Supreme Court

Smith *v* Royal Bank of Scotland plc

Burrell *v* Royal Bank of Scotland plc

[2023] UKSC 34

2023 Jan 12; Oct 4 — Lord Hodge DPSC, Lord Briggs, Lord Hamblen, Lord Leggatt JJSC, Lord Kitchin

Limitation of action — Statute, action on — Accrual of cause of action — Claimant entering into credit agreement with bank and related agreement with insurer — Claimant claiming repayment of sums paid under related agreement on ground credit relationship with bank unfair — Claim made more than six years after related agreement ending but less than six years after credit relationship ending — Whether claim time-barred — When cause of action accruing — Consumer Credit Act 1974 (c 39), ss 140A, 140B — Limitation Act 1980 (c 58), s 9

In each of two separate cases the claimant entered into a credit card agreement with the defendant bank and, at the same time, took out payment protection insurance ("PPI") with an insurer to insure their payments under the credit card, the monthly premiums for which were charged to the credit card. Unknown to the claimant, the bank received substantial commission payments on the PPI policy premiums. More than six years after terminating their PPI policy and making the last payment relating to it, but less than six years after terminating their credit card agreement, each claimant brought a claim against the bank seeking an order under section 140B(1)(a) of the Consumer Credit Act 1974[1] requiring the bank to repay the PPI premiums which they had paid, on the ground that the relationship between the bank and the claimant arising out of the credit agreement taken with the PPI agreement was unfair to the claimant for the purposes of section 140A of the 1974 Act. The bank argued, inter alia, that the claims were time-barred under section 9 of the Limitation Act 1980[2] since the cause of action had accrued when the last PPI payments had been made. In each case a district judge rejected the bank's limitation argument and a judge dismissed the bank's appeal, but the Court of Appeal allowed the bank's further appeal.

On the claimants' appeals—

Held, allowing the appeals, that, where a debtor made a claim under section 140A of the Consumer Credit Act 1974 in relation to a credit relationship which was still continuing, the court's power to make an order under section 140B was dependent on a determination that the credit relationship was unfair to the debtor at the time when the determination was made, rather than whether that relationship had been unfair when the relevant credit agreement had been made or at some other time in the past; that, on the other hand, where the debtor made a claim under section 140A in relation to a credit relationship which had ended by the time the claim came before the court, the court's power to make an order under section 140B was dependent on a determination that the relationship had been unfair to the debtor at the time when the relationship ended; that, therefore, for as long as the credit relationship was continuing, the debtor could not have a completed cause of action under section 140A until a determination of unfairness was made, since before that point in time there was no set of material facts which, if proved, would as a matter of law entitle the claimant to a remedy under section 140B; that, conversely,

[1] Consumer Credit Act 1974, s 140A: see post, para 13.
S 140B: see post, para 14.
[2] Limitation Act 1980, s 9(1): see post, para 31.

once the credit relationship had come to an end, the debtor would have a completed A
cause of action under section 140A, since from that date the court could make a
determination that the relationship had been unfair to the debtor at the time when the
relationship ended; that, if a credit relationship had ceased to be unfair before it came
to an end, that would not mean that the cause of action under section 140A would
have accrued when the relationship ceased to be unfair, but would mean that the
claim could not succeed because of the relationship not being unfair on the relevant
date for the court's determination, i e when the relationship ended; that, in the B
present case, the claimants' relationships with the bank had remained unfair even
after their ceasing to make PPI related payments, by reason of the bank's continuing
failure throughout the currency of the credit card agreements to disclose the existence
of its commission and to repay premiums; that, therefore, since the claimants'
respective causes of action had not accrued, and so the six-year period for bringing a
claim had not commenced, until their credit relationships had ended, both claims had
been brought in time for the purposes of section 9 of the Limitation Act 1980; and C
that, accordingly, absent any dispute by the bank that the relationships had been
unfair, the orders of the district judges would be restored (post, paras 2, 19–21,
42–47, 65–67, 85, 86–87).

Plevin v Paragon Personal Finance Ltd [2014] 1 WLR 4222, SC(E) applied.

Decision of the Court of Appeal [2021] EWCA Civ 1832; [2022] 1 WLR 2136 reversed.

D

The following cases are referred to in the judgment Lord Leggatt JSC:

Central Electricity Board v Halifax Corpn [1963] AC 785; [1962] 3 WLR 1313; [1962] 3 All ER 915, HL(E)
Cherry Hill Skip Hire Ltd, In re [2022] EWCA Civ 531; [2023] Bus LR 14; [2023] 1 All ER (Comm) 93, CA
Deutsche Bank (Suisse) SA v Khan [2013] EWHC 482 (Comm)
Edwardian Group Ltd, In re [2018] EWHC 1715 (Ch); [2019] 1 BCLC 171 E
Letang v Cooper [1965] 1 QB 232; [1964] 3 WLR 573; [1964] 2 All ER 929, CA
Nolan v Wright [2009] EWHC 305 (Ch); [2009] 3 All ER 823
P & O Nedlloyd BV v Arab Metals Co (No 2) [2006] EWCA Civ 1717; [2007] 1 WLR 2288; [2007] 2 All ER (Comm) 401, CA
Patel v Patel [2009] EWHC 3264 (QB); [2010] 1 All ER (Comm) 864
Plevin v Paragon Personal Finance Ltd [2013] EWCA Civ 1658; [2014] Bus LR 553, CA; [2014] UKSC 61; [2014] 1 WLR 4222; [2014] Bus LR 1257; [2015] 1 All ER F 625, SC(E)
Potter v Canada Square Operations Ltd [2021] EWCA Civ 339; [2022] QB 1; [2021] 3 WLR 777; [2021] 4 All ER 1036, CA
Promontoria (Henrico) Ltd v Samra [2019] EWHC 2327 (Ch); [2019] CTLC 295
Rahman v Sterling Credit Ltd [2001] 1 WLR 496, CA
Scotland v British Credit Trust Ltd [2014] EWCA Civ 790; [2014] Bus LR 1079; [2015] 1 All ER 708, CA G

The following additional cases were cited in argument:

A'Court v Cross (1825) 3 Bing 329
Bradford Old Bank Ltd v Sutcliffe [1918] 2 KB 833, CA
Campbell v Tyrrell [2022] EWHC 423 (Ch); [2022] CTLC 113
Coburn v Colledge [1897] 1 QB 702, CA H
Farmizer (Products) Ltd, In re [1997] 1 BCLC 589, CA
Hill v Spread Trustee Co Ltd [2006] EWCA Civ 542; [2007] 1 WLR 2404; [2007] Bus LR 1213; [2007] 1 All ER 1106, CA
Hillingdon Borough Council v ARC Ltd [1999] Ch 139; [1998] 3 WLR 754, CA
Hole v Chard Union [1894] 1 Ch 293, CA

Legal Services Commission v Rasool [2008] EWCA Civ 154; [2008] 1 WLR 2711; [2008] 3 All ER 381, CA
Paragon Finance plc v DB Thakerar & Co [1999] 1 All ER 400, CA
Phonographic Performance Ltd v Department of Trade and Industry [2004] EWHC 1795 (Ch); [2004] 1 WLR 2893; [2005] 1 All ER 369
Promontoria (Pine) Designated Activity Co v Hancock [2021] EWHC 259 (Ch); [2021] Bus LR 607
Smith v Central Asbestos Co Ltd [1973] AC 518; [1972] 3 WLR 333; [1972] 2 All ER 1135, HL(E)
Wilson v First County Trust Ltd (No 2) [2003] UKHL 40; [2004] 1 AC 816; [2003] 3 WLR 568; [2003] 4 All ER 97, HL(E)

APPEALS from the Court of Appeal

By a claim form issued on 19 August 2019 the claimant, Karen Smith, who had entered into a credit card agreement with the defendant, the Royal Bank of Scotland plc, and a related payment protection insurance ("PPI") policy to insure her payments under the credit card agreement, sought repayment of the premiums paid under the PPI policy on the basis that the defendant's non-disclosure of the commission it had received for arranging the policy had given rise to an unfair relationship for the purposes of sections 140A to 140C of the Consumer Credit Act 1974. On 9 March 2020 District Judge Stone sitting in the County Court at Bodmin allowed the claim and ordered the defendant to pay the claimant £1,346.29 plus costs, representing the whole of the PPI premiums paid with interest, less a sum already awarded to the claimant by the Financial Conduct Authority under a redress scheme. On 13 November 2020, Judge Gore QC sitting in the County Court at Exeter dismissed the defendant's appeal. Pursuant to permission granted by the Court of Appeal (Asplin LJ) on 10 March 2021 the defendant appealed.

By a claim form issued on 24 August 2019 the claimant, Derek Burrell, who had entered into a credit card agreement with the defendant, the Royal Bank of Scotland plc, and a related PPI policy to insure his payments under the credit card agreement, sought repayment of the PPI premiums paid under the PPI policy on the basis that the defendant's non-disclosure of the commission it had received for arranging the policy had given rise to an unfair relationship for the purposes of sections 140A to 140C of the 1974 Act. On 29 January 2020 Deputy District Judge Crow ordered that: (1) the claim could proceed notwithstanding that the PPI policy had ended before sections 140A to 140C of the 1974 Act came into force on 6 April 2008; and (2) the claim was not statute-barred under section 9 of the Limitation Act 1980. On 21 April 2021 Judge Murdoch sitting in the County Court at Northampton dismissed the defendant's appeal. Pursuant to permission granted by the Court of Appeal (Bean LJ) on 23 June 2021 the defendant appealed.

The Court of Appeal ordered that the two appeals be listed together. On 3 December 2021 the Court of Appeal (Macur, Coulson and Birss LJJ) [2021] EWCA Civ 1832; [2022] 1 WLR 2136 allowed the appeals.

Pursuant to permission granted by the Supreme Court (Lord Briggs, Lord Sales and Lord Burrows JJSC) on 8 August 2022 the claimants appealed. The issues for the court in both appeals, as stated in the parties' agreed statement of facts and issues, were: (1) in relation to the interpretation of section 140A, whether the Court of Appeal was wrong to find that the unfairness in the relationships had ended in April 2006 (in the *Smith* appeal) and March 2008 (in the *Burrell* appeal); (2) in relation to the issue of limitation, when did the claimants' causes of action under sections 140A to 140C for repayment of sums accrue for the purposes of section 9 of the 1980 Act; (3) in relation to the issue of whether sections 140A to 140C applied to the claims, (i) whether the Court of Appeal had been right to suggest at para 70 that insofar as an unfair relationship had ended before the coming into force of sections 140A to 140C in April 2007 (or the end of the transitional period in April 2008), but the credit agreement continued beyond the end of the transitional period, the claimant would not have a cause of action and (ii) in respect of a claim brought under sections 140A to 140C alleging non-disclosure of PPI commission by the creditor, where a credit agreement continued beyond the transitional period but the related PPI agreement ceased to have any operation before or during the transitional period, whether the effect of paragraphs 16(4) and (5) of Schedule 3 to the Consumer Credit Act 2006 was such that there was no cause of action or no remedy available under sections 140A to 140C.

The facts are stated in the judgment of Lord Leggatt JSC, post, paras 4–8.

Robert Weir KC and *Jonathan Butters* (instructed by *Cheval Legal Ltd*) for the claimants.

The new scheme inserted by the Consumer Credit Act 2006 into the earlier Consumer Credit Act 1974 as sections 140A to 140C was designed to enhance consumer protection: see *Scotland v British Credit Trust Ltd* [2014] Bus LR 1079, para 25. It was intended to introduce a broad definition of unfairness, in place of the narrowly-framed provisions which had previously governed extortionate credit bargains: see *Plevin v Paragon Personal Finance Ltd* [2014] 1 WLR 4222, para 29, per Lord Sumption JSC and [2014] Bus LR 553, para 52, per Briggs LJ. Bargaining power lies with the lender, and the social evils flowing from this are notorious: see *Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816, para 75.

The present case is not, as the bank suggests, primarily about limitation under section 9 of the Limitation Act 1980. The court's first task is to construe the statutory scheme so as to determine the constituent parts of the legal right of action provided. That exercise is wholly unaffected by limitation purpose or policy. Limitation defences do not divest any person of rights recognised by law; they limit the period within which a person can obtain a remedy from the courts for infringement of them: see *Letang v Cooper* [1965] 1 QB 232, 245–246.

The scheme invites a single assessment of unfairness in a singular relationship. Section 140A(1) enjoins the court to make a determination of whether the relationship between creditor and debtor is unfair to the debtor. As George Leggatt QC, sitting as a deputy judge of the High Court, observed in *Patel v Patel* [2010] 1 All ER (Comm) 864, para 64, this is a single question which admits of a "yes" or "no" answer. If the relationship is unfair to the debtor, then the right of action is complete and the court has the power, as the opening words of section 140A(1) establish, to make an order under section 140B in connection with the credit agreement. In this way, Parliament distinguishes between the right under section 140A and the remedy under section 140B.

By the express terms of section 140A(1), it is the relationship arising out of the credit agreement (or the agreement taken with any related agreement) that must be found to be unfair. It is not the credit agreement or the creditor's acts and omissions that are assessed for fairness but the relationship between creditor and debtor. Recognising this is crucial to the proper interpretation of section 140A which is unlike many, if not most, other statutory rights in attaching itself to a relationship.

The relationship between creditor and debtor arising out of a credit agreement is, by its nature, an enduring one. Credit necessarily involves an agreement under which the debtor receives something of value and agrees to pay for it later. So the relationship will never be limited to a single point in time, as with a simple sale of goods. It is always going to be a relationship over time. The relationship can arise simply out of the credit agreement, it does not have to arise out of the credit agreement taken with any related agreement.

The focus of section 140A(1) is on the current relationship. It provides in terms that the court may make an order under section 140B if it determines that the relationship arising out of the credit agreement "is" unfair to the debtor (not "was"). Since there is no temporal limitation when addressing the binary yes/no question as to whether the relationship is unfair, the court will make that assessment at the last possible date, i e the date of trial in an ongoing relationship and otherwise the date the relationship came to an end.

Although the court's power to make a finding of unfairness is circumscribed by the terms of section 140A(1)(a)–(c), those paragraphs are framed in very wide terms. When assessing the fairness of the relationship (which could be decades after the inception of the credit agreement) the court must have regard to all matters it considers relevant, including a misrepresentation before the credit agreement was entered into. By the same token, there is no requirement, in order to avoid a limitation bar, to bring the claim within six years of the date the credit agreement was entered into. Again, that is because the section 140A requirement is for the court to make an assessment as to whether the relationship "is" unfair.

Where the court does find that the relationship is unfair to the debtor, the court has a very wide discretion under section 140B to make such order as it thinks will reflect, and be proportionate to, the nature and degree of the unfairness which it has found. In this way, the scheme of sections 140A to 140C is coherent.

The unfair relationship in the present case arose by reason of the bank keeping each claimant in ignorance of the substantial commissions it received on PPI policy premiums. The Court of Appeal was wrong to hold that the unfairness derived from the claimants being kept in ignorance at the point in time that they were deciding whether to enter into the PPI agreement. The basis of the unfairness was not limited to the window prior to the debtors entering into the PPI agreements: see *Potter v Canada Square Operations Ltd* [2022] QB 1, para 83. With the initial non-disclosure the well has, so to speak, been poisoned. In any event, the bank's non-disclosure in these cases, and so the unfairness in the relationship, persisted to the end of each relationship. There was no counterweight to the identified unfairness and the bank was unable to discharge the statutory burden of proof on it to disprove unfairness.

The claims are not statute-barred. The court cannot determine when a cause of action accrued for the purposes of section 9 of the 1980 Act without going to the relevant "enactment" which provides the claimant with the relevant cause of action. The answer to the question as to when a cause of action accrues in respect of a sum recoverable by virtue of any enactment is to be found in the proper construction of the statute giving the right to recover: see *Hillingdon Borough Council v ARC Ltd* [1999] Ch 139, para 15. And since the enactment here is section 140A of the 1974 Act, with its requirement for the court to address the question whether the relationship "is" unfair, then so long as the credit relationship lasts no cause of action accrues. It only accrues at the date of trial (where the relationship is ongoing) or at the date of the end of the relationship. Provided that the claim is brought within six years of that latter date (the end of the relationship—and, here, both claims were brought within that period) no issue of limitation arises.

Reference to or reliance upon other cases in which different statutory provisions have been analysed, such as the old extortionate credit bargain scheme in *Rahman v Sterling Credit Ltd* [2001] 1 WLR 496, miss the target and do not assist.

Finally, as the courts below held, there is no merit in the bank's "transitional provisions" argument. From a reading of the terms of paragraphs 14 and 16 of Schedule 3 to the 2006 Act, coupled with the findings made at first instance, it is clear that the transitional provisions relied on by the bank do not operate to bar the rights of actions of these two claimants.

If a credit agreement endures in April 2008 it is in the new regime. If the related agreement ended at that earlier stage then the remedy is limited by the removal of the words "or related agreement". Since these claimants can show that the PPI premiums were paid by virtue of the credit agreement, it does not matter that the transitional provisions effectively remove the reference to "any related agreement". There is no unfairness to creditors. The transitional period gave them a year to cancel or terminate credit agreements if they did not wish for them to be caught by the new regime.

John Taylor KC and *Giles Robertson* (instructed by *Pinsent Masons LLP, Glasgow*) for the bank.

If the claimants are right, credit card customers who took out historic PPI policies that ended decades ago will continue to be able to bring claims like this so long as their credit card subsists. Only gradually will these claims (of which there are thousands) stop. That approach disregards the policy behind the Limitation Act 1980 and the wording of that Act, in particular section 9.

Since at least 1623, Parliament has limited the time in which claimants may bring their claims before the courts of England and Wales: see the Limitation Act 1623 (21 Jas 1, c 16) and *A'Court v Cross* (1825) 3 Bing 329. There can be few more long-standing legislative interventions in the field of civil justice. Delay makes it more difficult for legal procedures to do justice: evidence may have disappeared and recollections become unreliable. Companies such as the bank need certainty as to their rights and obligations. The policy applies no less strongly to consumers and private individuals and there is no reason why any different policy should be pursued in the realm of financial services.

It is common ground that, under the 1980 Act, it is the six-year limitation period under section 9 which is applicable rather than the 12-year limitation period under section 8 for actions on a specialty (because the remedy sought is payment of a sum of money pursuant to statute). Section 9 refers to six years "from the date on which the cause of action accrued". A cause of action comprises the facts which the claimant must prove to obtain the judgment they seek (*Coburn v Colledge* [1897] 1 QB 702, 706 and *Letang v Cooper* [1965] 1 QB 232, 242), namely "material" facts: see *Paragon Finance plc v DB Thakerar & Co* [1999] 1 All ER 400, 405. The term "cause of action" does *not* refer to the legal label applied to the facts: see *Smith v Central Asbestos Co Ltd* [1973] AC 518, 532.

A cause of action "accrues" when the claimant can *first* plead all the facts that make it up: see *Bradford Old Bank Ltd v Sutcliffe* [1918] 2 KB 833, 848, *Central Electricity Board v Halifax Corpn* [1963] AC 785, 806 and *Hill v Spread Trustee Co Ltd* [2007] 1 WLR 2404, para 120. Although, for claims under a statute, this involves interpreting the statute giving rise to the claim (since it is only by doing so that the point when all the relevant facts could first be pleaded can be identified), the courts will seek to interpret the statute consistently with the (already referred to) policy of limitation statutes: see, for example, *Legal Services Commission v Rasool* [2008] 1 WLR 2711, para 31 and *In re Farmizer (Products) Ltd* [1997] 1 BCLC 589, 595. The claimants' construction of sections 140A to 140C of the Consumer Credit Act 1974 is inconsistent with that policy. Although the regime is designed to provide enhanced consumer protection, it must do so without overriding the purpose of the 1980 Act.

Further, a cause of action can accrue even though liability and quantification, being matters in the court's discretion, will take place at a later date: see *Farmizer*, p 599, *Hillingdon Borough Council v ARC Ltd* [1999] Ch 139, 150 and *Spread Trustee*, para 148.

The Court of Appeal in the present case was correct to hold that, by the time of the first instance trials in 2020, the relationship between the bank and the claimants was fair. The facts going to unfairness pleaded by each claimant were, by then, long past. There can be "episodes" of unfairness in a financial relationship, for example in relation to the rate of interest payable at a particular point in time on a credit card. But, by definition, such episodes can end. And when these PPI policies ended, and all payments referable to them had been paid off, the relationship was fair.

To suggest that the use of the word "is" in "if [the court] determines that the relationship . . . is unfair to the debtor" in section 140A means that the court can only ever assess fairness as at the date of trial in an ongoing relationship, and otherwise at the date the relationship came to an end, takes the meaning of those words well beyond ordinary usage. A more straightforward reading is to read the words as requiring a determination at the relevant time (which may not be the present), rather than insisting on a determination at the present time and then shoehorning all possible past claims, however little connection they have to the present, into the words "is unfair".

The term "is unfair" is used in section 140A because the drafting proceeds on the assumption that if a lender is treating a borrower unfairly, the borrower will apply to the court under section 140B(2) during the term of the credit agreement to obtain relief from that unfairness. The present tense was not used so as to permit a debtor to sit on their hands for decades before deciding to bring any application under sections 140A to 140C.

The bank's failure to disclose the commissions after the PPI policies had come to an end was not in itself a new continuing source of unfairness. This would only prevent the claims from being time-barred if the bank had "deliberately concealed" its receipt of commission from the claimants within the meaning of section 32(1)(b) of the 1980 Act.

Unlike *Plevin v Paragon Personal Finance Ltd* [2014] 1 WLR 4222 and *Potter v Canada Square Operations Ltd* [2022] QB 1, which were "single premium" cases, the claimants' policies were month-to-month policies where a premium was charged each month. So long as the policy subsisted, the claimant had a decision to make each month about whether to continue the policy, and the information (about commission) was relevant to that decision. But once the PPI policies ended, the non-disclosure was of no further relevance.

Accordingly, these claimants' causes of action accrued, so that time began to run under section 9 of the 1980 Act, no later than the last date when each made their PPI premium payments, namely, in the one case April 2006 and in the other March 2008. The limitation period therefore expired in each case long before these proceedings were commenced in 2019.

The bank's alternative case is that even if (as the claimants say) the *determination of unfairness* must always be conducted by reference to the present (or the end of the relationship), the *causes of action* accrued substantially earlier, in 2006 or 2008 at the latest, and are time-barred.

Unfairness is a matter determined by the court: it is not itself a fact. It is similar to negligence or breach of duty in being a legal conclusion the court will reach from other facts, but not part of the cause of action itself. It is not enough for a claimant merely to make a bald assertion of unfairness (see *Promontoria (Pine) Designated Activity Co v Hancock* [2021] Bus LR 607, para 40 and *Campbell v Tyrrell* [2022] CTLC 113, para 90): they must allege the facts which are said to give rise to an unfair relationship. The court cannot determine that the relationship is unfair except on the basis of one of the facts contemplated by section 140A(1)(a)–(c). The present cases were therefore different from *Patel v Patel* [2010] 1 All ER (Comm) 864, where the unfairness continued up until the date of trial with the consequence that there was a continuing cause of action (as explained in *Hole v Chard Union* [1894] 1 Ch 293, 295–296). A new determination on the same facts is not a continuing cause of action. In any event, a continuing cause of action does not permit a claimant to claim damages or sums lost over six years before issuing their claim. They are entitled to sue only for losses which occurred within six years of issue: see *Phonographic Performance Ltd v Department of Trade and Industry* [2004] 1 WLR 2893, paras 17–19, 28.

Finally, and in any event, the claims must fail because of the effect of the transitional provisions regulating the entry into force of sections 140A to 140C, as set out in Schedule 3 to the Consumer Credit Act 2006, whereby the new law would not apply to a credit agreement which was a "completed agreement" by 5 April 2008. The courts below wrongly accepted the claimants' construction of paragraph 16(4) of Schedule 3 to the effect that the court can order repayment of PPI premiums under section 140B(1)(a) of the 1974 Act if they were paid "by virtue of" the credit agreement, notwithstanding that it is prohibited from ordering an account under section 140B(1)(g) in relation to those premiums. There is no sensible rationale for such a result. The intended effect of paragraph 16(4) is that, if a related agreement was made before 6 April 2007 and ceased to have any operation before 5 April 2008, no order may be made under section 140B requiring the creditor to repay any sum paid by the debtor by virtue of the related agreement even if the sum was also paid by virtue of the credit agreement. It is inherent in a transitional period that it be intended to give time to adapt to the new regime. It undermines that intention to apply the new regime to PPI policies which had come to an end before the end of the transitional period.

Weir KC replied.

The court took time for consideration.

4 October 2023. The following judgments were handed down.

LORD LEGGATT JSC (with whom **LORD BRIGGS** and **LORD HAMBLEN JJSC** and **LORD KITCHIN** agreed)

A. Introduction

1 What is the time limit for applying to the court for an order under section 140B of the Consumer Credit Act 1974 to remedy unfairness in the relationship between a creditor and a debtor? This question is raised by the two cases under appeal. Both are small claims brought against the Royal Bank of Scotland plc ("the bank") by former credit card holders who were sold payment protection insurance ("PPI") policies by the bank on which the bank received very large undisclosed commissions. In each case the claim was brought over ten years after the PPI policy was terminated and the last payment relating to it was made, but less than six years after the claimant's credit card agreement with the bank had ended. In each case the claimant was successful at a hearing before a district judge and on a first appeal. However, on second appeals by the bank to the Court of Appeal, where the two cases were heard together, the appeals were allowed and the claims were dismissed on the ground that the applicable time limit had expired before the proceedings were commenced. Because of the general importance of this issue, which potentially affects many other cases, permission was granted for a further appeal to the Supreme Court.

2 For the reasons given in this judgment, I would allow the appeal and restore the decision of the district judge in each case. In short, a claim for a remedial order under section 140B can be made at any time while the credit relationship said to be unfair to the debtor is continuing. The relevant relationship in these cases was the relationship arising out of the credit card agreement between the bank and the claimant, which continued after the PPI policy came to an end. The period of limitation begins to run only when the relationship ends and expires after six years. Each of these claims was brought within that period. So the claims are not time-barred.

B. The claims

3 Although the details differ, the facts and timelines of these two cases are similar in all relevant respects.

Karen Smith

4 Karen Smith applied (successfully) for a credit card with the bank in January 2000. The same application form offered her PPI "to protect your . . . card payments in the event of death, accident, sickness or involuntary unemployment" and stated: "We [i e the bank] strongly recommend you take out this cover. For cover just tick this box." Ms Smith did so. What the bank did not disclose was their financial interest in making this recommendation. In fact, well over 50% of the money paid for PPI did not go to the insurer but was retained as commission by the bank. Even to this day the bank has chosen not to reveal the exact size of its commission.

5 The customer was entitled to terminate the PPI policy at any time. Ms Smith did so in March 2006 and made her last payment relating to her PPI policy in April 2006. However, her credit card agreement with the bank continued for another nine years until 2015.

6 The bank never informed Ms Smith that it had received commission out of her PPI payments until February 2018, when it paid her back £529.80 under a redress scheme for PPI mis-selling established by the Financial Conduct Authority ("FCA"). This payment was said to represent the commission received by the bank insofar as it exceeded 50% of the PPI premiums paid by Ms Smith, plus interest on the principal sum refunded.

7 In August 2019 Ms Smith issued a claim against the bank in the county court seeking relief under section 140B of the Consumer Credit Act 1974. The specific relief asked for was an order requiring the bank to repay all the money paid by Ms Smith for PPI under her credit agreement (less the sum already repaid under the FCA scheme), with interest. The hearing took place before District Judge Stone sitting in Bodmin and I endorse the tribute paid by the Court of Appeal to his exemplary written judgment. He upheld the claim and ordered the bank to pay £1,346.29 (inclusive of interest) plus costs. That decision was affirmed on appeal by the county court judge.

Derek Burrell

8 Derek Burrell entered into a credit card agreement with the bank and related PPI policy in April 1998. He terminated the PPI policy some ten years later in March 2008, when his last payment relating to that policy was also made; but his credit card agreement with the bank continued for 11 more years until 2019. He was first told about the commission retained by the bank from his payments of PPI premium in December 2017, when he was repaid £855.07 (calculated in the same way as the sum paid to Ms Smith) by the bank under the FCA redress scheme. Like Ms Smith, Mr Burrell issued a claim in the county court in August 2019. The deputy district judge decided preliminary issues which included the issues still in dispute on this appeal in favour of Mr Burrell; and that decision was upheld on an appeal to the county court judge.

The decision of the Court of Appeal

9 On its appeal to the Court of Appeal in these cases the bank advanced two grounds of appeal. One was that, by reason of the transitional provisions which regulated the entry into force in 2007 of the relevant provisions of the Consumer Credit Act 1974, the claimants have no claim. The second ground was that the claims are in any event time-barred by section 9 of the Limitation Act 1980.

10 For reasons given by Birss LJ in a judgment with which Macur and Coulson LJJ agreed, the Court of Appeal rejected the first ground of appeal but upheld the second. The appeals were therefore allowed and the claims dismissed: [2021] EWCA Civ 1832; [2022] 1 WLR 2136.

11 The two issues argued before the Court of Appeal are raised again on this appeal. Before discussing them, I need to introduce the key legislative provisions.

C. The legislation

The key provisions

12 Sections 140A–140C were added to the Consumer Credit Act 1974 by the Consumer Credit Act 2006 and came into force on 6 April 2007. They replaced an earlier regime which gave the court power to re-open "extortionate credit bargains". As Briggs LJ explained in *Plevin v Paragon Personal Finance Ltd* [2014] Bus LR 553, para 52, the earlier regime was regarded as having been too technical, and as having set the bar for court intervention too high. The new scheme was intended to provide consumers with greater protection based on the concept of an "unfair relationship".

13 So far as relevant, section 140A states:

> "*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."

14 Section 140B(9) places the burden of proof on the creditor. It provides that, where "the debtor . . . 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". Section 140B(1) sets out a list of things which an order under section 140B may do. It gives the court a wide range of powers. The key provision for present purposes is section 140B(1)(a) whereby an order may "require the creditor . . . to repay (in whole or in part) any sum paid by the debtor . . . by virtue of the [credit] agreement or any related agreement . . .” A

15 Section 140C contains definitions of terms used in sections 140A and 140B. It is common ground in these cases that the credit card agreements were “credit agreements” as defined in section 140C and that the PPI policies were “related” agreements.

B

How the regime operates

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 C 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 D *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 E 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), quoted at para 14 above, 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 F 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 G (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 If section 140A(1) had required the court as the general rule to determine whether the relationship between the creditor and the debtor *was* unfair to the debtor at some past time (such as when the credit agreement was made or when money became payable or was paid by the debtor), then subsection (4) would have been unnecessary. Its inclusion in section 140A H confirms that the use of the present tense in subsection (1) is deliberate and that, subject to the exception created by subsection (4), the requirement to determine whether the relationship “is” unfair to the debtor means what it says.

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. They include not only (a) "any of the terms of the [credit] agreement or of any related agreement" and (b) "the way in which the creditor has exercised or enforced any of his rights under the agreement or any related agreement", but also (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)". 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. The breadth of the matters that may be thought relevant is illustrated by a list of examples given by Hamblen J in *Deutsche Bank (Suisse) SA v Khan* [2013] EWHC 482 (Comm) at [346].

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 This is an important point to bear in mind when considering the time bar defence asserted by the bank in this case. As I noted in *Patel v Patel* [2010] 1 All ER (Comm) 864, para 64, in a passage approved by the Court of Appeal (Kitchin LJ, with whom Underhill and Moore-Bick LJJ agreed) in *Scotland v British Credit Trust Ltd* [2014] Bus LR 1079, para 82:

> "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 section 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."

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.

Plevin v Paragon Finance

26 This last point is confirmed by the decision of this court in *Plevin v Paragon Personal Finance Ltd* [2014] 1 WLR 4222, a case which, like the present cases, involved the non-disclosure of commissions received out of premiums paid for PPI cover. The claimant had borrowed money to pay off existing debts and fund some home improvements. The loan, which had a ten-year term, was arranged by a broker who recommended PPI. The PPI premium was all paid upfront and added to the amount of the loan. Of the PPI premium, 71.8% 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.

27 During the period of the loan the claimant brought proceedings against the lender which included an allegation that her relationship with the lender was unfair within section 140A(1)(c) of the 1974 Act because of the non-disclosure of the amount of the commission. On an appeal to the Supreme Court, the claimant succeeded on this issue. Lord Sumption JSC (with whom the other Justices agreed) said, at para 18:

> "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."

28 Lord Sumption JSC then considered whether this unfairness was due to anything "done (or not done) by, or on behalf of, the creditor" so as to fall within section 140A(1)(c). There was nothing which the creditor had positively done to cause the unfairness, so the question was whether the unfairness resulted from the creditor's failure to do something. On this point Lord Sumption JSC said, at para 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."

29 Applying this test, Lord Sumption JSC considered that, given the size of the commissions paid and their potential significance for the claimant's decision whether to purchase PPI cover, it would have been reasonable to expect the lender in the interests of fairness to have disclosed to her the amount of the commissions. Had this been done, this source of unfairness would have been removed because the claimant would then have been able to make a properly informed judgment about the value of the PPI policy (para 20). The Supreme Court concluded that this was a sufficient reason to justify reopening the transaction and remitted the case to the county court to decide what, if any, remedial order to make under section 140B.

D. The time bar issue

30 In the light of the judgment in *Plevin*, the bank does not dispute that in each of the present cases its failure to disclose the commissions that it received made its relationship with the claimant arising out of the credit agreement (taken with the related PPI agreement) unfair to the claimant. In the case of Karen Smith, the district judge made a finding of fact that she would not have applied for PPI cover if she had known that more than half of her monthly payments would be kept as commission by the bank. The bank cannot and has not sought to challenge that finding. The bank also does not dispute that, if the court was entitled to make an order under section 140B(1)(a) for the repayment of money, the order made requiring the bank to repay all the sums paid for PPI by Ms Smith (insofar as they had not been repaid already), with interest, was an order which the court was entitled to make.

31 The main argument made by the bank is that the claims are barred by section 9 of the Limitation Act 1980. This provides:

> "(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."

It is common ground that this is the applicable limitation period in the present cases. The dispute is about when "the cause of action accrued".

The bank's contention

32 The bank contends that the claimant's cause of action accrued so that time began to run under section 9 when each of the PPI premium payments was made which the claimant is seeking to recover. In the case of Ms Smith, the last such payment was made in April 2006; and, in the case of Mr Burrell, it was made in March 2008. The limitation period therefore expired six years later, in each case long before these proceedings were commenced in 2019.

33 As stated earlier, it was not until partial redress was offered to the claimants under the FCA scheme—in December 2017 in the case of Mr Burrell and February 2018 in the case of Ms Smith—that the bank disclosed the fact that it had received commission and also that the amount of that commission had exceeded (by a clearly considerable though still undisclosed margin) 50% of the sums paid for PPI cover. Until then, the claimants were kept in total ignorance of these facts by the bank. Indeed, this inequality of knowledge was one of the very matters which, as District Judge Stone found in the case of Ms Smith, made her relationship with the bank unfair for the duration of that relationship. As the claimants did not

know about the commissions, they could not reasonably have been expected to bring proceedings seeking an order for repayment.

34 The bank submits, however, that this would only prevent the claims from being time-barred if it were found that the bank "deliberately concealed" its receipt of commission from the claimants within the meaning of section 32(1)(b) of the Limitation Act 1980. This provision states that, where any fact relevant to the claimant's right of action "has been deliberately concealed from him by the defendant," the period of limitation does not begin to run until such time as the claimant has discovered the concealment or could with reasonable diligence have discovered it. It is for a claimant who wishes to rely on this provision in answer to a limitation defence to raise it and prove the facts necessary to establish deliberate concealment.

35 In another case under appeal to this court, *Potter v Canada Square Operations Ltd* [2022] QB 1, the claimant has alleged deliberate concealment. The facts of that case differ from the present claims, as Ms Potter did not become aware that most of her premium payments for PPI cover for a loan had been retained as commission by the lender until more than six years after her credit relationship with the lender had ended. So by the time she found out about the commission and its non-disclosure and brought proceedings for a remedy under section 140B, the limitation period had on any view expired unless the claimant could successfully rely on section 32(1)(b). The Court of Appeal held that there had been deliberate concealment within the meaning of section 32(1)(b) so that the time when the limitation period began to run was postponed and the proceedings had been brought in time. That decision is the subject of an appeal which has been heard by a different panel of the Supreme Court. The outcome of that appeal, however, will not affect the present cases because neither Ms Smith nor Mr Burrell has made an allegation of deliberate concealment.

36 If, therefore, the bank is correct that the claimants' causes of action accrued when the PPI premium payments were made, it follows that the Court of Appeal was right to dismiss the claims on the ground that they were brought after the limitation period had expired.

37 The Court of Appeal reached that result by a different route from the argument made by the bank. On this appeal, the bank has renewed its argument which the Court of Appeal did not accept and also relies, in the alternative, on the Court of Appeal's reasoning. It is therefore necessary to consider both approaches. I will consider first the bank's primary case, which I will call the "completed cause of action" argument. Then I will consider the analysis adopted by the Court of Appeal, which I will call the "no unfairness" argument.

The "completed cause of action" argument

38 The principal argument made by the bank starts from the well-established definition of a "cause of action" as a set of facts which entitles a person to obtain a remedy against another person from the court: see e g *Letang v Cooper* [1965] 1 QB 232, 242–243 (Diplock LJ). To identify when a cause of action has accrued, it is thus necessary to identify, first, the remedy sought by the claimant and, second, the material facts which, if proved, would as a matter of law entitle the claimant (subject to any positive defences) to obtain that remedy. The cause of action accrues on the date when all those material facts are first capable of being pleaded.

39 There are many authoritative statements of this test. For example, in *Central Electricity Board v Halifax Corpn* [1963] AC 785, 806, Lord Guest said that the date when a cause of action accrues is "the date on which the plaintiff would be able to issue a statement of claim capable of stating every existing fact which, if traversed, it would be necessary for the plaintiff to prove in order to support his right to judgment."

40 Where a claim is made by a debtor for an order under section 140B of the 1974 Act on the ground that the relationship arising out of the credit agreement is unfair, the burden is on the creditor to prove that the relationship is not unfair: see para 14 above. This does not, however, mean that the claimant is absolved from pleading particulars of claim which identify concisely the facts on which the claimant relies. Nor does it mean that the claimant can make allegations of fact which the court is bound to accept unless the creditor disproves them; it is still the debtor who has the onus of proving facts on which he or she positively relies: *Promontoria (Henrico) Ltd v Samra* [2019] CTLC 295, para 26.

41 Applying this approach to the present claims, counsel for the bank point out that the sole remedy sought by both claimants is an order for repayment of sums which they paid in respect of their PPI policies. They submit that, once the last PPI related payment had been made, all the matters which entitled the claimant to an order for repayment had occurred and were capable of being pleaded. The cause of action was therefore complete and time began to run under section 9 of the Limitation Act 1980.

Why the "completed cause of action" argument is flawed

42 All the courts below, including the Court of Appeal, rejected this argument and, in my opinion, they were quite right to do so. The central flaw in the completed cause of action argument is that, for as long as the credit relationship is continuing, the debtor cannot have a completed cause of action before the time at which a determination of unfairness is made. Proof of facts which made the relationship unfair to the debtor at some earlier point in time is never sufficient to give the debtor an entitlement to a remedy. That is because, as noted at paras 19–21 above, unless the relationship has ended, section 140A makes the power of the court to make an order under section 140B conditional on a determination that the relationship "is" (i e at the time when the determination is made) unfair to the debtor. Necessarily, a right to obtain a remedy for unfairness existing on that day cannot arise before that day comes.

43 To illustrate this point, take the case of *Patel v Patel* [2010] 1 All ER (Comm) 864, which I decided in 2009 when sitting as a deputy High Court judge. The credit agreement in that case was made in 1992. When the trial took place, the relationship between the creditor and the debtor arising out of the credit agreement was still continuing. At the trial I found that the relationship was unfair to the debtor and made an order under section 140B designed to remedy that unfairness. As the credit relationship had not ended, the power to make such an order depended on a determination that the relationship "is unfair to the debtor" when the order was made, which was on 10 December 2009. A finding that the relationship had been unfair on any earlier date would not have satisfied the statutory condition in section 140A(1) for making an order under section 140B; nor could the debtor have been entitled before 10 December 2009 to a remedy for unfairness of the relationship existing on that date.

44 Thus, for as long as the credit relationship lasts, no cause of action accrues for which the debtor then has a period of time in which to sue for a remedy under section 140B. Any entitlement to a remedial order arises from a set of facts which is complete only at the time when the order is made. In the judgment of the Court of Appeal, at para 54, Birss LJ expressed the point clearly when he said that:

> "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."

45 Once the credit relationship ends, the position changes. A determination that the relationship was unfair to the debtor on the date when it ended can be made on that date or any later date. All the facts relevant to the determination are fixed when the relationship ends and nothing that occurs subsequently can affect the assessment of fairness. It can therefore be said that a cause of action has accrued so that the period of limitation starts to run.

46 The reason why in this case the completed cause of action argument may seem appealing at first blush is that the facts resemble quite closely facts which could give rise to a cause of action founded on contract or tort of a type which lawyers are used to analysing in a way that is similar to the approach for which the bank contends. If, when offering PPI cover to a customer, the bank had owed a duty under a statute or at common law to disclose to the customer the existence and amount of commission that it stood to receive, a cause of action based on breach of such a duty would accrue on proof that: (i) the customer entered into a PPI contract and made payments of premium under the contract; (ii) the bank did not disclose before the contract was made or while it remained in force the commission payable out of the PPI premium payments; and (iii) had such disclosure been made, the customer would not have entered into the PPI contract (or would have terminated it immediately if the contract had already been concluded) and therefore would not have made any subsequent payments of premium. In such a case the cause of action would be complete, and the limitation period would therefore begin to run, at the time when the payments were made.

47 To draw an analogy with a claim of this type, however, is misleading because a claim for relief under section 140B of the 1974 Act is not based on any breach of a legal duty and cannot be analysed in the same way. While the relationship between the creditor and the debtor arising out of the credit agreement is continuing, there is no set of material facts which as a matter of law constitute necessary and sufficient elements of the cause of action such that, if those facts are established, the claimant has an accrued entitlement to a remedy under section 140B. As described at paras 16–25 above, the jurisdiction under sections 140A and 140B does not fit that model and operates in a very different way.

The previous regime

48 To understand why the regime in sections 140A–140C of the 1974 Act was designed as it is, it is instructive to consider the previous regime which these provisions replaced. Under the previous regime, which was contained in sections 137–140 of the 1974 Act, the court had power to reopen a credit agreement "so as to do justice between the parties" if it found that the credit bargain was "extortionate". In reopening such an agreement, the court had power to grant a range of remedies, including an order requiring the creditor to repay the whole or part of any sum paid under the credit bargain or any related agreement by the debtor. Case law established that the period of limitation for a such a claim depended on the nature of the relief sought. Insofar as the debtor was seeking relief from indebtedness incurred under the credit agreement, the claim was "an action upon a specialty", for which section 8 of the Limitation Act 1980 prescribes a limitation period of 12 years. Insofar as the debtor was seeking repayment of payments already made under the credit agreement, the claim fell within section 9 which, as already noted, prescribes a limitation period of six years. In each case the cause of action accrued when the credit agreement was made: see *Rahman v Sterling Credit Ltd* [2001] 1 WLR 496.

49 From the point of view of limitation, this regime had two palpable defects. First, where a claim was brought more than six years but less than 12 years after an extortionate credit bargain was made, the extent of the relief which the court could grant depended on what sums the debtor had already paid and what sum was still outstanding. This appears arbitrary. In *Rahman v Sterling Credit Ltd*, for example, the debtor had borrowed £5,000. The loan carried interest at a rate of 32.1% and was secured by a legal charge over the debtor's property. For some 11 years the debtor made sporadic payments, but his indebtedness gradually increased. By the time the debtor applied to the court for relief, he had paid around £14,000 under the credit bargain but still owed around £13,000. The Court of Appeal held that, insofar as the debtor was seeking relief from the obligation to pay amounts still owing, the action had been brought in time as the applicable limitation period was 12 years; but any claim for repayment of sums of money already paid under the credit agreement would be time-barred. Thus, a debtor who had made greater payments under an extortionate credit bargain was disadvantaged in comparison with a debtor who had paid less and accumulated larger arrears. It is hard to see any logic in this.

50 Even more unsatisfactory was the fact that a claim for relief of any kind under sections 137–140 became time-barred by reason of section 8 of the Limitation Act 1980 after 12 years. In *Nolan v Wright* [2009] 3 All ER 823, para 11, Judge Hodge QC sitting as a judge of the High Court commented on the undesirability of applying a strict limitation period—even one as long as 12 years—to a claim to reopen an extortionate credit bargain. Judge Hodge quoted the witness statement made by the creditor in that case explaining that he often left loans to "run" for more than 12 years before taking proceedings to enforce them. The creditor pointed out candidly that this strategy had the benefit of allowing him to accrue a limitation defence to "the inevitable claims" that the relevant credit agreement was an extortionate credit bargain.

51 The repeal of sections 137–140 and their replacement by sections 140A–140C of the 1974 Act was clearly designed to avoid these defects by giving the court broader and more flexible powers. If the bank is correct, a technical and arbitrary regime has been replaced by one that is no less arbitrary and even more technical. Take a case with facts such as those in *Nolan v Wright*, where the creditor has allowed more than 12 years to run before taking steps to enforce a credit agreement under which interest is payable at an exorbitant rate. If the debtor then applies to the court for relief under section 140B, determining whether the claim had been brought in time would, on the bank's case, require a highly complex analysis. If and insofar as the debtor was seeking an order for repayment of sums paid more than six years before the action was brought, it would not be enough to consider whether the credit relationship was unfair to the debtor at the time of the trial (or when the relationship ended) and, if so, what, if any, order for repayment was appropriate. The court would also have to make such an assessment at a point in time six years before the claim was brought. If at that time the debtor could have pleaded all the facts necessary to show that the relationship was unfair and justify an order for repayment of sums that had been paid, the debtor would on the bank's approach have had a completed cause of action for which time had started to run. The claim would therefore be time-barred insofar as it sought repayment of those sums.

52 The complication would not end there. If another remedy, such as relief from outstanding indebtedness, was sought and considered by the court to be appropriate, the court would have to conduct a similar exercise to review the state of the relationship between the creditor and the debtor 12 years before the claim was brought. It would be necessary to assess whether or to what extent the relationship was at that time unfair because of one or more the matters specified in section 140A(1) and, insofar as the relationship was unfair for that reason, what order it would have been appropriate to make. That hypothetical order would then need to be compared with the order which the court thought appropriate to remedy the current unfairness of the relationship. To the extent that the relief thought appropriate to remedy the current unfairness would have been granted if an action had been brought 12 years or more before the actual action was brought, the claim for such relief would be time-barred by section 8 of the Limitation Act 1980.

53 It is impossible to suppose that the regime under sections 140A–140C of the 1974 Act was intended to operate in such a technical, complex and unsatisfactory way. And, as discussed already, it is clear on the face of the provisions that this is not how the statutory scheme works. Instead, technicality and strict time limits (until the relationship ends) have been eschewed in favour of a regime which gives the court broad, flexible, discretionary powers.

The absurdity argument

54 Counsel for the bank argued that this approach leads to absurdity. They submitted that, if it is correct that a claim for an order under section 140B can be commenced at any time until at least six years after the credit relationship has ended, and that a claim made within this time opens up for consideration the whole history of the relationship, then absurd consequences follow. They posed an example of a claim complaining about interest paid at an unfair rate for only the first year of a 25-year loan. It would, they submitted, be absurd if such a claim could be pursued over 30

A years after the interest was paid, despite the fact that the interest rate applied during the last 24 years of the loan was fair.

55 It is not, I suspect, common for a lender who charges interest at an extortionate rate for the first year of a long-term loan to agree a reasonable rate of interest for the remaining period of the loan. But such a situation is at least theoretically possible and it is legitimate to pose the question whether in such a case a claim brought by the borrower within six years after the B relationship arising out of the loan agreement ended, alleging that the relationship was unfair when it ended, could succeed. It follows from what I have already said that such a claim would not be barred by section 9 of the Limitation Act 1980. But this does not mean that the claim would have any real prospect of success. There are, in my view, two reasons why it would not (absent some additional grounds for finding the relationship unfair).

C **56** The first is that the date at which the fairness of the credit relationship would need to be assessed is, as discussed, the date on which the relationship ended. On the facts supposed, after the first year of the loan the debtor paid interest at a fair rate for 24 years. Even if the rate of interest payable in the first year would, if viewed by itself, be considered unfair, it is hard to imagine that this would cause the credit relationship, viewed as a whole when it ended, to be seen as unfair. As Kitchin LJ said in *Scotland v* D *British Credit Trust Ltd* [2014] Bus LR 1079, para 87:

> "if there are matters relied on by the debtor which point to the relationship being unfair the court must clearly take into account any countervailing factors or other matters which put those matters relied on by the debtor into perspective and so may affect the assessment."

E Apart from the rate of interest, other matters capable of affecting the assessment would include what complaint, if any, about the interest charged in the first year or attempt to seek redress the debtor had made during the 25-year history of the relationship. In the absence of some extraordinary explanation, inaction by the debtor over such a length of time is likely to be regarded as an overwhelming factor pointing to the relationship not being unfair when it ended.

F **57** Second, even if the court were to find that the relationship was unfair to the debtor when it ended, it is in the court's discretion whether to make an order under section 140B. If the debtor, with knowledge of the relevant facts, had waited for 30 years after the contested payments of interest were made before making a claim for repayment, it seems inconceivable that the court would think it just to make such an order.

G **58** The regime under sections 140A–140C of the 1974 Act is not unique in treating the consequence of delay in bringing proceedings as a matter governed partly or even wholly by an exercise of judicial discretion rather than a statutory time limit. There are some types of claim which are not subject to any statutory period of limitation at all. One example is a claim for specific performance, where the only control for delay is the discretion to refuse relief by applying the equitable doctrine of laches: *P & O Nedlloyd* H *BV v Arab Metals Co (No 2)* [2007] 1 WLR 2288. Another example is a petition for relief under sections 994 to 996 of the Companies Act 2006 on the ground of unfair prejudice in the conduct of a company's affairs. Where there has been delay in issuing such a petition, the court's approach is to consider how the delay should affect the exercise of the discretion under section 996 to make such order as the court thinks fit. If, in view of the delay and the reasons for the delay, it is unfair in all the circumstances for the petitioners to obtain the relief they seek, the court will exercise its discretion to refuse it: *In re Cherry Hill Skip Hire Ltd* [2023] Bus LR 14, para 36 (approving *In re Edwardian Group Ltd* [2019] 1 BCLC 171).

59 A similar discretionary approach applies in deciding whether to make an order under section 140B in a case where, although the claim is not time-barred, in view of delay by the debtor in making a claim and the reasons for the delay, the court considers it unfair in all the circumstances for the debtor to obtain the relief sought.

60 In his judgment in the case of Karen Smith, District Judge Stone observed that:

> "if the bank had not continued to keep her in total ignorance, and had written to her more than six 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."

I agree with this observation. However, it does not assist the bank since, in fact, the bank did continue to keep Ms Smith in total ignorance until a matter of months before the proceedings were commenced. In these circumstances the fact that she did not make a claim for repayment sooner cannot be held against her. It cannot be said either that her inaction had the result that the credit relationship was no longer unfair when it ended or that it provides a reason why the court in exercising its discretion should decline to order the return of the sums paid. Indeed, for the bank to complain about delay in making the claim seems to me wholly unreasonable.

The "no unfairness" argument

61 The Court of Appeal did not accept the argument advanced by the bank that the claimant's cause of action accrued when payments of PPI premium were made. They considered as I do that the point in time at which the assessment of fairness must be made, and the right to a remedy under section 140B arose, is the time when the relationship came to an end. Birss LJ said, at para 45, that:

> "the court in assessing the fairness of the relationship between the debtor Ms Smith and the creditor the bank 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."

I agree with this statement, save to say that the court is not merely entitled but required to assess the fairness of the relationship between the bank and Ms Smith at the point in time when the relationship came to an end—that is, in 2015.

A **62** As Ms Smith issued her claim form within six years from that time, it follows that her claim is not time-barred. The Court of Appeal, however, reached the opposite conclusion. They held that the claims are nevertheless barred by section 9 of the Limitation Act 1980. The reasoning of Birss LJ started, at para 64, from this premise:

> "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."

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Birss LJ went on to say, at para 65, that, just as the court can find that a relationship was fair in the past but then became unfair, so the converse is possible and that, in a case where the relationship was unfair at a point in the past but where 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, the relationship may not still be unfair.

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63 All this seems to me indisputable. As already discussed, the fact that the relationship may cease to be unfair is one of the reasons why a debtor cannot have a completed or accrued cause of action before the date at which the fairness or otherwise of the credit relationship must be assessed.

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64 Where, as I see it, the Court of Appeal went wrong is at the next step in their reasoning. Taking the case of Ms Smith, they held that the relationship arising out of her credit agreement with the bank ceased to be unfair to her in April 2006 once her last PPI related payment was made. In their view, as explained by Birss LJ at para 68:

> "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 [the bank] 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."

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From this the Court of Appeal drew the conclusion that April 2006 is the date when time started to run for the purposes of limitation.

65 If it is correct that the relationship between Ms Smith and the bank ceased to be unfair to her in April 2006 when she made her last payment of PPI premium, then the Court of Appeal was right to hold that her claim could not succeed. But that is not because time started to run for the purposes of limitation on that date. In stating, at para 69, that "the relevant unfair relationship came to an end in April 2006," it seems to me that the Court of Appeal conflated the question of when the relationship came to an end with the question of when (if at all before it came to an end) the relationship ceased to be unfair. The Court of Appeal had previously recognised, correctly, that, after a relationship arising out of a credit agreement has ended, the fairness of the relationship is to be assessed at the point in time when the relationship came to an end. The corollary is that the right to claim relief on the ground that the relationship was unfair at that time arose then and the limitation period began to run. In the case of Ms Smith, this occurred in 2015. Whether the relationship between the

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bank and Ms Smith was unfair in 2015 is the question which the court had to decide in adjudicating on the merits of her claim. If the Court of Appeal is correct that the relationship ceased to be unfair to her in April 2006, then the bank is entitled to succeed, not because the claim alleging unfairness in 2015 was brought after the time limit had expired, but because the relationship was not unfair to Ms Smith when it ended in 2015. So the condition for making an order under section 140B was not satisfied and no remedial order was possible or needed.

66 I cannot accept, however, that the relationship between the bank and Ms Smith ceased to be unfair to her in April 2006. Indeed, I think it plain that it did not. It is true that no more payments for PPI cover were made by her after April 2006 out of which the bank received further commission. But the bank did not at any time before the relationship ended in 2015 repay any of the sums which Ms Smith had paid for PPI cover, nor did it disclose to her the existence let alone the amount of the commission that it had received out of those payments. Applying the test articulated in *Plevin* [2014] 1 WLR 4222 (see para 27 above), those are both steps which it would be reasonable to expect the creditor to take in the interests of fairness and which were necessary to reverse the consequences of the unfairness so that the relationship as a whole could no longer be regarded as unfair.

67 The Court of Appeal was, in my opinion, clearly wrong to say that 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". To the contrary, the economic consequence that Ms Smith was financially worse off as a result of having paid PPI premiums which she would never have paid if the bank had disclosed the amount of its commission persisted throughout that period of around nine years. Indeed, her loss was exacerbated because she did not have the use of the money during this period. The relationship was therefore still unfair to her at the time when it ended in 2015.

68 If the approach of the Court of Appeal were correct, I find it difficult to see how a claim for an order under section 140B brought after the credit relationship ended could ever succeed. The relief applicable in such a case will generally if not inevitably be an order requiring the creditor to repay money. Necessarily, the money of which repayment is sought must have been paid by the debtor before the date at which the question whether the relationship was unfair to the debtor is to be assessed. If the fact that the payments had been made meant that they could not be regarded as a cause of any continuing unfairness, no order for repayment would be possible. This result is not only irrational but contrary to the intention reflected in section 140A(4) that the powers of the court to grant relief should be available notwithstanding that the credit relationship may have ended.

69 I therefore consider that the "no unfairness" argument is also mistaken and that in adopting it the Court of Appeal went down a blind alley. They should have affirmed the conclusions of the courts below that the relevant credit relationships remained unfair to the debtors when they ended and that the claims seeking a remedy for that unfairness were brought in time.

E. The transitional provisions

70 As mentioned earlier, the bank has also renewed on this appeal an argument that the claims must fail because of the effect of the transitional provisions regulating the entry into force of sections 140A–140C. This argument was rejected by all the courts below for very good reason.

71 Sections 140A–140C were inserted into the 1974 Act by sections 19 to 21 of the Consumer Credit Act 2006. Those provisions were brought into force on 6 April 2007 by article 3(2) of the Consumer Credit Act 2006 (Commencement No 2 and Transitional Provisions and Savings) Order 2007 (SI 2007/123). The transitional provisions are contained in Schedule 3 to the 2006 Act. They provided for a "transitional period" of one year which ended on 5 April 2008. The evident purpose of the transitional period was to give creditors a window of time in which to bring an existing relationship arising out of a credit agreement to an end if they wished to avoid that relationship being subject to sections 140A–140C.

72 Thus, Schedule 3, paragraph 14(2), provides that the court shall not make an order under section 140B of the 1974 Act in connection with a credit agreement made before section 140B came into force if, before the end of the transitional period, the agreement became a "completed agreement". A "completed agreement" is defined in paragraph 1(2) as an agreement under which there is no sum that is payable or will or may become payable.

73 If a credit agreement did not become a "completed agreement" before the end of the transitional period, an order under section 140B of the 1974 Act could subsequently be made in connection with the agreement. The credit agreements in connection with which the present claims are brought did not become completed agreements before the transitional period ended on 5 April 2008. Indeed, sums continued to become payable under those agreements for many years after that—until 2015 in the case of Ms Smith and 2019 in the case of Mr Burrell. Orders under section 140B can therefore be made in connection with both agreements.

74 Schedule 3, paragraph 16, deals with related agreements and gives the creditor protection against retrospective effect where a related agreement ceased to have any operation before the end of the transitional period even though the credit agreement itself continued. For present purposes the relevant provisions are paragraph 16(4)(a) and (5), which state:

> "(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 . . . and the order shall not under paragraph (g) of that subsection direct accounts to be taken . . . between any persons in relation to a related agreement to which this sub-paragraph applies.
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> "(5) Sub-paragraph (4) applies to a related agreement . . . if— (a) it was made . . . before [6 April 2007]; and (b) it ceased to have any operation before the end of the transitional period."

75 The effect of these provisions is that where, after the end of the transitional period, a court is considering what order to make under section 140B in connection with a credit agreement, the list of possible orders in section 140B(1) must be read as excluding any reference to any

related agreement made before 6 April 2007 which ceased to have any operation before 5 April 2008.

76 It is common ground that in the present cases the PPI policies were related agreements made before 6 April 2007 (when sections 140A–140C came into force) and which ceased to have any operation (because they were terminated and the last payments of premium were made) before 5 April 2008 (the end of the transitional period). It follows that section 140B(1) must be read for the purposes of these claims as if it did not include any reference to the PPI policies as related agreements.

77 This modification, however, does not affect the claims made by Ms Smith and Mr Burrell. It is notable, first of all, that the only references to any related agreement to which paragraph 16(4) applies are references in section 140B(1). References in section 140A(1) to any related agreement are not affected. In applying section 140A(1) in the present cases, therefore, the PPI policies are still relevant even though they ceased to have any operation before the end of the transitional period. Thus, the relationship which has to be considered in making the assessment of fairness in these cases is not simply that arising out of the credit agreement, viewed on its own; it is the relationship arising out of that agreement taken with the related PPI policy.

78 The order made in the case of Ms Smith and sought by Mr Burrell is an order under section 140B(1)(a) requiring the bank to repay sums paid by them for PPI cover. Section 140B(1)(a) gives the court power to order the creditor to repay any sum paid by the debtor "by virtue of the [credit] agreement or any related agreement." Because of the effect of the transitional provisions, the reference to "any related agreement" must be ignored. The court's power is limited to ordering repayment of sums paid by virtue of the credit agreement between the bank and the claimant. However, the sums paid by Ms Smith and Mr Burrell for PPI cover were paid by them by virtue of their credit agreements with the bank. The court therefore has power to order repayment of those sums.

79 In the case of Ms Smith, District Judge Stone made a specific finding that all sums paid for PPI cover were paid by virtue of her credit agreement. This finding is unimpeachable. It was based on the facts that: the PPI policy and the credit agreement were entered into at the same time and by completing the same form; the PPI policy could not exist without the credit agreement and could only continue for so long as the credit agreement continued; the PPI premiums were calculated as a percentage of the liabilities incurred under the credit agreement; and the PPI premiums were added to the balance payable under the credit agreement each month and could only be paid by making payments under the credit agreement.

80 The bank does not dispute that all the sums paid by the claimants for PPI cover were paid by virtue of their credit agreements. It follows that the court has power to order the bank to repay those sums and is not deprived of this power by the transitional provisions.

81 The bank seeks to avoid this conclusion by arguing that it is not what the drafting of the transitional provisions was intended to achieve. According to the bank, the intended effect of Schedule 3, paragraph 16(4), is that, if a related agreement was made before 6 April 2007 and ceased to have any operation before 5 April 2008, no order may be made under section 140B requiring the creditor to repay any sum paid by the debtor by virtue of the related agreement even if the sum was also paid by virtue of the credit agreement. If this is what had been intended, however, it is what the transitional provisions would have said. It is impossible to read paragraph 16(4) as bearing such a meaning. Indeed, no explanation has even been offered of how the requirement to read references in section 140B(1) to any related agreement as if they do not include references to a related agreement to which paragraph 16(4) applies is capable as a matter of language of being understood to have such an intended effect.

82 The plain intention of the transitional provisions is that, if a creditor wanted to achieve a situation where no repayment could be ordered under section 140B of sums which the debtor had paid by virtue of both the credit agreement and a related agreement, it was not sufficient for the creditor to ensure that the related agreement ceased to have any operation before the end of the transitional period; it was necessary to ensure that the credit agreement became a completed agreement before the end of that period. That did not happen here.

83 Clutching at a straw, counsel for the bank tried to make something of the final words of paragraph 16(4) which say that an order under section 140B(1) "shall not under paragraph (g) of that subsection direct accounts to be taken . . . between any persons in relation to a related agreement to which this sub-paragraph applies". It was submitted that there is no sensible rationale for a result whereby the court can order repayment of PPI premiums if they were paid "by virtue of" the credit agreement but is prohibited from ordering an account in relation to those premiums. Even if this were the effect of paragraph 16(4), it would not entitle the court effectively to rewrite the transitional provisions to achieve a result considered to be more sensible. But I do not accept that this is the effect of paragraph 16(4). I can see nothing to prevent the court in cases of the present kind from ordering an account to be taken between the bank and its customer of payments of PPI premiums made under the credit agreement. The fact that no such account could be ordered in relation to the PPI policies themselves would not prevent this.

84 I conclude that the argument made by the bank based on the transitional provisions is without merit.

F. Decision

85 For these reasons, I would allow the appeals and reinstate the order made by the district judge in each case.

LORD HODGE DPSC (concurring)

86 I am very grateful to Lord Leggatt JSC for setting out the facts in his judgment and do not repeat them in this concurring judgment. I agree that, for the reasons which he gives, the appeals should be allowed and that in each case the order of the district judge be restored. I comment only on the limitation question and the bank's concern about being exposed to stale claims.

87 After the hearing, I was initially of the view that the appeal should fail on the ground of the limitation of actions, but I am persuaded that my initial view was mistaken. To my mind, the central question in relation to the limitation defence is whether the use of the present tense in section 140A(1) of the Consumer Credit Act 1974, which Lord Leggatt JSC has set out in para 13 of his judgment, i e "the relationship . . . is unfair to the debtor . . ." prevents the operation of the statutory limitation. I have come to the view that as a matter of statutory construction, subsection (4), which allows a determination of the fairness of the relationship to be made "notwithstanding that the relationship may have ended", qualifies subsection (1) but only in the circumstance that the relationship has ended. Therefore, in subsection (1) "is" cannot be read as "is or was" with the result that, during the course of the relationship, the court must give effect to the use of the present tense in subsection (1) by asking itself whether on the date of a trial the subsisting relationship *is* unfair.

88 As a matter of pleading, a debtor seeking a remedy under section 140A(1) of the 1974 Act in the context of a continuing relationship could properly plead in a statement of claim that the relationship with the creditor continues to be unfair because of some past event in the relationship which has not been remedied. In these appeals the appellants could, if they had had the requisite knowledge, have done so several years before their relationship with the bank arising out of their credit agreements had ended. But, as Lord Leggatt JSC has explained, the court is empowered to make an order under section 140B of the 1974 Act only if the relationship is unfair at the date of trial. That is the effect of the use of the present tense.

89 The bank states that, if the relationship between the bank and the debtor continues, this interpretation exposes banks to continuing claims relating to PPI policies long after the PPI mis-selling scandal has become stale. The Limitation Act 1980 has no relevant longstop date. Notwithstanding that people have been aware of the PPI mis-selling and the provision of regulatory compensation for such mis-selling for many years, it is feared that a continuing relationship between the debtor and the bank would give a green light to a claim. The answer to this concern, to my mind, lies in the discretion which Parliament has given the court in relation to the appropriate remedy, if any, which it chooses to give. If a debtor sits on his or her hands in knowledge of the relevant facts, it would be, as Lord Leggatt JSC states, inconceivable that a court would think it just to make an order under section 140B of the 1974 Act. This is so, both during the currency of the relationship and in the six years after that relationship has ended.

Appeals allowed.

COLIN BERESFORD, Barrister