The Courts' approach to determining unfair relationships under Section 140A Consumer Credit Act 1974

The broad concept of unfair relationship contained in Section 140A in respect of banking and credit agreements has now been in use for almost fifteen years, replacing the narrower test of extortionate credit bargains.[1] The section confers wide discretionary powers on the Court, and was deliberately framed in very broad terms and with little guidance about the criteria for its application.[2] This article examines how the Courts have developed the interpretation of the provision, and determined what constitutes such a relationship.

The statutory provision

The relevant sections relating to unfair relationships are found in sections 140A to D of the Consumer Credit Act 1974 and are applicable to 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.

In respect of determination of the relationship, Section 140A enables the Court to award the debtor a remedy if the relationship between a creditor and a debtor is unfair, on the basis of:

(a) Any 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); or
(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.

The test is to be applied having regard to all the matters the Court thinks relevant (S140A (2)) including matters relating to the creditor and matters relating to the debtor. S140B (9) further specifies that once unfairness has been raised as an issue by a debtor, it is for the creditor to prove that the facts alleged do not give rise to unfairness (although the facts of an allegation of unfairness must still be set out by the party relying on them).

Once unfairness is established against a creditor, the court has wide discretionary powers under S140B to grant relief, including ordering the creditor to refund monies paid under the agreement, compensate the debtor for proven losses or to do or cease to do anything specified in the order, in connection with the agreement or any related agreement.[3]

[1] Sections 140A –D added to the Consumer Credit Act 1974 in 2006, (in force April 2007), Sections 137 to 140 of Consumer Credit Act repealed.
[2] See Lord Sumption JSC in Plevin v Paragon Personal Finance Ltd [2014] UKSC 61 at paragraph 10.
[3] Section 140B (1) (a) to (g).

Court decisions

In early clarification, the High Court in *Patel v Patel [2009] EWHC 3264QB]* confirmed that as the provisions of Section 140A were concerned with the unfairness of relationship and not the agreement, then determination should be made at the point at which the *relationship* ended, or would end - not, as previously thought, the date of the agreement.

Subsequent to *Patel*, there were some decisions which arguably narrowed the interpretation of S140A in favour of creditors:

- *Khodari v Tamimi [2009] EWCA Civ 1109* found no coercion (and therefore no unfair relationship) in an agreement between two members of a gambling club, in which one loaned money to the other to spend on gambling, which was repayable on demand with a 10% fee.
- *McGuffick v Royal Bank of Scotland [2009] EWHC 2386 (Comm)* held that reports to credit agencies and commencement of proceedings did not constitute enforcement and did not render the relationship unfair.
- In *Carey v HSBC Bank plc [2009] EWHC 3417 (QB)* it was found that the failure by the Defendant Bank to comply with a debtor request for an executed copy of their credit agreement pursuant to Section 78(1) did not of itself give rise to the alleged unfair relationship.
- The Court of Appeal in *Harrison v Black Horse Limited [2011] EWCA Civ 1128* determined that an undisclosed commission of 87% did not give rise to an unfair relationship, on the basis that there was no breach of the Insurance Conduct of Business (ICOB) rules.

Plevin and beyond

The course of determinations broadly in favour of creditors was altered in the landmark case of *Plevin v Paragon Personal Finance Ltd [2014] UKSC 61*, which, by the Supreme Court overturning the decision in *Harrison*, held that compliance with ICOB rules was NOT determinative, and that S140A was primarily concerned with whether the relationship between the parties was unfair, not whether either party was in breach of legal duty.

The Supreme Court found that the relationship was unfair, due to the extreme inequality of knowledge and understanding which represented a classic source of unfairness in any relationship between a creditor and non-commercial debtor. *Plevin* also demonstrated that the unfair relationship provisions could be used as a sword by debtors in pursuit of remedy, where otherwise none would be available.

That the provisions are now viewed both as sword and shield by Debtors is to some extent confirmed by the disquiet expressed[4] over the disapplication of S140A-C in respect of the government's Business Bounce Back Loan Scheme (S140A (6) & (7)).[5] Those subsections are however very strictly limited, and the Scheme itself was closed to new applications and top-ups from 31st March 2021.

Following *Plevin*, there is a line of cases where the courts have determined unfairness, or found to the contrary, based on findings of fact in relation to the basis of agreement, the sophistication and experience of the debtor or the independence of advice available or provided.

Unfairness has been established in *Verrin v Welcome Financial Services Limited [2017] E.C.C.7* where the existence of a commission payment was disclosed, but not the amount, and whilst PPI was made clear as being optional, the borrower was led to believe it would assist the application. In *Nelmes v NRAM [2016] EWCA Civ 491* an undisclosed fee paid to a broker was found to create unfairness by depriving the debtor of disinterested advice from the broker. In *Pilgrim Rock v Iwaniuk [2019] EWHC 203 (Ch)* the lender was unable to demonstrate that the agreement was not unfair where the loan had a contractual rate of 6%, which was compounded quarterly and rose to 9% on default, this in addition to a delay in enforcement and accrual of interest for four years.

Creditors have had successes also, however. In *McMullen v Secure the Bridge Limited [2015] EWCA Civ 884* no unfairness could be established due to the debtor's prior knowledge of the links between the provider of bridging loans and the companies who later rejected further loan applications. In *Holyoake v Candy [2017] EWHC 3397* there was a finding that the borrower was a sophisticated user of financial services, and despite the disingenuous conduct of the lender, the unfair relationship provisions were not intended to interfere with commercial negotiations between parties.

More recently, in *Greenlands Trading Limited* v *Pontearso [2019] EWHC 278 (Ch)* an agreement was found not to be unfair on grounds of a 3% monthly default rate, and that the defaulting borrower had had a possible exit strategy when she entered the agreement. In *obiter* comment, the Court emphasised that the test for unfairness was objective; The question of whether a relationship was unfair was not limited by the borrower's perception. Otherwise, the less a borrower understood, the more difficult it would be to establish an unfair relationship. Some borrowers would not see what had made a relationship unfair, even with hindsight. Unfairness was for the court's objective assessment.

Two even more recent cases give an indication of the point the courts have reached: In *Canada Square Operations Limited v Potter [2021] EWCA* Civ 339[6], the Court of Appeal found that limitation could be postponed

[4] See for example https://www.joannaconnollysolicitors.co.uk/the-governments-business-bounce-back-loan-scheme
[5] The BBLS is the scheme of that name operated from 4th May 2020 by the British Business Bank on behalf of the British Business Bank.
[6] There is no connection between the Claimant in this case and Canada Square Chambers.

under both Sections 32(2) and 32(1)(b) of the Limitation Act 1980 on the basis of unfair relationship. In that case, the finding of unfair relationship by virtue of undisclosed commission on insurance premiums, was held to be a breach of duty which the debtor could rely on under S32 (2) of the 1980 Act, and furthermore S 32(1)(b) was also available as the obligation to act fairly imposed by S140A was sufficient to mean that a failure to disclose such a very high commission amounted to concealment within the meaning of S32 (1) (b). In *Credit Capital Corporation Limited v Watson [2021] EWHC466 (QB)* the High Court declined to find unfair relationship in the circumstances of a bridging loan on which the debtor had defaulted. In particular, in relation to interest charges and also fees paid to a broker, the evidence did not indicate that there was unfairness, and the contract was negotiated on in a business context with legal advice.

Potter and *Watson* show respectively the Court's willingness to use the full extent of the wide discretion in identifying unfairness and its consequences and at the same time ensure that the facts relied on by a debtor are sufficient to lead to such a finding, given the terms of agreement, experience of the debtor and advice received.

The Current Situation

Post *Plevin* the Courts have continued to exercise and develop the wide discretion afforded to identify unfairness in relationships[7] and impose the at-times draconian remedies under S140B; however, this is not without limit. Lenders have successfully established that not all situations that impose harsh impacts on debtors are necessarily unfair in this context, particularly with careful reference to the basis of agreement, the sophistication and experience of debtors and/ or the independent advice available to them.[8]

The reverse burden of proof as to findings of unfairness has made the use of summary proceedings more difficult to achieve[9], but not impossible, and arguably also led to an expectation from debtors of a willingness in creditors to compromise claims, particularly where the value is low and the volume and litigation risk high, relative to the costs of full proceedings. Given the extent of discretion afforded by S140A and B, it is inevitable that there will be further developments in coming years, and the wholesale disapplication of this provision, other than in the extreme circumstances of pandemic (S140A (6) and (7)) is unlikely to be repeated.

JOHN INMAN

SOLICITOR-ADVOCATE (HIGHER RIGHTS CIVIL PROCEEDINGS)

25 CANADA SQUARE CHAMBERS

1ST SEPTEMBER 2021

[7] Lord Sumption JSC in *Plevin v Paragon Personal Finance Ltd [2014] UKSC 61 at paragraph 10*.
[8] *Credit Capital Corporation Limited v Watson [2021] EWHC466 (QB) & Greenlands Trading Limited* v *Pontearso [2019] EWHC 278 (Ch)*
[9] Contrast *Bevin v Datum Finance Limited [2011] EWHC 3542 (Ch)* with *Axton v GE Money Mortgages*