SQUIRE SANDERS

THE FINAL COUNTDOWN: PPI APPEAL WITHDRAWN FROM SUPREME COURT

Introduction

In a welcome development for lenders and brokers, the Supreme Court of the United Kingdom has sealed a consent order withdrawing the borrowers' appeal from the Court of Appeal's decision in *Harrison & Harrison v Black Horse Limited* [2011] EWCA Civ 1128. The borrowers' appeal will now no longer proceed to a hearing before the Supreme Court. The effect of the appeal being withdrawn by the Supreme Court[1] is that the extremely positive appeal decisions of both the Court of Appeal[2] and the High Court[3] remain intact. They will continue to be applied by trial judges hearing payment protection insurance mis-selling disputes and remain binding on them. This will no doubt lead to many claims being struck-out or dismissed by judges in the County Court in the forthcoming few months.

Effect of *Harrison*

Following the withdrawal of the appeal, our view of the legal position is set out below. The law in this field is now settled and clear. In many cases, it is likely to be suitable for summary determination by the Court.

- If a lender or intermediary has failed to disclose either the existence and/or the amount of any commission, this does not create any unfairness in the relationship between the parties within the meaning of Section 140A of the Consumer Credit Act 1974 (the "CCA 1974").
- If there is a claim against a lender or intermediary alleging that the payment protection insurance was expensive or overly costly, this claim must fail. Lord Justice Tomlinson in the Court of Appeal decided that:
  - an intermediary is under no obligation to advise a borrower that the same cover could have been obtained more cheaply elsewhere.
  - charging a high price for a product which is freely and readily available more cheaply in the market would be met with incomprehension in any other context.
- If a lender or an intermediary has complied with the Insurance: Conduct of Business Rules ("ICOB") or the Insurance: Conduct of Business Source ("ICOBS") it will be extremely difficult (if not impossible) to bring a successful claim alleging unfairness within the meaning of Section 140A of the CCA 1974.
- If there is an allegation of unfairness within the meaning of Section 140A of the CCA 1974, the Court must look at (a) whether the relationship (and not the agreement) between the parties is unfair and (b) matters relating to both the lender as well as the borrower: it is not a one-sided consideration and those matters must be balanced.
- If a lender or an intermediary selling payment protection insurance is subject to either ICOB or ICOBS, it is only required to advise on the product or products it sells. It does not have to advise on the whole market: any comparison should be undertaken against only with the policies it sells.
- Claims alleging payment protection insurance mis-selling must show that the claimed breach of ICOB or ICOBS has caused the borrower actual loss (in the legal sense). Any claimed loss must not be too remote and borrowers must show they have mitigated their losses: simply claiming a refund of the sums paid for the payment protection insurance is not enough.
- Borrowers may have caused some of their own loss or have been contributorily negligent when buying payment protection insurance. If a court makes such a finding then the amount of compensation will be reduced or wiped out. This will be significant where a borrower has failed to exercise a right to cancel.

Stayed Claims

After the Supreme Court granted permission to appeal, a significant number of claims were stayed pending the final determination of the *Harrison* appeal. Now the appeal has been withdrawn, these stays can be lifted and directions can be given for trial. Alternatively, lenders and intermediaries could apply to strike-out claims which are no longer viable.

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1 If you want more information about the Supreme Court's decision to give the borrowers permission to appeal, please read our note entitled "Supreme Court Grants Permission to Appeal on Unfair Relationship Provisions in *Harrison & Harrison v Black Horse Limited*", which is available from: http://www.lexology.com/library/document.ashx?g=3c4b1244-7653-47e4-ba58-16190bc3a681#page=1

2 If you want more information on the Court of Appeal's consideration of unfair relationships in payment protection insurance mis-selling disputes, please read our note entitled "My Sweet Lords: Court of Appeal hands down emphatic judgment in *Harrison & Harrison v Black Horse Limited*", which is available from: http://www.lexology.com/library/document.ashx?g=77a84b22-a8c6-425e-b120-5c5f0cded031#page=1

3 If you want more information on the High Court's consideration of ICOB and unfair relationships in payment protection insurance mis-selling disputes, please read our note entitled "Black Horse romps home with another victory in the High Court: *Harrison & Harrison v Black Horse Limited*", which is available from: http://www.lexology.com/library/detail.aspx?g=513c1b16-53d1-4cf9-8d21-230c0e64edc2

Comment

For all lenders or intermediaries, the withdrawal of the appeal in *Harrison* will come as extremely welcome news. It will enable lenders to resolve these claims now – rather than having to wait another year and a half for a Supreme Court decision. Given the emphatic nature of the three earlier judgments, any prudent 'after the event' insurer would need to be satisfied that there were very strong prospects indeed of a third appeal succeeding. *Goode: Consumer Credit Law and Practice*, a leading textbook on consumer credit law, notes[4] that the Court of Appeal decision "is not a surprising one". Professor Lomnicka[5] also comments that "if creditors comply with their regulatory obligations, the courts will not impose more onerous obligations". With this in mind, any underwriters properly advised would be unlikely to continue to provide insurance to allow this third appeal to proceed. The costs that an insurer would have to pay if this final appeal were unsuccessful would be hugely disproportionate to the claim amount.

For those still wanting to pursue a court claim for payment protection insurance mis-selling, they will face a steep uphill battle. Courts hearing these cases must apply the law as it currently stands and as laid down by the Court of Appeal and High Court. This will lead to a significant number of claims brought by borrowers being dismissed or summarily determined in the lender's or intermediary's favour. In these circumstances, "after the event" insurers who have backed claimants will have to pay the lender's or intermediary's costs.

Borrowers could, of course, complain to a firm instead and, if dissatisfied, take a complaint to the Financial Ombudsman Service ("FOS"). FOS determines claims applying a "fairness" test rather than applying the strict legal one that Courts must use. Borrowers also have the benefit of the evidential presumptions contained in Appendix 3 to the Financial Services Authority's Dispute Resolution: Complaints. Borrowers are more likely to succeed before FOS but neither their advisers nor claims management companies will recover any legal costs.

Further Information

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4 Note to *Harrison* case in [2012] GCCR 11327 at 11351

5 Professor Lomnicka edits "*Guest & Lloyd: Encyclopaedia on Consumer Credit Law*". This commentary is in the Durham Law Review, April 2012 Edition: "*Unfair Credit Relations: Five Years On*".

7342/08/12