. As I construe s 140A, the question whether the relationship between the creditor and the debtor is unfair to the debtor, upon the answer to which the power to make an order under s 140B depends, is a single question which admits of a "Yes" or "No" answer that has to be determined as at a particular point in time. However, in determining whether, at the relevant date, the relationship is or is not unfair, the court is required to have regard to certain matters specified in s 140A(1) and to all other matters it thinks relevant, whenever those matters occurred. There is no possibility, therefore, if the court is entitled to make the determination of fairness at all and is not barred by limitation from doing so, of restricting the temporal scope of the inquiry.'

45. I respectfully agree with all of this analysis. Applied to the facts of the present case, and subject to the transitional provisions, it means that the court in assessing the fairness of the relationship between the debtor Ms Smith and the creditor RBS is entitled to take all relevant matters into account whenever they took place, and that will include a related agreement such as the PPI agreement even if that PPI agreement itself had come to an end before the point in time that the unfairness of the relationship is being assessed. So here, as the courts below did, one is entitled to assess the fairness of the relationship which came to end at the point it came to an

end, i.e. 2015, and in doing so it is appropriate to take into account a related agreement which had ended before that.

46. The next question therefore is whether and if so how the transitional provisions make any difference to this analysis. On that in my judgment the answer is that the transitional provisions make no difference at all to the fairness assessment conducted under s140A. Sub-section 140A(1) provides in terms that the relationship to be considered is the one arising not only out of the credit agreement but also "the agreement taken with any related agreement". Paragraph 16 is clear that for related agreements which ended prior to 6 April 2008, the remedies provisions in s140B must be read without the reference to such a related agreement. However it plainly makes no such provision in relation to a140A. That provision (s140A) applies in the same form, including the express reference to related agreements.

47. In other words, I do not accept the contention of RBS that the transitional provisions preclude as a matter of law a finding under s140A that a relationship, at the relevant date (in this case 2015) "is" (present tense) unfair taking into account all the circumstances including a related agreement which had concluded before 6 April 2008. They do not. Nor do I accept the submission that if this is the law then the transitional provisions have no effect. The amendments to paragraph 140B in its application to a case involving a pre-transition related agreement demonstrate why that latter point is not so. In the present case, having found the relationship to be unfair in 2015, if the relevant payments had only been paid by virtue of the related agreement itself, then the court could not have ordered their repayment under s140B. Therefore critical to the court's power to order repayment of those sums was the finding of fact by DJ Stone, plainly open to the judge on the evidence and not challenged as a matter of fact on this appeal, that those payments were also made by virtue of the credit agreement itself.

48. A different point of statutory construction advanced by RBS was that s140B(1)(a), as applied to a pre-transitional related agreement by Sch 3 paragraph 16 of the 2006 Act, meant that if a payment was made by virtue of the related agreement and also made by virtue of the credit agreement, nevertheless the order could not be made. I do not accept that construction of the statute. Not every payment made by virtue of any sort of related agreement will necessarily have also been made by virtue of the credit agreement. The fact that that is the situation in the present case does not require the Act to be construed in the way RBS contends for. The Act simply does not prevent orders for payments made by virtue of the credit agreement.

49. I agree with the respondents that there is nothing ambiguous about the legislation which would engage ***Pepper v Hart*** in this case. I also agree with the respondents that the admissible material, the Explanatory Notes and the Q&A material, does not assist RBS on its appeal. When this material refers to agreements which have been completed before the end of the transitional period, it is talking about credit agreements. Crucially in this case the credit agreements are not completed agreements. The admissible material does not support the submission that a purpose of the transitional provisions was to ensure that if related agreements ended before 6 April 2008 there would be no remedy even if they caused or contributed to an unfair relationship extant after that date. I should add that for what it is worth I do not believe the statements by the Minister recorded in Hansard support RBS's view either.

50. I accept that to some extent the effect of the legislation is retrospective because in order to assess the unfairness of a relationship one does look at what happened before the provisions came into effect. However that retrospective effect emerges clearly from the terms of the Act itself. The key finding in this case was that the relationship in 2015 was unfair. That is a time well after the end of the transitional period. It is not retrospective at all.

51. The conclusions above s140A and s140B are I believe the same as the conclusions reached by Judge Waksman QC (as he then was) in ***Barnes v Black Horse*** [2011] EWHC 1416 (QB), May 2011, at paragraphs 64-75.

52. A different point is the submission by RBS before this court that the relationship in 2015 cannot be unfair when the alleged unfairness arises from undisclosed commissions for PPI agreements which agreements came to an end many years beforehand. The bank submits that the relevant unfair relationship by virtue of which the PPI premiums were paid ended when the PPI policy came to an end, some two years before 6 April 2008, i.e. the end of the transitional period. However the problem at this point in the argument is that RBS is attempting to say, in my judgment unsuccessfully, that even if in fact a related agreement which came to an end before April 2008 was the cause or contributor to unfairness extant at 2015, such a conclusion is positively precluded by law by the transitional provisions regardless of the facts. I do not agree.

Limitation

53. I turn to consider limitation. In order to apply either of s8 of the Limitation Act (actions on a specialty) or s9 (sums recoverable by statute) the question to be answered is to identify the date on which the cause of action accrued. I accept the submission of RBS that a cause of action accrues when all the facts necessary to be proved to make that claim can be pleaded. This is amply supported by the cases RBS cited (***Central Electricity Board***, ***Letang v Cooper***, ***Hill v Spread Trustee*** and ***Re Farmizer***). However beyond that proposition RBS sought to place particular reliance on ***Re Farmizer*** and ***Hill v Spread Trustee***. Those two cases decide issues about the applicability of sections of the Limitation Act to certain claims under the Insolvency Act 1986 (s9 of the Limitation Act to s214 (wrongful trading) of the Insolvency Act in ***Re Farmizer***, and ss 8 and 9 of the Limitation Act to s423 (transactions at an undervalue) of the Insolvency Act in ***Hill v Spread Trustee***). Those conclusions are not transposable to the Consumer Credit Act but those cases do illustrate that in order to work out what it means to say that a cause of action has accrued, the court has to examine the nature of the legal claim. In a case like this one, that task is one of construction of the legislation which provides for the claim in question.

54. As I have said already, the claim in the present case is not for an unfair agreement (whether a credit agreement or a related agreement) nor is it a claim for an unfair payment. The claim is for relief from an unfair relationship (s140A of the 1974 Act). A relationship is something which continues over time. If a relationship which happens to have been in existence for a very long time is still unfair on a given date (e.g. 2015), then in my judgment the Act is clear that the debtor can bring a claim under the section and seek appropriate relief for the unfairness identified. The fact that unfairness occurred in the past may or may not assist in assessing the question whether the relationship is unfair on a given date later on, but crucially the fact that a

relationship was unfair yesterday is not same fact as the relationship being unfair today. The facts necessary to make a claim for the unfairness on that given date cannot be said to have occurred until that given date.

55. Mr Leggatt QC was making what I believe is the same point in ***Patel*** at paragraphs 65 and 66, as follows:

> [65] Hence the critical question is: what is the relevant date at which the fairness or otherwise of the relationship has to be determined? In principle, it seems to me that the determination should be made having regard to the entirety of the relationship and all potentially relevant matters up to the time of making the determination. This means that if the relationship between the creditor and the debtor has ended, the determination should be made as at the date when the relationship ended; and if the relationship is still ongoing, the determination should be made as at the time of the trial.
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> [66] When the debtor's cause of action accrues for the purpose of s 9 of the 1980 Act depends on when all the material facts have come into existence which the debtor needs to allege in support of an application for an order under s 140B: see eg *Coburn v Colledge* [1897] 1 QB 702 at 706–707, [1895–99] All ER Rep 539 at 541. Those facts are, first, that a credit agreement has been entered into between the creditor and the debtor and, second, that the relationship arising out of that agreement is unfair to the debtor. If I am right in my analysis of the date at which the fairness of the relationship between the creditor and the debtor falls to be assessed, the result is that the debtor's cause of action is a continuing one which accrues from day to day until the relevant relationship ends. It follows, in my view, that an application under s 140B can be made at any time during the currency of the relationship arising out of a credit agreement, based on an allegation that the relationship is unfair to the debtor at the time when the application is made, or at any later time (as s 140A(4) expressly permits) until the expiration of the applicable period of limitation after the relationship has ended. (That period is 12 years except in so far as the relief sought is the recovery of money which has been paid by the debtor, in which case the effect of s 8(2) is that the six year period prescribed by s 9(1) of the 1980 Act applies.)

56. Subject to two points which I will address below, I agree with this analysis. It shows that the fact that the remedy sought for the unfairness on the relevant date is the repayment of a sum paid many years before is not something precluded by the Limitation Act. Whether in all the circumstances such a remedy should follow will be a matter for the court, but that is a different issue. As long as the relevant date on which unfairness is found is within the limitation period, and as long as the court concludes on proper grounds that the repayment of a sum paid many years before is an appropriate remedy for unfairness found to exist at that relevant date, then the 1980 Act does not prevent such a result.

57. The first point arises from the reference to s9 of the 1980 Act at the start of paragraph [66]. RBS contended this was a typo and should have been a reference to s8, which was the relevant provision in ***Patel*** and so indicated that ***Patel*** was not on point. I do not know if the reference to s9 there was a slip and ought to have been s8 but it makes no difference in my view because both sections are based on the same concept in that one has to identify a date on which the cause of action accrued.

58. The second point is that I would not say that the relevant date always and necessarily has to be the date when the relationship ended (assuming it has come to an end by the time the court considers the matter). I do not think paragraph [65] means that, but if it does, then I respectfully disagree. Looking at the matter that way was undoubtedly appropriate in ***Patel*** and may well be the right date in most cases, but in my judgment, for the reasons addressed below under the heading of "Compartmentalisation", the 1974 Act does not preclude a finding that the relationship can change over time.

59. However in the end the key point in the present case is that having found that the relationship was unfair in 2015, the claim was not barred by the Limitation Act and that Act did not prevent the judge from ordering repayment of sums paid many more than 6 years before.

Compartmentalisation and the conclusion that the relationship was unfair in 2015

60. ***Patel*** was a clear case in which one could see that the unfairness of a relationship at the time the matter came before the court arose from events which had taken place a long time in the past, well before the transitional period (and before the start of the 12 year limitation period). The unfairness arose from an exorbitant interest rate, a lack of records, a failure to formulate a realistic schedule of payments and a failure to provide a calculation of what was outstanding, all of which took place over a long period of time (see [58], [73] and [74]). The relationship had started in 1979-1983 with the advance of loans of about £56,000, by 1992 the sum outstanding was about £207,000. By the 1992 agreement no sum was payable until a request for payment was made, and that did not happen until 2008, by which time the sum due had grown to about £4½ million. By the time of the trial the unfairness still existed because the debt was still due. It had grown to about £6 million. That is the context for paragraph 64 of the judgment in ***Patel***, which was approved by the Court of Appeal in ***Scotland***.

61. So in ***Patel*** the unfairness of the relationship as it was at trial had its origins in events many years before. Although there is no obvious reason emerging from the 1974 Act why the court should be precluded from deciding that a relationship was unfair at one time but that the unfairness ceased at some stage for some reason, the respondents submit that such a conclusion is not permitted by the Act because the court may not "compartmentalise" the relationship into parts. The submission is said to be supported by Kitchin LJ in ***Scotland*** at paragraph [78].

62. Paragraph [78] of ***Scotland*** was concerned with a submission that something Tomlinson LJ had said in an earlier case meant that the misrepresentation in ***Scotland***, which had taken place long ago, was not capable in principle of giving rise to an unfair relationship. Kitchin LJ rejected that as follows:

> [78] In my judgment Mr Tolley seeks to place far more weight upon this observation of Tomlinson LJ than it can possibly

> bear. I recognise that a misrepresentation may not create or even contribute to an unfair relationship but I do not understand Tomlinson LJ to have been suggesting that it can never do so. Indeed it seems to me that it plainly can. In this regard it is important to have in mind that *the court must consider the whole relationship between the creditor and the debtor arising out of the credit agreement and whether it is unfair* having regard to one or more of the three matters set out in s 140A(1), which include anything done (or not done) by or on behalf of the creditor before the making of the agreement. A misrepresentation by the creditor or a false or misleading presentation of relevant and important aspects of the transaction seem to me to fall squarely within the scope of this provision.
>
> [*my emphasis*]

63. The respondents' submission is another example of putting more weight on a judicial observation that it can bear. Just as in ***Patel***, so ***Scotland*** was another example of conduct years beforehand having effects continuing over a long time and supporting a finding of unfairness at trial. The loan in ***Scotland*** to cover the PPI payments, which had been induced by the misrepresentation, was still outstanding, at least in part, when the case came to trial. It is clearly correct that the court must consider the whole relationship when deciding whether the relationship is unfair at the relevant moment that the question arises, and on facts like those in ***Scotland*** (and ***Patel***), consideration of the whole relationship over time leads to a finding that it "is" unfair at the relevant moment. However that does not mean a court, having carried out that exercise, is constrained to compartmentalise the outcomes into one of only two possibilities – that the entire relationship is fair or is unfair and no other outcome is possible.

64. There is nothing in the 1974 Act which somehow means that once a credit relationship was unfair for some reason, that unfairness always and necessarily has to persist for all time as long as the credit agreement persists, as a matter of law and irrespective of the facts.

65. It would be surprising if it were the case since relationships can self-evidently change over time. For example in a situation not too far from the facts of this case one could imagine a case in which a bank's customer could start a credit card agreement but decline the PPI policy at the outset, however then some years later the bank might offer a PPI policy when an increase in the credit limit was offered and the customer might accept it at that point. Assuming the position of the PPI policy was the same as in this case, then it would follow that a relationship which started out as a fair one, had become unfair. The fact that the question of whether the relationship is unfair is one answered by considering all circumstances does not mean the court is forced to apply a simplistic characterisation to that whole as merely fair or unfair. The correct characterisation of the relationship from the start of the credit agreement in that case would be that it was fair and then became unfair. Equally the same conclusion is open the other way round. The fact that a relationship was unfair in the past does not mean that things cannot change. Just as the court can find that a relationship was fair but became unfair, so the converse is possible. In a case in which the relationship was unfair at a point in the past but in which the source of that unfairness has ceased to

have any effect, then when looking at what the state of the relationship "is" at a later date, it may well not still be unfair.

66. I return to the finding that the relationship between Ms Smith and RBS was unfair in 2015 even though the relevant PPI policy had come to an end in March 2006 and the last outstanding payment due as a result of that policy was paid in April 2006. The credit relationship up to April 2006 was clearly an unfair one, for the reasons explained by Lord Sumption in paragraph 18 of ***Plevin***, but is it really possible to conclude on these facts that the relationship as it was in 2015 was unfair? Apart from anything else, unlike both ***Patel*** and ***Scotland***, at the relevant time (2015) Ms Smith did not owe anyone any sum arising from the unfair PPI agreement, had not owed any such sum for 9 years and would never in future owe any obligation relating to the PPI agreement, since it had ended 9 years previously.

67. At paragraph [20] of DJ Stone's judgment the judge held that the unfairness persisted for the duration of the parties' relationship until it ended in 2015. The sole basis for this finding was because the inequality of knowledge remained. As the judge put it, the bank had "even now" not told Ms Smith what percentage of the PPI payments she made was paid to it as a commission. However it seems to me that that conclusion is based on a misapplication of the law stated in ***Plevin***, based I think on the judge's incomplete extract from paragraph 18 of Lord Sumption's judgment. The passage extracted by DJ Stone focusses solely on the fact that the bank kept the customer in ignorance of the commissions. However reading the paragraph as a whole (set out at paragraph 9 above), it is clear that the unfairness derives not simply from being deprived of information on its own, but from the customer being kept in ignorance, of what was a material fact, at the point in time that they were deciding whether to enter into the PPI agreement.

68. The consequences of that unfairness in the present case will have included accruing a liability to make payments required by the PPI agreement and paying those sums. If the customer still owed sums under the credit agreement which had arisen from the PPI agreement but were outstanding even after the PPI agreement itself had ended, then in such a case the unfairness would still exist at that later stage. However once all sums due had been paid and no liability remained, the fact that the bank continued to leave the customer in ignorance of the commission well after the customer's liability to make any payments has ceased, does not justify the conclusion the judge reached, all the more so when the credit agreement alone, absent the PPI agreement, was not itself unfair. The relationship was unfair in January 2000 when Ms Smith entered into the PPI agreement in ignorance of the commission and was unfair up to April 2006 because Ms Smith was still obliged to and was in fact making payments to RBS of sums which only arose because of that PPI agreement. However the relationship changed after April 2006 because the PPI agreement ended. There was no case, alleged or proved, that any economic effect or consequence of the PPI agreement for Ms Smith persisted after April 2006 or existed in 2015.

69. Thus RBS is right that the relevant unfair relationship came to an end in April 2006. The relationship afterwards was not unfair and so April 2006 is the date when time started to run for the purposes of limitation. Since the claim form was issued in 2015, the claim is statute barred by s9 of the Limitation Act. The difficulty in this appeal has been caused by the bank's attempt to set a harder line in the law and preclude altogether any argument arising from an agreement which ended before the law

changed even if unfairness persisted afterwards. No error of law of that sort was made by the courts below. The error of law made in the present case was a mischaracterisation of the unfairness identified in ***Plevin***, as I have explained. Applied properly to the facts of this case, the conclusion is that the unfair relationship came to an end in April 2006.

70. Furthermore, although the point was not argued on this basis, our provisional view is that since the unfair relationship ended before the coming into force of s140A-C, an action for what was an unfair relationship in 2006 does not come within the 1974 Act at all. That is what the Act means in s140A by asking if the relationship "is" unfair. The same provisional conclusion would not apply in Mr Burrell's case because his PPI agreement was cancelled in March 2008, which is after the date of commencement of s140A (April 2007) albeit it is before the end of the transitional period. However Mr Burrell's claim is also barred by s9 of the Limitation Act since the claim was commenced in August 2019, well over 6 years later.

71. The continued non-disclosure of the commissions might (or might not) have been relevant to the application of s32 of the Limitation Act but that point does not arise in either case in this appeal.

72. Standing back, another way of looking at this matter is that the proper application of the reasoning in ***Patel*** that the cause of action under s140A accrues from day to day, which I agree with, does not in fact assist the respondents. The day to day accrual does not mean that unfairness in the past is simply projected into the future, rather it means that each day is capable of being considered separately.

Conclusion

73. The appeal succeeds on Ground 3 in Ms Smith's case and Ground 2 of Mr Burrell's case in that both claims are statute barred by s9 of the Limitation Act. The appeal on Ground 2 in Ms Smith's case and Ground 1 in Mr Burrell's case is dismissed.

Lord Justice Coulson:

74. I agree.

Lady Justice Macur:

75. I also agree.