Neutral Citation: [2015] IEHC 557

THE HIGH COURT

[Record No.2014/1871 SS]

BETWEEN

LARRY UNTOY

PLAINTIFF

AND

GE CAPITAL WOODCHESTER FINANCE LIMITED AND GE CAPITAL WOODCHESTER LIMITED TRADING AS GE MONEY

DEFENDANTS

JUDGMENT of Ms. Justice Iseult O'Malley delivered the 25th day of August 2015.

Introduction

1. This is an appeal by way of case stated pursuant to the provisions of s.2 of the Summary Jurisdiction (Ireland) Act 1857, as extended by s. 51 of the Courts (Supplemental Provisions) Act 1961. The appeal is brought by the plaintiff, who makes a claim that GE Money mis-sold to him payment protection insurance products that he did not need, and that were of no benefit to him. He says that in so doing the defendant failed in its duty to advise him and also failed to ensure that the products sold to him were suitable. He also claims that it misled him in failing to disclose its relationship with the underwriter, and in failing to disclose the fact that it was earning commission on the sale.

2. The transaction arose in the context of loans taken out by the plaintiff with GE Money. In offering him a separate payment protection policy on each occasion, GE Money was in fact acting as intermediary for an underwriting company called Lighthouse. Lighthouse is owned by the same parent as the two named defendants (which, for the sake of simplicity, I shall refer to as "the defendant" or GE Money).

3. By civil process dated the 22nd March, 2013, the plaintiff claimed that he had suffered loss due to the actions and omissions of the defendant and in particular by reason of negligence (including negligent misstatement and/or negligent misrepresentation), deceit, breach of duty (including breach of contractual duty, fiduciary duty and statutory duty).

4. It was pleaded that the defendant advised and represented to the plaintiff that the policies were of benefit to him when in fact he was not eligible or entitled to avail of such benefit. It was further pleaded that it advised and represented that the policies were in his best interests when it knew, or ought to have known, that alternative policies were available and would have been better suited to his needs. The particulars of negligence include pleas that the defendant failed to conduct an adequate assessment of the plaintiff's circumstances and needs.

5. As a separate issue it was pleaded that, in breach of an implied term of the agreement and in breach of duty to the plaintiff, the defendant secretly received a commission, the value of which was unknown to him.

6. The plaintiff has sought reimbursement of his premiums, general damages and exemplary damages.

7. In paragraph 4 of the Case Stated the facts described as *"proved or admitted or agreed and as found"* by the learned District Judge are outlined as follows:

> *(1) Mr. Untoy is a senior staff nurse in the urology department of the Adelaide and Meath Hospital, Dublin incorporating the National Children's Hospital in Tallaght. Mr. Untoy gave evidence that he believed this to be a public hospital and that he was employed in the public sector.*
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> *(2) He is a naturalised Irish citizen originally from the Philippines. He graduated with his Bachelor of Science degree in nursing in 1997. After working for a time in Saudi Arabia, he arrived in Ireland 2001 where he commenced employment initially under a temporary working visa which was renewed biennially until he obtained citizenship in 2009.*
>
> *(3) Mr. Untoy became aware from media reports in 2012 that payment protection insurance may have been mis-sold and on that basis sought to take legal advice which commenced with the completion of an application form on the website of McHale Muldoon solicitors. Mr. Untoy gave evidence under cross examination that it was his understanding that at that time that it would be a straight-forward claim and that he had an automatic entitlement to repayment of any premiums paid by him. Mr. Untoy also confirmed that he did not know that he may have to go to court in relation to his claim.*
>
> *(4) Under cross examination, Mr. Untoy gave evidence that he received a response from McHale Muldoon solicitors following the completion of the online form and did not have any further contact with them until Monday, 7th April, 2014, at which point he was advised that the hearing of the within proceedings would take place on 10th April, 2014. Mr. Untoy gave further evidence under cross examination that he was not aware that he could bring his complaint to the Financial Services Ombudsman however he became aware of this independently two days previously when searching online.*
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> *(5) McHale Muldoon, on behalf of Mr. Untoy, wrote to GE by letter dated the 21st November, 2012, setting out Mr. Untoy's claim against GE for the mis-selling of payment protection insurance.*
>
> *(6) GE responded to that letter under cover date the 21st January 2013 and signed by Ms. Heidi M. Carreiro, with the title of compliance manager.*
>
> *(7) The within proceedings were issued out of the District Court Office on the 22nd May 2013.*

(8) Mr. Untoy gave evidence in chief that he entered into three linked credit agreements with GE, all of which, by their terms, were flexible loans regulated by the Consumer Credit Act 1995.

(9) The three loan agreements are respectively dated the 18th September 2007, the 31st December 2007 and the 12th May 2008. The three loan agreements were annexed to Ms. Carreiro's letter dated the 21st January 2013.

(10) The first loan was in respect of the sum of €5,000 for a period of 24 months and which was for the purpose of taking a holiday to the Philippines. Payment protection insurance was offered in conjunction with the first loan in a separate section of the loan agreement headed "Payment Protection Plan" and "Please sign only if availing of optional cover". Mr. Untoy did not apply his signature in the separate section of the loan agreement to indicate his acceptance of same. Mr. Untoy gave evidence that he did not accept the offer of payment protection insurance in respect of this loan as it was only a small amount of money.

(11) The second loan was for the amount of €24,703.87, which incorporated a top up amount of €20,000 for a period of 60 months. Mr. Untoy advised GE that the purpose of the loan was to clear credit card debt, however Mr. Untoy gave evidence that the actual use of the monies advanced was for the construction of a house in the Philippines for his mother.

(12) Payment protection insurance was also offered to Mr. Untoy in conjunction with that loan in a separate section of the loan agreement headed "Payment Protection Plan" and "Please sign only if availing of optional cover". Two levels of optional cover were offered. The first was for life, accident, sickness, redundancy and was stated to be available only to employees other than those employed directly by the state. The second was for life, accident, sickness and critical illness and was stated to be available only to self-employed or state employed customers.

(13) The separate section also stated:

> *"You can avail of the Payment Protection Plan as long as you are over 18 and under 65 years of age for the period of this agreement. I understand that the payment protection Plan is optional. I understand that no medical condition which I have received medical treatment advice or consultation for during the 12 months immediately prior to the date of my agreement will be covered. I confirm that I have read the terms of the Payment Protection Plan and that I am aware of those terms and that they meet my requirements. I understand that I must be actively at work in my normal occupation to avail of Payment Protection Plan. You may cancel the Payment Protection Plan within 30 days from the date you receive your certificate of insurance and receive a refund of any premium paid. If you cancel the Payment Protection Plan outside this 30 day period, you will not receive a refund of any premiums paid. For further information on the cancellation in the 30 day period, please refer to the terms and conditions of the certificate of insurance".*

(14) Mr. Untoy applied his signature in the separate section of the agreement to indicate his acceptance of the offer of payment protection insurance on 19 December 2007. Mr. Untoy gave evidence that he opted to purchase payment protection insurance as he wanted to protect his loan repayments due to the size of the borrowing and in the event that he became sick or became redundant. Mr. Untoy conceded under cross examination that this was a decision he made by himself and that no-one forced him or told him to purchase payment protection insurance.

(15) Mr. Untoy also gave evidence that he ticked the first level of cover offered, namely life, accident, sickness, redundancy which was stated to be available only to employees, other that those employed directly by the state. Under cross-examination, Mr. Untoy gave evidence that he did not read the descriptions of the levels of cover. Mr. Untoy confirmed that he ticked the box as it was first in sequence and he did not know at the time whether or not he was state employed although he also gave evidence as to his belief that he was employed in the public sector. Mr. Untoy also gave evidence that might have considered cheaper options had they been offered to him.

(16) The third loan availed of by Mr. Untoy in May 2008, was for the amount of €27,495.15 which incorporated a top up amount of €4,000 for a period of 60 months. The stated purpose of the loan was for a holiday, which Mr. Untoy used to travel to the Philippines to see the house that he had built for his mother.

(17) Payment protection insurance was offered for sale in conjunction with that loan and in a separate section of the agreement headed "Payment Protection Plan" and "Please sign only if availing of optional cover". Two optional levels of cover were offered. The first was for life, accident, sickness and redundancy and was noted to be available only to employees other than those employed directly by the state. The second was for life, accident, sickness and critical illness and was noted to be available only to self-employed or state employed customers.

(18) The separate section also stated:

> *"You can avail of the Payment Protection Plan as long as you are over 18 and under 65 years of age for the period of this agreement. I understand that the payment protection Plan is optional. I understand that no medical condition which I have received medical treatment advice or consultation for during the 12 months immediately prior to the date of my agreement will be covered. I confirm that I have read the terms of the Payment Protection Plan and that I am aware of those terms and that they meet my requirements. I understand that I must be actively at work in my normal occupation to avail of Payment Protection Plan. You may cancel the Payment Protection Plan within 30 days from the date you receive your certificate of insurance and receive a refund of any premium paid. If you cancel the Payment Protection Plan outside this 30 day period, you will not receive a refund of any premiums paid. For further information on the cancellation in the 30 day period, please refer to the terms and conditions of the certificate of insurance".*

(19) Mr. Untoy applied his signature in the separate section of the loan agreement to indicate his acceptance of the offer of payment protection insurance on the 10th May 2008. Mr. Untoy gave evidence that he opted to purchase payment protection insurance in respect of this loan as he wanted to protect his loan repayments due to the size of the borrowings and in the event that eh became sick or was made redundant. He also stated that he did not want to compromise his work and get a bad reputation if he failed to meet his loan repayments.

(20) Mr. Untoy gave evidence that he opted for the first level of cover offered notwithstanding the fact it was his belief at this time that he was state employed. Under cross-examination, Mr. Untoy gave evidence that he did not read the

descriptions of the level of cover. Mr. Untoy confirmed under cross-examination that he was aware the payment protection insurance in respect of this loan was optional.

(21) On taking out the third loan and the second policy of insurance, the first policy of insurance was cancelled automatically.

(22) Mr. Untoy gave evidence that following a conversation with a work colleague who informed him that payment protection insurance would provide no benefit to him, he contacted GE by telephone to cancel his second policy of insurance. A handwritten letter dated the 18th November 2008 was sent by Mr. Untoy to GE to confirm that request. GE duly cancelled the policy immediately and without cost or penalty to Mr. Untoy.

(23) In total, Mr. Untoy paid €701.33 in insurance premiums to GE for payment protection insurance.

(24) Both insurance policies were underwritten by Lighthouse General Insurance Company Limited and Lighthouse Life Assurance Company Limited, with their registered offices in Gibraltar.

(25) By the date of the hearing of the action Mr. Untoy had repaid his loans to GE in full.

(26) Mr. Untoy gave evidence that he did not recall receiving or seeing any PPI Booklets (dated 2007 and 2008) respectively prior to agreeing to purchase payment protection insurance or at any time prior to the bringing of the within claim.

(27) Mr. Untoy gave evidence that he did not recall receiving the certificates of insurance dated the 7th January 2008 and the 14th May 2008. He stated that he maintained his records in a file for important documents and that those certificates were not included among those.

(28) The certificate of insurance dated 7th January 2008 provided details of letters of appointments held by GE to act as an insurance intermediary for four companies in respect of payment protection insurance, namely: Lighthouse General Insurance Company Limited; Lighthouse Life Assurance Company Limited; Financial Insurance Company Limited; and Financial Assurance Company Limited.

(29) Under cross examination, Mr. Untoy conceded that he had shredded this file in January 2013 in the belief that the documents were no longer necessary as the loans had been repaid. Mr. Untoy also conceded under cross examination that he was unaware of the existence of the within proceedings and only became aware on Monday, 7th April 2014. He also gave evidence under cross examination that he was unfamiliar with the pleadings exchanged in the proceedings and had no contact with McHale Muldoon in relation to the exchange of same.

(30) Counsel for Mr. Untoy objected to questions put to the Plaintiff under cross examination by counsel for GE in relation to his familiarity of the pleadings delivered on his behalf on the grounds that it was an enquiry into the legal advice that Mr. Untoy received. In response, Counsel for GE confirmed that she did not propose to ask about legal advice Mr. Untoy received and acknowledged such questions could not be put to Mr. Untoy.

(31) In her letter dated the 21st January 2013, in response to the letter of claim, Ms. Carreiro, on behalf of GE, advised that based on the employment records held by GE for Mr. Untoy life, accident, sickness and critical illness cover may have been more appropriate than life, accident, sickness and redundancy. She confirmed that the premiums payable for both covers were identical and thus that the premiums paid were correct. She noted that Mr. Untoy may claim for any critical illness, that he may have suffered during the period that the policy was effective. She advised that he contact the insurer Genworth Financial Insurance Company Limited.

(32) Mr. Untoy gave evidence that during the period of cover he did not suffer any accident, sickness or critical illness which caused him to be unable to work for 15 days or more.

(33) Under cross examination, Mr. Untoy accepted that he was eligible under the policies of payment protection insurance insofar as he met the eligibility criteria set out in the certificates of insurance. Similarly, under cross examination, Mr. Untoy also accepted that the policies were suitable for him and were suitable for PAYE workers, self-employed and state employed people.

(34) It was accepted by GE that in selling payment protection insurance, it had a duty to act honestly and in good faith in its dealings with Mr. Untoy.

(35) Mr. Untoy gave evidence that he was surprised to learn the GE had earned a commission upon the sale of payment protection insurance. Mr. Untoy gave evidence that he thought that the insurer and GE were the same entity. Under cross-examination he was questioned on the nature of that surprise. In response he gave evidence that the failure to disclose details of the commission received was just like being deceived. He went on to explain that had he known he was paying extra for insurance in the form of commission and where he was not informed of other options at the point of sale, he might have instead gone to the insurer directly or looked for other options from third parties.

(36) Under cross examination, Mr. Untoy confirmed that he was unaware of whether other payment protection products were in fact available from other insurance intermediaries at that time and whether or not they would have charged commission. Mr. Untoy confirmed that he did not at any stage shop around for other payment protection insurance.

(37) Under cross examination, Mr. Untoy gave evidence that he was not informed of the existence of commission at the time the loan was extended and policies of insurance was sold. When it was put to Mr. Untoy that there was no statutory obligation on GE to advise of commission at or in advance of the sale of insurance, he responded that he thought there was an obligation on the basis that a client needs to know about fees to inform him when considering whether to purchase insurance. Under further cross examination Mr. Untoy repeated that in his view it was quite deceitful of GE not to disclose the amount of commission earned on the sale and repeated his view that GE should tell the client abut the commission. Mr. Untoy conceded that he did not think about nor ask about commission and profits at the time he entered into the policies. He also gave evidence that he first became aware of commission when there were media reports in relation to the Central Bank's review of payment protection insurance.

(38) Ms. O'Neill then put it to Mr. Untoy that commission was a universal practice. She offered the analogy of purchasing milk where it followed for example Tesco made a profit on the sale and that that should come as no surprise. In response, Mr. Untoy differentiated milk from insurance by suggesting that when buying milk it is guaranteed to be from Ireland as opposed to Poland whereas when GE sold payment protection insurance he was not informed of the existence of commission.

(39) It was accepted by Mr. Untoy that he could see from the certificate of insurance that GE disclosed that "GE Money may receive commission and other payments from the insurer to whom orders are transmitted and may charge you a fee".

(40) It was accepted by GE that it was in technical breach of Regulation 19(1)(d) of the Insurance Mediation Regulation by inadvertently and accidentally failing to disclose to Mr. Untoy that both GE and the insurer underwriting the policy of payment protection insurance have the same ultimate parent. Mr. Untoy gave evidence that he had assumed that GE and the insurer were the same entity.

(41) Counsel for Mr. Untoy in his oral submission sought to principally rely on the following authorities: European Communities (Insurance Mediation) Regulations 2005 (S.I. 13/2005); Directive 2002/92/EC of the European Parliament and of the Council of 9th December 2002 on insurance mediation; Consumer Protection Act 2007; Consumer Protection Code (August 2006 version); Atlantic Marine Supplies Ltd & Anor v. Minister for Transport & ors [2010] IEHC 104; Plevin v. Paragon Personal Finance Ltd and another [2013] EWCA Civ 1658; and Saville & Anor v. Central Capital PLC [2014] EWCA Civ 337.

(42) Counsel for GE made oral submissions and also provided the Court with written legal submission with set out the authorities relied on by GE […]

8. Paragraph 5 records the decision of the learned District Judge as follows:

Having heard the evidence put before the Court and the submissions of counsel on behalf of the parties, I reserved my decision and adjourned the proceedings before me until the 1st May 2014. On the said date, in a short decision delivered ex tempore I dismissed Mr. Untoy's claim against GE on the basis that Mr. Untoy was a responsible and prudent individual and at the time of the sale he was aware that the policies of payment protection insurance were optional. I found no fault with GE and its conduct was above reproach.

9. For the purposes of this judgment it is relevant to note that, prior to the hearing date in the District Court, the plaintiff had sought discovery of documents relating to the commission payable to the defendant in respect of the payment protection policy. The defendant had been ordered (by a different District Judge) to prepare an affidavit of discovery. However, the order left it for the trial judge to determine whether the affidavit should be given to the plaintiff.

10. The plaintiff's counsel applied for a ruling that the affidavit should be disclosed at the end of the cross-examination of the plaintiff. Counsel for the defendant objected on the basis of relevance. She pointed to the statement on the certificate of insurance that GE might receive commission, and said that it was an admitted fact that the defendant did receive commission. It was further admitted that the amount of commission was not disclosed to the plaintiff. She submitted that the plaintiff's evidence was that he did not consider the question of commission when he purchased the policy, and that he had not given any evidence as to what level of commission might have caused him not to purchase it.

11. Counsel for the plaintiff said that issues as to causation (in relation to the plaintiff's reasons for proceeding with the purchase), and the legitimacy or otherwise of the commission, were matters for legal submission. The plaintiff's "very clear evidence" was that the commission should have been disclosed.

12. The learned District Judge refused the application, on the basis that he was not satisfied that the question of commission was relevant.

13. Although counsel then re-examined the plaintiff briefly, the re-examination did not touch upon any matter relevant to this particular issue and the ruling can therefore be regarded as having been made after hearing all relevant evidence adduced in the case.

14. In these circumstances, and having regard to *Revenue Commissioners v. Bradley* [1943] I.R. 16 the parties are agreed that this court can take it into consideration despite the fact that it is not referred to in the case stated.

Questions of law

15. The question posed to this court is whether Judge O'Neill was correct in law in dismissing the plaintiff's claim with particular reference to the following points of law:

i. Does an insurance intermediary owe to a customer in the sale of insurance any duty of care?

ii. If so, what duty of care is owed? In particular, do any of the following factors inform or affect that duty of care:

a. The relationship between the intermediary and the underwriter; and/or

b. The customer's status as a consumer?

iii. Is an intermediary under a positive obligation to advise a customer in offering for sale payment protection insurance?

iv. Is an intermediary under a positive obligation to assess suitability in offering for sale payment protection insurance? If so, what is the test for suitability?

v. Is an intermediary under a positive obligation to inform a customer of options available which may be suitable for his needs? If found to apply, is such an obligation affected by letters of appointment held by an intermediary?

vi. What material facts, if any, is an intermediary required to bring to the attention of a customer in offering for sale payment protection insurance? If found, when and how are such material facts to be communicated?

vii. If found to exist, does a breach of duty by an intermediary to either advise or to inform a customer in offering for sale payment protection insurance constituted a misleading and/or aggressive commercial practice as defined in chapters 2 and 3 of the Consumer Protection Act 2007?

viii. Who bears the burden of proof in demonstrating that any duty of care owed has been discharged? In particular, is it for the intermediary to prove that he has complied with the requirements of the rules and in particular that he properly established that the insurance contract was suitable for the demands and needs of the customer, or for the customer to prove that it was unsuitable? (And as per Sir Stanley Burnton sitting in the Court of Appeal (Civil Division) in the matter of Saville & anr v Central Capital PLC [2014] EWCA Civ 337 at para. 66)

ix. Is the test to be applied to the issue of causation in an action for breach of statutory duty to ask whether, if the duty had not been breached, the damage would not have occurred and particularly whether in this case if the Defendants had not broken the applicable rules, the Plaintiff would have purchased the policies of payment protection insurance? (And as per Lord Justice Floyd sitting in the Court of Appeal (Civil Division) in the matter of Saville & anr v Central Capital PLC [2014] EWCA Civ 337 at para 36).

x. Is there any duty on an intermediary to disclose the commission it would receive on foot of the sale of payment protection insurance to the customer in advance? (And as per Lord Justice Briggs, Lord Justice Beatson and Lord Justice Moses sitting in the Court of Appeal (Civil Division) in the matter of Plevin v Paragon Personal finance Ltd and anor (and related matters) [2013] EWCA Civ 1658 at paras 26,80 and 81-81 respectively)

xi. Does a breach of the European Communities (insurance Mediation) Regulations (S.I. 13/2005), and particularly reg.19 thereof by an intermediary amount to a breach of statutory duty? If so, is that breach actionable by a customer against the intermediary?

xii. Does the communication of optionality and/or the existence of a cooling off period by an intermediary discharge his duty to a customer?

xiii. Is an intermediary entitled to rely on contractual warranties and/or estoppel to the effect that the customer has understood the optional nature and main terms of payment protection insurance?

xiv. What is the definition of a person employed by the state in the context of payment protection insurance? Who bears the burden of ascertaining a prospective customer's employment status?

The Summary Jurisdiction (Ireland) Act 1857

16. The procedure for an appeal by way of case stated is governed by this statute, as extended by s.52 (1) of the Courts (Supplemental Provisions) Act 1961.

17. Section 2 of the Act reads as follows:

> *"After the hearing and determination by a justice or justices of the peace of any information or complaint, which he or they have power to determine in a summary way by any law now in force or hereafter to be made, either party to the proceedings before the said justice or justices may, if dissatisfied with the said determination as being erroneous in point of law, apply in writing within three days after the same to the said justice or justices, to state and sign a case setting forth the facts and the grounds of such determination, for the opinion thereon of [the High Court]."*

18. A judge may refuse to state a case if of the opinion that it is merely frivolous, but not otherwise.

19. Section 6 provides that

> *"The Court to which a case is transmitted under this Act shall hear and determine the question or questions of law arising thereon, and shall thereupon reverse, affirm, or amend the determination in respect of which the case has been stated, or remit the matter to the justice…, with the opinion of the Court thereon, or may make such other order in relation to the matter, and may make such orders as to costs, as to the Court may seem fit; and all such orders shall be final and conclusive on all parties…"*

20. Section 7 provides that the court may send the case back for amendment.

The format of the case stated

21. At the hearing of the appeal the court expressed misgivings as to the content of the case stated, having regard to the principles of law relating to this procedure. It is clear on the authorities that the case stated must set out the findings of fact made by the trial judge, and questions of law which arise from those facts. The purpose of this is to ensure that the High Court dealing with the matter can see how the questions arise from the findings, and does not find itself engaged in a moot.

22. In this case the court's concern was, firstly, that very extensive questions were being asked on the basis of relatively brief findings by the learned trial judge. Secondly, the court was concerned that the plaintiff appeared to be approaching the case that paragraph 4 sets out findings of fact, whereas in reality it is largely a recital of the evidence of the plaintiff in chief and under cross-examination.

23. It appears that the preparation of the case stated took some five months. It commenced with the notification by the plaintiff that he wished to invoke the procedure. There followed a contested hearing before the learned District Judge as to whether the request to state a case was frivolous and vexatious. That was resolved in the plaintiff's favour.

24. Counsel for the plaintiff then undertook the drafting of the document. In correspondence, his initial drafts were criticised by the defendants' representatives as failing to identify discrete questions of law. After a further contested hearing, the learned judge directed the articulation of individual points of law.

25. The next draft was objected to as containing two legal points that had not been raised in the District Court. At a further hearing, the judge approved the draft subject to the removal of one factual matter and the two points queried by the defendants. A final draft, drawn up in accordance with that ruling, was signed by him the following day.

Submissions on the content of the case stated

26. On behalf of the defendant, Mr. Eoin McCullough S.C. submits that the case stated is not in a format that permits the court to answer the questions. He contends that it describes the matters set out in paragraph 4 as facts, and raises questions that do not arise from the facts properly so described. Many of the questions are said to be at a level of generality and ambiguity that would make it undesirable for the court to answer them.

27. Mr. McCullough argues that the requirement to set out clear findings of fact, and questions arising therefrom, is perhaps all the more important in an appeal by way of case stated since there will be no further opportunity for evidence to be heard.

28. Reliance is placed on Blayney J.'s decision in *Mitchelstown Co-operative Society Ltd. v. Commissioner for Valuation* [1989] I.R. 210, which concerned an appeal by way of case stated from the Valuation Tribunal. Blayney J. adopted the views of the Court of Appeal in Northern Ireland as expressed in *Emerson v Hearty and Morgan* [1946] N.I. 35 in the following passage:

> *"The case should set out clearly the Judge's findings of fact, and should also set out any inferences or conclusions of fact which he drew from those findings. The task of finding the facts and of drawing the proper inferences and conclusions of fact from the facts so found is the task of the Judge. It does not fall within the province of this Court. Accordingly it is not legitimate by setting out the evidence in the Case Stated and omitting any findings of fact to attempt to pass the task of finding the facts on to the Court of Appeal. What is required in the Case Stated is a finding by the Judge of the facts, and not a recital of the evidence. Except for the purpose of elucidating the findings of fact it will rarely be necessary to set out any evidence in the case stated save in the one type of case where the question of law intended to be submitted is whether there was evidence before the Judge which would justify him in deciding as he did."*

29. In the case before Blayney J., the Valuation Tribunal had annexed a transcript of the hearing and stated that it accepted the uncontradicted evidence adduced on behalf of the appellants. Blayney J. held that this did not amount to a finding of fact.

30. Mr. McCullough also submits that the questions asked must be clear and unambiguous. He refers to *Browne v. McBryan* (1897) 31 I.L.T.R. 165. In that case the Court of Appeal held that it could not answer a question on an abstract point of law, the answer to which would not necessarily affect the determination in the case. (It should be noted that in the circumstances of that case the Court felt that it could not amend the case stated, as one of the parties was not present.)

31. Reliance is also placed on the decision of this court in *O'Shea v. West Wood Club Ltd.* [2015] IEHC 24, where the case stated was remitted on the basis that no findings of fact were set out, and the court could not see whether or not the issue raised in the question arose on the facts.

32. It is submitted by Mr. McCullough that in paragraph 5 the learned District Judge made only three findings: - that the plaintiff was a responsible and prudent individual; that at the time of the sale he was aware that the policies of payment protection insurance were optional; and that the conduct of the defendant was above reproach. It is accepted that this last finding may be a mixed finding of fact and law.

33. Mr. Stephen Moran BL, on behalf of the plaintiff, distinguishes the instant case from that of *O'Shea v. West Wood*. He notes that in that case no findings of fact at all had been set out in the case stated.

34. Mr. Moran submits, in the first instance, that the phrase *"the facts as proved or admitted or agreed and as found by me"* as used in paragraph 4 of the case stated must be given full meaning, particularly in circumstances where there was only one witness, there was no real dispute as to the facts and the parties had agreed the draft in so far as it referred to the facts. He contends that paragraph 5 makes it clear what inferences the trial judge drew from those facts.

35. It is also submitted that *O'Shea v West Wood* can be distinguished on the basis that the procedure under consideration in that case was a consultative case stated and that, while the two procedures are similar, they do differ significantly. In a consultative case stated, no determination has been made by the trial judge. In an appeal by way of case stated, the High Court has a broad jurisdiction to reverse, affirm or amend the determination made. It can also remit the matter back, either so that the case stated can be amended, or giving its opinion on the questions asked and inviting the trial judge to take such steps as follow therefrom.

36. Alternatively, Mr. Moran submits that even if only the contents of paragraph 5 are to be regarded as the findings of fact, it would still be open to the court to consider whether or not it was permissible to make those findings of fact having regard to the evidential substratum set out in paragraph 4. That will require an analysis of the correct legal principles to be applied to cases involving the sale of payment protection insurance, and an assessment whether, as a matter of law, the trial judge was correct in making the findings that he did.

37. Mr. Moran refers to the judgment of Charleton J. in *Director of Public Prosecutions v. Buckley* [2007] IEHC 150, and to the necessity to look at the whole of the case stated and give advice on the basis of the issue on which the District Court requires guidance. He suggests that the court could view the questions asked as a useful structure against which the court can consider the issues in the case, and points out that it is open to the court to reformulate the questions as it sees fit in the light of the trial judge's findings.

The plaintiff's case

Overview

38. The plaintiff's claim is that the payment protection insurance (PPI) was mis-sold to him. He describes *"the practice of a seller misrepresenting to, or otherwise misleading a buyer about, the characteristic of a product or service in order to make, or resulting in, a sale"* as a civil wrong encompassing a number of traditional causes of action which are primarily, but not exclusively, tortious in nature. They include negligence, negligent misstatement and breach of statutory or fiduciary duty.

39. The plaintiff says that the defendant was under a duty to advise him of the options open to him in respect of PPI, to recommend

a product that was suitable to him having regard to his circumstances and requirements and to draw to his attention any material facts.

40. In the instant case, the defendant gave no advice, made no assessment of suitability and failed in its duty to disclose material facts in that it did not disclose to the plaintiff either its relationship with the underwriter (both companies being owned by the same parent) or the level of commission to be earned by it.

41. The issue of the commission is described as being of central importance, and as something that the plaintiff was entitled to know about before making the decision to purchase the PPI. The plaintiff says that the learned District Judge erred in law in ruling that commission was irrelevant, and relies in this regard on the decision of the United Kingdom Supreme Court in *Plevin v Paragon Personal Finance Ltd.* [2015] 1 All E.R. 625. In that case it was held that the non-disclosure of a 71.8% commission rendered a contractual relationship unfair (within the meaning of the relevant statute). A reasonable person, given that information, would be bound to question whether the insurance represented value for money.

42. The plaintiff points to the fact that the failure to disclose the relationship between the companies was a breach of regulation 19(1)(d) of the European Communities (Insurance Mediation) Regulations 2005 (S.I. No. 13/2005).

43. Regulation 19 imposes obligations on an insurance intermediary to provide certain information before entering into an initial insurance contract with a customer. Regulation 19(1)(d) requires that the customer be told whether any particular insurance undertaking, or any parent undertaking of a particular insurance undertaking, holds, directly or indirectly, more than 10% of the voting rights or the capital in the intermediary. It was admitted by the defendants in the District Court that this had not been complied with, although the breach was described by counsel as "technical", "accidental" and "inadvertent". The plaintiff says that it should be seen as going hand in hand with the failure to disclose the commission, since if the companies had not been related the charging of commission would have come as less of a surprise to the plaintiff. The learned trial judge erred in holding that the defendant was "beyond reproach" having regard to the admitted breach of the regulation.

44. The case made is that, as an insurance intermediary, GE Money owed to the plaintiff a duty to act honestly, in good faith, with the customer's best interests in mind and with due professional diligence. This duty arises from the nature of an insurance contract and the requirement that both parties act in the utmost good faith. The failure to disclose either the commission, the relationship between the companies or the alternative options open to the plaintiff was a breach of this duty.

The burden of proof

45. According to the plaintiff, once a buyer has established a prima facie case of mis-selling, and a failure to comply with the applicable rules and codes governing the sale, the burden of proof shifts to the seller. This is because the plaintiff has asserted a negative – that the policy sold to him was unsuitable and in selling it the defendant had not complied with its obligations – while the defendant is asserting positively that it did comply. It should therefore have to demonstrate that it had assessed the plaintiff's circumstances and made a suitable recommendation. The plaintiff's evidence that the policy was suitable for him does not therefore dispose of the issue.

46. Further, the plaintiff relies on the "peculiar knowledge" principle, as considered by the Supreme Court in *Hanrahan v Merck Sharpe & Dohme* [1988] ILRM 629. He also refers to the observation of Hardiman J. in *Rothwell v. Motor Insurers Bureau of Ireland* [2003] 1 I.R. 268 that the onus of proof shifts when the matter is *"peculiarly within the range of the defendant's capacity of proof".*

47. Reliance is also placed on the decision of the United Kingdom Court of Appeal in *Saville & Anor v Central Capital PLC* [2014] EWCA Civ 337. This case also involved a claim against an insurance intermediary of mis-selling payment protection insurance. It was accepted that the defendant had breached certain of the Insurance Conduct of Business ("ICOB") rules (a code promulgated by the Financial Services Authority). The Court held that the rules imposed an obligation to ensure that any recommended insurance policy met the demands and needs of the customer, and therefore to seek out and assess relevant information about the customer. On the facts of the case, the Court found that the plaintiffs would not have purchased the policy if the defendant had complied with this obligation.

48. In indicating his agreement with this result, Sir Stanley Burton added the following observation:

> *"In these circumstances, it is unnecessary to decide whether, once the issue is fairly raised (as it is in this case), it is for the intermediary to prove that he complied with the requirements of the rules, and in particular that he properly established that the insurance contract was suitable for the demands and needs of the customer, or for the customer to prove that it was unsuitable. I incline to the view that the burden of proof is on the intermediary to show that he complied with the Rules."*

49. The plaintiff further relies on the judgment of Baker J. in *Law v. The Financial Services Ombudsman* [2015] IEHC 29. This concerned a claim that an investment product had been mis-sold. The appellants argued that the Ombudsman had given undue weight to the fact that they had signed declarations on the application forms to the effect that various options had been discussed with them. Baker J. agreed, on the basis that there was no evidence of any such discussions having taken place. The Ombudsman had also found that there had been a signed declaration confirming that the appellant's attitude to risk had been correctly recorded. Baker J. held that this was not sufficient to amount to a finding that the appellants knew what they were buying. The proposition that a party signifies by signature alone his or her knowledge and understanding of a purchase of a financial product could, she considered, be difficult to reconcile with the rigorous obligations imposed on financial brokers under the regulatory regime.

50. Mr. McCullough takes issue with the plaintiff's submissions as to where the burden of proof lies and how it can be discharged. It is submitted that, even if it did lie on the defendant, such a burden can often be discharged through cross-examination on the plaintiff's evidence without the defendant going into evidence. In this case, the plaintiff had accepted in cross-examination that he was eligible for the policies and that they were suitable for him. This was evidence which entitled the learned District Judge to find as he did.

The Consumer Protection Code 2006

51. The plaintiff relies on the following provisions of the Consumer Protection Code 2006 as they applied to an insurance intermediary at the relevant time:

> i. The general principles set out in Chapter 1, and in particular General Principle No. 6 – the obligation to make full disclosure of all relevant material including all charges in a way that seeks to inform the customer;

ii. Para. 8 of Chapter 2, and in particular subparagraphs (e) and (f) – the obligation to provide a description of the services provided, and to inform the customer whether it is tied to any other entity for such services;

iii. Para. 12 of Chapter 2 – the obligation to ensure that all information it provides is clear and comprehensible and that key items are brought to the attention of the customer;

iv. Para. 23 of Chapter 2 – the prohibition on excluding any legal liability or duty of care;

v. Para. 24 of Chapter 2 – the requirement to gather sufficient information from the customer to enable it to recommend a product or service suitable to that consumer;

vi. Para. 30 of Chapter 2 – the requirement to ensure that, having regard to the facts of which it is aware, the product or service offered is suitable to the customer;

vii. Para 31 of Chapter 2 – the obligation to provide the customer with a written statement as to suitability;

viii. Para. 44 of Chapter 2 – the obligation to provide the consumer with details of all charges;

ix. Para 51 of Chapter 2 – the obligation to inform the consumer of any direct or indirect conflict of interest.

52. The plaintiff refers to the judgment of Clarke J. in *Atlantic Marine Supplies Ltd & Anor v Minister for Transport & Ors* [2010] IEHC 104 for an analysis of the status of codes of practice. The code in question in that case had been promulgated by the relevant Minister. A statutory provision provided that, where a code of practice had been published by the Minister, no sea-fishing boat could be licensed unless it complied with that code.

53. Clarke J. considered that the code therefore had a "quasi statutory" status, in that it was a document by reference to which statutory rights and obligations arose. It thus fell somewhere between codes issued merely for the purposes of guidance, which have no formal status, and codes which are expressly authorised by a statute which provides that a breach of the code will be a criminal offence or otherwise unlawful.

54. In considering whether a liability in damages could arise on foot of a breach of the code, Clarke J. said, with reference to *Moyne v. Londonderry Port and Harbour Commissioners* [1986] I.R. 299 and *Sweeney v. Duggan* [1991] 2 I.R. 274, that the starting point must be consideration of whether it could be said that the legislature intended that an aggrieved plaintiff would be entitled to damages.

55. The plaintiff submits that the legislature must have intended that a consumer would receive effective protection, with real rights and remedies. However, he says that whether the Consumer Protection Code is seen as being actionable per se or simply as informing a common law duty of care, a consumer must be entitled to rely upon a breach of it in making a claim for damages.

The Consumer Protection Act 2007

56. This Act implements the Unfair Commercial Practices Directive (Directive 2005/29/EC). A "commercial practice" is defined as

> *"any conduct (whether an act or omission), course of conduct or representation by the trader in relation to a consumer transaction, including any such conduct or representation made or engaged in before, during or after the consumer transaction".*

57. Section 41 of the Act prohibits unfair commercial practices in the following terms:

> *(1) A trader shall not engage in an unfair commercial practice.*
>
> *(2) A commercial practice is unfair if it-*
>
> *(a) is contrary to one or both of the following (the requirements of professional diligence):*
>
> *(i) the general principle of good faith in the trader's field of activity;*
>
> *(ii) the standard of skill and care that the trader may reasonably be expected to exercise in respect of consumers,*
>
> *and*
>
> *(b) would be likely to –*
>
> *(i) cause appreciable impairment of the average consumer's ability to make an informed choice in relation to the product concerned, and*
>
> *(ii) cause the average consumer to make a transactional decision that the average consumer would not otherwise make.*
>
> *(3) In determining whether a commercial practice is unfair under subsection (2), the commercial practice shall be considered in its factual context, taking account of all of its features and the circumstances.*

58. Section 42(1) provides that a trader shall not engage in a "misleading commercial practice". This concept is expanded upon in ss. 43 to 46. Section 43(2) defines it in part as follows:

> *"A commercial practice is misleading if it would be likely to cause the average consumer to be deceived or misled in relation to any matter set out in subsection (3) and to make a transactional decision that the average consumer would not otherwise make."*

59. Section 43(3) sets out a lengthy list of matters covered by the "misleading practice" concept. The plaintiff relies on s.43(3) (b) (iv) (the characteristics of a product, including its benefits or fitness for purpose); s.43(3)(c) (the price of the product, the manner in

which that price is calculated or the existence or nature of a specific price advantage); s. 43(3)(f) (the identity of the trader, including its affiliation or connection with others); s.43(3)(g) (the extent of the trader's commitments) and s.43(3)(h) (the trader's motives for the commercial practice).

60. Subsection (4) of s.43 provides that if the misleading commercial practice involves the provision of information, it is not a defence in any proceeding to show that the information is correct.

61. To engage in a misleading practice as described in s. 43(1) or (2) is an offence.

62. Section 46(1) provides further definition as follows:

> *"A commercial practice is misleading if the trader omits or conceals material information that the average consumer would need, in the context, to make an informed transactional decision ("material information") and such practice would be likely to cause the average consumer to make a transactional decision that the average consumer would not otherwise make."*

63. Subsection (3) lists certain types of information that are to be considered as "material". Subsection (4) stipulates that:

> *"The material information set out in subsection (3) is in addition to and not instead of any other information that the trader is required by law to provide to a consumer, including, without limitation, any information required to be provided by regulations under this Act."*

64. The plaintiff says that the defendant failed to provide material information about its relationship with the insurer and the commission earned on the sale.

65. Section 74 (2) provides to a consumer who is aggrieved by a prohibited act or practice a right of action for damages, which may include exemplary damages, against the trader. (By virtue of subs.(1), a "prohibited act or practice" does not include a misleading commercial practice described in s.45. However, this latter provision is not relied upon in the instant case).

The disclosure of commission

66. The plaintiff submits that the level of commission, particularly where it is substantial, has a bearing on the assessment of the fairness of the relationship. Its disclosure would alert prospective consumers to the motivation of the intermediary, and whether it was putting its own financial interests ahead of those of the consumer.

67. As mentioned above, reliance is placed on *Plevin v Paragon Personal Finance Ltd.*

68. Before considering this authority, it is necessary to put it in context. Sections 140A and 140B of the Consumer Credit Act 1974 (as added in 2006) permit a court in the United Kingdom to reopen a credit agreement if it determines that the relationship between the creditor and the debtor is "unfair to the debtor" having regard a list of factors. The court is given discretion to order inter alia the repayment of any sum paid to the creditor. After the list of potential factors to be considered, s.140A(1)(c) refers to a general consideration of

> *"any other thing done (or not done) by, or on behalf of, the creditor".*

69. It must be noted that the legislation provides that, if a debtor asserts that a contract was unfair, it is for the creditor to prove that it was not.

70. The Insurance Mediation Directive does not require the disclosure of commissions. The ICOB rules in operation at the time did require such disclosure, but only in limited circumstances involving commercial customers. It was noted in *Plevin* that this was a considered policy on the part of the Financial Services Authority.

71. At p. 635 of *Plevin* Lord Sumption summarised the then leading authority on the issue as follows:

> *"The current leading case on the relationship between section 140A and the ICOB rules is the decision of the Court of Appeal in Harrison v Black Horse Ltd [2012] Lloyd's Rep IR 521. The Court of Appeal considered an application by a borrower under section 140A to recover the single premium paid on a PPI policy sold with a loan. There was no credit broker involved. The borrower dealt directly with the lender, who acted as an intermediary with the insurer. The commission taken by the lender was 87%. Tomlinson LJ, delivering the only reasoned judgment, described this level of commission as "quite startling", adding that there would be "many who would regard it as unacceptable conduct on the part of lending institutions to have profited in this way". But he declined to find that the relationship was thereby rendered unfair, because the lender had committed no breach of the ICOB rules either in charging the commission or in failing to disclose it. At para 58, he said:*
>
> > *"…the touchstone must in my view be the standard imposed by the regulatory authorities pursuant to their statutory duties, not resort to a visceral instinct that the relevant conduct is beyond the Pale. In that regard it is clear that the ICOB regime, after due consultation and consideration, does not require the disclosure of the receipt of commission. It would be an anomalous result if a lender was obliged to disclose receipt of a commission in order to escape a finding of unfairness under section 140A of the Act but yet not obliged to disclose it pursuant to the statutorily imposed regulatory framework under which it operates."*

72. Lord Sumption went on:

> *"The result of this decision was that in the present case both the Recorder and the Court of Appeal were bound to dismiss Mrs Plevin's claim so far as it was based on non-disclosure of the commission. The Court of Appeal expressed dismay at this outcome. In my opinion, the dismay was justified. I think that Harrison was wrongly decided.*
>
> *The view which a court takes of the fairness or unfairness of a debtor-creditor relationship may legitimately be influenced by the standard of commercial conduct reasonably to be expected of the creditor. The ICOB rules are some evidence of what that standard is. But they cannot be determinative of the question posed by section 140A, because they are doing different things. The fundamental difference is that the ICOB rules impose obligations on insurers and*

insurance intermediaries. Section 140A, by comparison, does not impose any obligation and is not concerned with the question whether the creditor or anyone else is in breach of a duty. It is concerned with the question whether the creditor's relationship with the debtor was unfair. It may be unfair for a variety of reasons, which do not have to involve a breach of duty. There are other differences, which flow from this. The ICOB rules impose a minimum standard of conduct applicable in a wide range of situations, enforceable by action and sounding in damages. Section 140A introduces a broader test of fairness applied to the particular debtor-creditor relationship, which may lead to the transaction being reopened as a matter of judicial discretion. The standard of conduct required of practitioners by the ICOB rules is laid down in advance by the Financial Services Authority (now the Financial Conduct Authority), whereas the standard of fairness in a debtor-creditor relationship is a matter for the court, on which it must make its own assessment. Most of the ICOB rules, including those relating to the disclosure of commission, impose hard-edged requirements, whereas the question of fairness involves a large element of forensic judgment. It follows that the question whether the debtor-creditor relationship is fair cannot be the same as the question whether the creditor has complied with the ICOB rules, and the facts which may be relevant to answer it are manifestly different. An altogether wider range of considerations may be relevant to the fairness of the relationship, most of which would not be relevant to the application of the rules. They include the characteristics of the borrower, her sophistication or vulnerability, the facts which she could reasonably be expected to know or assume, the range of choices available to her, and the degree to which the creditor was or should have been aware of these matters.

I turn therefore to the question whether the non-disclosure of the commissions payable out of Mrs Plevin's PPI premium made her relationship with Paragon unfair. In my opinion, it did. A sufficiently extreme inequality of knowledge and understanding is a classic source of unfairness in any relationship between a creditor and a non-commercial debtor. It is a question of degree. Mrs Plevin must be taken to have known that some commission would be payable to intermediaries out of the premium before it reached the insurer. The fact was stated in the FISA borrowers' guide and, given that she was not paying LLP for their services, there was no other way that they could have been remunerated. But at some point commissions may become so large that the relationship cannot be regarded as fair if the customer is kept in ignorance. At what point is difficult to say, but wherever the tipping point may lie the commissions paid in this case are a long way beyond it. Mrs Plevin's evidence, as recorded by the Recorder, was that if she had known that 71.8% of the premium would be paid out in commissions, she would have "certainly questioned this." I do not find that evidence surprising. The information was of critical relevance. Of course, had she shopped around, she would not necessarily have got better terms. As the Competition Commission's report suggests, this was not a competitive market. But Mrs Plevin did not have to take PPI at all. Any reasonable person in her position who was told that more than two thirds of the premium was going to intermediaries, would be bound to question whether the insurance represented value for money, and whether it was a sensible transaction to enter into. The fact that she was left in ignorance in my opinion made the relationship unfair.

The next question is whether that state of affairs arose from something done or not done by or on behalf of Paragon…

…On that footing, I think it clear that the unfairness which arose from the non-disclosure of the amount of the commissions was the responsibility of Paragon. Paragon were the only party who must necessarily have known the size of both commissions. They could have disclosed them to Mrs Plevin. Given its significance for her decision, I consider that in the interests of fairness it would have been reasonable to expect them to do so. Had they done so this particular source of unfairness would have been removed because Mrs Plevin would then have been able to make a properly informed judgment about the value of the PPI policy. This is sufficiently demonstrated by her evidence that she would have questioned the commissions if she had known about them, even if the evidence does not establish what decision she would ultimately have made."

73. Mr. Moran accepts, of course, that the statutory context is different to that pertaining in this jurisdiction. However, he relies on the Court's analysis of the importance of the information to the customer.

The defendant's case

74. As noted above, the defendants object to the form of the case stated. They also object to each question raised as being framed in overly vague or general terms, and/or as raising matters that were not argued in the District Court, and/or as raising matters that are not in dispute, and/or as raising issues that are moot.

75. It is submitted that some of the issues could not be determined in the absence of evidence, and that it was incumbent on the plaintiff to call evidence on such matters. This argument is made in relation to the assertion on behalf of the plaintiff that advice should have been given – there was no evidence as to what such advice might have been. It is also made in respect of the question about available options, on the basis that no evidence was adduced as to what the available options were. The range of options is publicly available. Such evidence, from a witness with knowledge of the market, would be required before a court could reach any determination.

76. Similarly it is contended that, where there is an allegation of breach of a duty of care, a plaintiff would be expected to call evidence as to what is to be expected of an intermediary. No such evidence was adduced.

The submissions on the questions

Questions (i) and (ii) *(whether an insurance intermediary owes the customer any duty of care, and if so what duty is owed; whether the duty is affected by the relationship between intermediary and underwriter; whether the duty is affected by the customer's status as a consumer)*

77. Mr. Moran points to the acceptance by the defendants that they have a duty to act honestly and in good faith, fairly and professionally in the best interests of the customer and to act with due skill, care and diligence in the best interests of the customer.

78. Mr. McCullough says that these questions are phrased at such a level of generality as to be, in effect, unanswerable and that they do not arise from the factual findings made by the trial judge. There was no evidence before the District Court as to what advice was or should have been given.

79. However it is accepted that insurance intermediaries are governed by the 2005 Regulations. It is further accepted that they have to comply with certain general principles under the consumer Protection Code, including the duty to act honestly, fairly and professionally in the best interests of the customer, and to act with due skill, care and diligence to the same end. Quoting from Breslin, *Banking Law* (Third ed. 2013) at 6-20, it is said that the Code

"effectively imposes a duty of care on the bank to provide sufficient information to its customers so that the customer is in a position to make an informed choice as to the contract options open to it."

80. It is submitted that the Code is "one of the factors which informs the duty of care owed by an insurance intermediary to a customer." Other factors will, it is said, vary from case to case.

81. The defendant denies that the relationship between the intermediary and the underwriter is a factor affecting or informing the duty of care, and objects to this aspect of the question on the basis that it was not raised in the District Court. The status of the customer as a consumer affects the duty, in so far as the intermediary is bound to comply with the Consumer Protection Code in selling financial products to consumers.

Questions (iii) and (iv) *(whether an intermediary is under a positive obligation to advise a customer, and whether an intermediary is under an obligation to assess suitability in relation to payment protection insurance)*

82. Counsel for the plaintiff submits that the answer to both questions is "Yes". He says that the acceptance by the plaintiff in cross-examination that the product sold to him was suitable is irrelevant and does not amount to a discharge of the defendants' duty. The obligation to advise is, he suggests, probably not distinct from the obligation to assess suitability.

83. Again, the defendants say that these questions are too vague and general to be of assistance. It is submitted that no suggestion has been made as to the source, content or extent of such obligations.

84. It is also submitted that they do not arise out of the factual findings of the District Court, given the plaintiff's acceptance that the PPI products sold to him were suitable for him and that he was eligible to benefit from them.

85. Without prejudice to the foregoing, the defendant says that an intermediary is not under a positive obligation to advise a customer in relation to the sale of PPI.

86. However, it is accepted that the Consumer Protection Code and the Regulations require the intermediary to carry out a "customer fact find" and to provide the customer with a product suitability statement.

87. It is further accepted that the Code (Ch. 2, 24 – 31) and Regulation 19(7) require a regulated entity to gather sufficient information from the consumer to enable it to make a recommendation for a product or service suitable to that consumer. The level of information gathered should be appropriate to the nature and complexity of the product being provided.

88. Mr. McCullough submits that these provisions do not require an intermediary to assess suitability of the range of products across the market as a whole.

89. The defendant says that since PPI is a relatively simple product, it is deemed to be suitable for the customer if the customer is deemed to be eligible to purchase it.

Question (v) *(whether an intermediary is under a positive obligation to inform a customer of the available options; whether such an obligation could be affected by letters of appointment held by the intermediary)*

90. It is submitted by Mr. Moran that the duty to act openly, honestly and fairly and in the customer's best interests means that the intermediary is obliged to present all of the available options and make a recommendation on the most suitable. He says that it is clear on the evidence, including the letter from the defendants, that they had conducted no assessment of the plaintiff's employment status and had not recommended the most suitable option.

91. Mr. McCullough again says that the question is too vague and was not considered in the District Court. It does not arise, given the plaintiff's acceptance that the PPI products purchased by him were suitable. It is further submitted that, in the absence of any evidence that there were other, more suitable options available that might have been better for the plaintiff, it would not be possible to find that there had been a breach of such a duty and that damage flowed from it.

Question (vi) *(what material facts, if any, must be brought to the attention of the customer in relation to payment protection insurance)*

92. Mr. Moran says that the customer must be informed of anything that might have a material affect on his or her assessment of the transaction, including the nature of the relationship between an intermediary and an underwriter (including levels of commission); the options available to the customer; an explanation as to suitability and the reasons why the product recommended is the most suitable. All of this information should be placed in the context of the customer's financial position and requirements.

93. It is submitted by the defendant that the material facts which must be brought to the customer's attention are those set out in Regulations 19 and 20 of the 2005 Regulations, and perhaps the matters set out in the Code.

94. The defendant accepts that there was a breach of regulation 19(1)(d) in that the plaintiff was not informed that the companies were connected. However, it says that no damage flowed from the breach, since the plaintiff said that he had assumed that GE Money and the underwriter were "the same entity", or parts of the same larger entity. Since that was in fact the case, the breach of the regulation made no difference to him. He had not given evidence that it would have made a difference, and it would not be open to this court to find that he would have acted differently, had he been informed.

Question (vii) and (ix)*(whether, if there is a duty to advise or inform, breach of such duty constitutes a misleading and/or aggressive commercial practice within the meaning of the Consumer Protection Act 2007; and what is the test of causation in action for breach of statutory duty)*

95. It is not suggested by the plaintiff that the definition of an "aggressive" practice applies. The case made is that the defendant engaged in a misleading practice.

96. In relation to causation, the plaintiff says that if a breach is found to have occurred, the court must consider whether it was likely to have led to a transactional decision that the average consumer would not otherwise have made. Under s.74(2) of the Act it would also have to consider an award of damages irrespective of loss. On a common law approach, the test would be as set out by Floyd L.J. in *Saville v. Central Capital* – whether, if the duty had not been breached, the plaintiff would have purchased the policy.

97. The defendant says that Question (vii) is "unworkably" vague. In any event it does not arise, since there was no finding that any such duty was breached.

98. Mr. McCullough submits that Question (ix) is premised on an assumption that there had been a finding that if the plaintiff had been given different information, he would not have purchased the PPI. The question does not in fact arise, given the findings of the trial judge. Without prejudice, the defendant's position is that the normal rules in relation to causation apply. The plaintiff must show that but for the breach complained of the damage complained of would not have occurred.

Question (viii) *(as to where the burden of proof lies in relation to a dispute about the discharge of a duty of care)*

99. Mr. Moran relies here on the statement of principle by Sir Stanley Burton in *Saville v Central Capital*, favouring the burden being placed on the defendant. He argues that if the plaintiff is correct in believing that the commission was so large that it created a conflict between the financial motivation of GE Money and the interests of the plaintiff, that would be a point he could not prove unless the burden was shifted.

100. It is submitted on behalf of the defendant that this issue does not arise since there is nothing to suggest that the onus of proof played any part in the decision of the trial judge. It is further submitted that, as in practically all civil litigation, the burden of proof is on the plaintiff to establish on the balance of probabilities that a duty of care has not been discharged. The comments made by Sir Stanley Burton in *Saville* are described as *obiter*. They were in any event made in the context of consideration of the ICOB rules, and the statutory provisions that made those rules actionable.

Question (x) *(whether there is a duty to disclose commission)*

101. The plaintiff relies here on the judgment of the United Kingdom Supreme Court in *Plevin*. Mr. Moran says that in both jurisdictions, there was no express regulatory obligation to disclose commission. However, the findings of that Court demonstrate that commission may become relevant depending on its size. In this case, the trial judge decided that it was not relevant, regardless of size.

102. On the question of disclosure of commission, Mr. McCullough submits that it is not required by either the Regulations or the Code. It is accepted that the common law duty of care is informed by the Code. However, it is submitted that, in the first instance, the Code is not directly enforceable or actionable in itself. In this regard the judgment of Birmingham J. in *Zurich Bank v McConnon* [2011] IEHC 75 is relied upon.

103. Secondly, it is submitted that the Code does not require disclosure of commission. The reference to "charges" in General Principle 6 is to costs or fees payable by the customer to the regulated entity and does not encompass commission, since that is not payable by the customer.

104. The review of the Code conducted by the Central Bank in December 2008 is relied on in support of this position. The consideration of the issue in that document proceeded on the basis that there was no such requirement in respect of non-life assurance, and the question whether such a regulation should be introduced was discussed. On foot of the issues identified, new rules were introduced in the 2012 Code.

105. It is argued that there is no duty of disclosure at common law and that the principle that contracts of insurance are *uberrima fides* has no application. In any event there were no factual findings in the case as to what the consequences of such an obligation would be.

106. Referring to the Consumer Protection Act 2007, Mr. McCullough says that it would not be possible for the court to determine whether the sections relied upon can apply without embarking on a fact-finding exercise. "The general principle of good faith", "the standard of skill that the trader may reasonably be expected to exercise", the question whether false information was provided, and the likelihood that an "average consumer" would be affected in making a decision are, he says, all matters that require to be grounded in expert evidence.

107. It is also submitted that if there was no obligation to disclose commission under the 2006 Code, failure to disclose it could not be considered to have been an unfair or misleading commercial practice, at least in the absence of "extensive factual analysis and evidence".

108. It is submitted that *Plevin* cannot assist the plaintiff given the differences in the statutory context. In the first place, the provisions in question were concerned with the relationship between creditors and debtors, and not with insurance intermediaries.

109. Secondly, it is noted that the ICOB rules were, by statute, specifically made actionable but they did not require disclosure of commission. The result in *Plevin* therefore turned on the provisions of s.140A, and the finding of the Court that the commission paid in the case made the contractual relationship "unfair" within the meaning of that section so as to permit a court to re-open the agreement and grant relief.

110. Mr. McCullough points out that there is an equivalent provision in ss. 47 and 48 of the Consumer Credit Act 1995 but, again, it applies only to credit agreements. He submits that any duty to disclose commission could only arise in a statutory context or by virtue of a Code. No such duty has been imposed in any context.

Question (xi) *(whether a breach of the European Communities (Insurance Mediation) Regulations, and particularly reg.19, amounts to a breach of statutory duty, and, if so, whether the breach was actionable by a customer)*

111. The plaintiff relies on *Law v. FSO* on this aspect. Baker J. found that the Ombudsman had erred in finding that the documentation supplied to the appellants, although lacking certain prescribed information, was sufficient to comply with the statutory requirements.

> *"In doing so he failed to take into account the mandatory nature of the Regulations and the absence of information at the time of investment as to what the investment services were to cost the appellants in fees to the intermediary…"*

112. It is submitted in the instant case that the learned trial judge appears to have placed excessive weight on the evidence that the plaintiff knew that the PPI was optional and had signed the contract, in circumstances where there had been a failure to provide the information about the inter-company relationship required by the regulation and a failure to comply with the common law duty to disclose the commission.

113. Mr. McCullough says that at an abstract level the answer to this question is probably yes, but it does not arise in this case. The plaintiff's evidence was that he assumed that GE and the insurer were the same company. The admitted breach of the regulation therefore caused him no loss.

Question (xii) *(whether the communication of optionality and/or the existence of a cooling-off period discharges the duty of the intermediary)*

114. The plaintiff submits that the answer is "No", and these obligations should be seen as additional to those otherwise identified by him.

115. The defendant complains that this question is vague and ambiguous, and fails to identify the duty in issue. It had been argued by the defendant in the District Court that optionality and the cooling-off period were relevant but no finding of fact was made raising this question.

Question (xiii) *(whether the intermediary is entitled to rely on contractual warranties and/or estoppel to the effect that the customer has understood the optional nature and main terms of PPI)*

116. Mr. Moran accepts that the District Judge found that the plaintiff knew that the policy was optional, and that the plaintiff said in cross-examination that it was suitable and had signed it. However, he says that the court is obliged to embark upon a "holistic" assessment having regard to the judgment of Baker J. in *Law v FSO*.

117. Mr. McCullough says that it was clear that the plaintiff understood that PPI was optional, and elected to buy it. No issue of contractual warranties or estoppel arises. There is nothing to indicate that the learned District Judge had placed excessive weight on the fact of the plaintiff's signature.

118. Question (xiv) was not pursued.

Discussion and conclusions

119. It seems to me that the concern expressed by the court about the content of the case stated, and many of the submissions made thereon on behalf of the defendant, are valid. It is clear that many of the questions in this case simply cannot be answered without embarking upon a treatise on consumer rights in the area of the sale of insurance policies, without reference to the facts of the case. The plaintiff's representatives have, I think, attempted to create far too large a structure of law on the relatively small foundations of the case.

120. However, in the circumstances, I do not believe that it would be helpful to remit the matter for amendment. There are, I consider, sufficient findings of fact to enable the court to deal with those aspects of the case that appear to be of most relevance to the transactions in question. For this purpose I propose to amend the questions.

121. Having regard to the findings of fact (which I think I am justified in taking as including implicit findings that the policies were sold to the plaintiff, and that the issue of commission was not relevant), the overarching issue is whether the trial judge applied the correct principles of law in assessing the facts and dismissing the plaintiff's claim. The questions that seem to me to be pertinent to that issue are these: -

1. Was the defendant obliged to ensure that the policies sold to the plaintiff were suitable to his circumstances?

2. Did the failure to inform the plaintiff as to the relationship between the defendant and the underwriter have any legal consequence?

3. Did the non-disclosure of the fact of, and the amount of, the commission to be earned by the defendant have any legal consequence?

122. It appears that any doubt as to suitability arose from the advice of a friend of the plaintiff to the effect that the policies were of no benefit to him, because of the nature of the plaintiff's employment. However no issue in this regard was actually established in evidence.

123. The problem here is not, in my view, really about the burden of proof, but is, rather, a matter of *locus standi*. Although it was pleaded that the policies were unsuitable, that plea was made without specificity as to the reasons for the alleged unsuitability. As it happens, the plaintiff's evidence was to the effect that the policies were suitable. That is the only evidence on the issue. It was therefore not, in my view, open to him to contend that the defendant should have taken steps to ensure that they were suitable, and that the failure to take such steps sounds in damages.

124. If I am wrong about that I would accept the argument made by the defendant that the plaintiff bears the burden of proof in relation to the question of unsuitability. I do not think that the plaintiff is correct in characterising the plea that the product was unsuitable as a negative assertion. It is as much a positive assertion as a plea in a road traffic case that the defendant failed to comply with the rules of the road. In any event, even if a burden did lie on the defendant I would consider that it was discharged by eliciting, in cross-examination, the plaintiff's evidence that the product was suitable. The "peculiar knowledge" principle does not have any application in circumstances where the issue as to suitability, in so far as it arose at all, turned on the employment status of the plaintiff. That was a matter for him to establish if it was relevant.

125. On the second question, I note that the admitted breach was described by counsel for the defendant as "accidental", "technical" and "inadvertent". There was, of course, no evidence that it was accidental or inadvertent, and that certainly is a matter within the knowledge of the defendant. The use of the word "technical" is not particularly helpful. The defendant's main point is that the breach was irrelevant in this particular case because the plaintiff said that he had assumed that GE Money and the underwriter were "the same entity" and they were were in fact related companies, or parts of the same entity.

126. I think that counsel for the plaintiff is correct in saying that this aspect should be considered in conjunction with the issue of disclosure of the commission.

127. It is obvious that the policy behind all of the statutory and regulatory provisions referred to above is that the consumer should be given adequate information before entering into a transaction. There is an express requirement in the 2005 Regulations that the consumer must be told the nature of the relationship between the insurance intermediary and the underwriter. This requirement

cannot be regarded as mere window-dressing – it is a mandatory part of the information structure.

128. The defendant says that nothing turns on this admitted breach because the plaintiff said that he assumed that the intermediary and the underwriter were the same entity, and they were in fact parts of the same entity. However, this is where, in my view, the question of commission becomes material. If a consumer believes that the one entity is selling both the loan and the insurance, he or she is unlikely to think that commission arises. Where the services are being provided by entirely separate entities, commission becomes a more likely possibility and one which the average consumer might enquire into. Where the companies are related, and one is paying commission to the other, it seems to me that both of these pieces of information are material since the consumer may well not realise that he or she is, in effect, paying "on the double" to related entities. At that point, the size of the commission becomes relevant for the reasons identified by Lord Sumption in *Plevin*. Depending on the ratio between the premium for the insurance and the commission, a customer might well feel that the product was not good value and might be less likely to buy it. I do not believe that this is a matter requiring expert evidence.

129. I accept that it was the view of the 2008 Review Group that commission for non-life assurance products did not require to be disclosed under the 2006 Code, but that seems to have been on the basis that there was no express requirement to that effect. "Relevance" and "materiality" are both concepts that have to be assessed in context. The context of this case was that the defendant had failed to provide one mandatory piece of information, the absence of which could be found to have to some extent obscured, from the consumer's point of view, the fact that commission was being charged.

130. The Code is not in itself actionable, although it is accepted by the defendant that it informs the content of an insurance intermediary's duty of care. However, it seems to me that the defendant's conduct was capable of amounting to a misleading commercial practice within the meaning of s.43(2) and s.43 (3)(c). The non-disclosure of commission, particularly if combined with a failure to give adequate information as to the connection between the intermediary and the underwriter, is something likely to cause a consumer to be misled in relation to the manner in which the price of the product is calculated. That is a matter giving rise to an action for damages. I note that the Review Group does not appear to have considered the applicability of this provision.

131. In the instant case, the plaintiff's evidence was that

> *"…had he known he was paying extra for insurance in the form of commission and where he was not informed of other options at the point of sale, he might have instead gone to the insurer directly or looked for other options from third parties."*
>
> (Para.4 (ii))

132. I therefore consider that the learned trial judge fell into error in holding that the conduct of the defendant was "beyond reproach" having regard to the admitted failure to comply with a mandatory requirement to disclose the relationship between the companies. I further consider that he erred in holding that commission was not relevant to the case.

133. I will hear the parties as to the form of the final order.