July 2010

Review

Commercial & Dispute Resolution

Speak no Evil, Hear no Evil: Black Horse Limited v Speak & Speak

INTRODUCTION

His Honour Judge Waksman QC, sitting in the High Court, handed down judgment on 21 July 2010 in *Black Horse Limited v David Speak & Caroline Speak* [2010] EWHC 1866 (QB) on four issues often argued payment protection insurance litigation: firstly, whether being told that payment protection insurance (the "**Policy**") is a condition of the agreement when it is recorded, on the face of the agreement, as optional means a regulated credit agreement is unenforceable; secondly (and subject to the first allegation failing), whether a representation that the Policy was compulsory when it was not entitles a borrower to damages for misrepresentation; thirdly, whether the lender complied with the Insurance: Conduct of Business Rules ("**ICOB**"); and fourthly whether the sale of the Policy creates an unfair relationship.

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THE FACTS

Mr & Mrs Speak were a married couple. On 13 October 2006 they applied for, and obtained, a loan for £5,000.00 with Black Horse Limited ("**Black Horse**"). They also applied for, and obtained, further credit from Black Horse to pay a premium of £2,012.39 for the Policy. The agreement was documented in a fixed-sum loan agreement regulated by the Consumer Credit Act 1974 (the "**CCA 1974**"). The agreement separately documented the amount of the loan, the charges for the loan, the premium for the Policy and the charges for the Policy.

Mr & Mrs Speak failed to make the payments due under the agreement. Black Horse served default notices on 16 February 2009. The arrears were not paid so the agreement was terminated. Black Horse issued proceedings for the outstanding balance of £7,179.66 plus costs. Mr & Mrs Speak defended the claim.

THE ISSUES

The Court had to determine the following issues:

1 Whether Black Horse had told Mr & Mrs Speak that the Policy was a condition of advancing the loan and, if so, whether it rendered the agreement unenforceable.

2 If the Policy was not a condition of advancing the loan, whether Black Horse misrepresented it was a condition.

3 Whether Black Horse breached Rules 2.2.3(1) and/or 4.3.1 of ICOB when selling the Policy.

4 Whether the way in which the Policy was sold created an unfair relationship between the parties.

ENFORCEABILITY

For agreements regulated by the CCA 1974 and pre-dating 6 April 2007, the failure to include or correctly state the 'prescribed terms' renders the agreement irredeemably unenforceable. For a fixed-sum loan agreement with a fixed rate of interest, the prescribed terms are the amount of credit and how the debtor is to make repayments. In this case, Mr & Mrs Speak argued that the Policy was compulsory meaning the premium should be treated as a 'charge for credit' (as required by Regulation 4(c) of the Consumer Credit (Total Charge for Credit) Regulations 1980 (the "**CCTCCR 1980**")) but was, instead, treated and documented as 'credit'. It therefore followed, said Mrs &

Mrs Speak, that the amount of credit had been mis-stated rendering the agreement irredeemably unenforceable.

After hearing evidence from Mr & Mrs Speak and Black Horse's employee (who sold the loan and the Policy to Mr & Mrs Speak), the Court decided that:

1 Black Horse did not require the Policy as a condition of advancing the loan.

2 Mr Speak's evidence was "inconsistent or implausible… in a number of important respects".

3 Black Horse's employee's evidence was, by contrast, "clear and reliable" and given "candidly and carefully".

4 Black Horse went through the demands and needs questionnaire with Mr Speak and the answers were correctly recorded.

5 Mrs Speak had been given her full authority to Mr Speak to discuss the proposed loan with Black Horse.

The Court went on to decide that, because of its finding that Black Horse did not require the Policy as a condition of advancing the loan, the agreement was enforceable and correctly stated the amount of credit.

The Court did, however, give some observations on other arguments raised by both Mr & Mrs Speak and Black Horse. In particular, if it had been required to decide the issues, it said it would have decided that:

1 If a lender tells a borrower than the Policy is compulsory but the agreement records it as optional, it is still "required" for the purposes of Regulation 4(c) of the CCTCCR 1980 so should be documented as a charge for credit rather than credit.

2 Whether the policy was cancellable within 30 days (as most are) did not impact how the premium would be treated for the purposes of the CCTCCR 1980: Regulation 4(c) says the premium will be a charge for credit where the making or maintenance of the policy is required by the creditor. The opposite conclusion was reached by His Honour Judge Ibbotson in *Beardsley v HSBC Bank plc* (2009), Unreported, 20 November 2008.

3 Whilst the loan and the premium were separately recorded on the agreement, Section 9(4) of the CCA 1974 (which says that any item entering into the charge for credit cannot be credit) did not allow a creditor to argue that the agreement correctly states the amount of credit (ie the loaned sum). In particular, Black Horse's argument would have led to the premium being both credit and a charge for credit.

MISREPRESENTATION

Lenders will not be surprised to learn that Mr & Mrs Speak argued that, if the Court decided (as it did) that the Policy was optional, Black Horse misrepresented that the Policy was compulsory. Given the Court's finding on the fact, this claim did not succeed. The Court interestingly commented that there are "difficulties in alleging this kind of misrepresentation when a debtor fails in the principal allegation that the [Policy] was … mandatory." Its reason was, in essence, that if the Court decided that the Policy was compulsory then the lender's representation that it was compulsory would be true.

ICOB

Another common argument made by borrowers is a breach of ICOB. Mr & Mrs Speak's first argument was that Black Horse failed to communication in a clear, fair and not misleading way contrary to Rule 2.2.3(1). Their barrister, however, conceded that there would be no breach of this rule because the misrepresentation argument did not succeed.

Mr & Mrs Speak's second argument was that Black Horse failed to take reasonable steps to ensure its recommendation was suitable contrary to Rule 4.3.1. Given the Court's finding that Mr Speak was taken through the demands and needs questionnaire in detail and question by question, it decided there was no breach. Similarly, because Mr Speak had his wife's authority, a failure to go through the questionnaire with her did not, on its own, breach ICOB.

Lenders often argue that even if there is a breach of ICOB, the borrower has suffered no loss. The Court supported such a position by commenting that "it is very difficult to see what loss in real terms was suffered by Mrs Speak" and there was "no proper evidence of loss at all".

UNFAIR RELATIONSHIP

Given the Court's findings on the facts that there was no misrepresentation and no breach of ICOB, it decided that there was no unfair relationship.

COMMENT

This is clearly a pleasing decision for Black Horse as Mr & Mrs Speak were unsuccessful on all of the issues raised. It is also a pleasing decision for lenders generally given the Court's robust approach on misrepresentation, where it considered such a claim would be "difficult", and ICOB where the bank's evidence of procedures was crucial to the decision that it had talked Mr Speak through the demands and needs questionnaire. Lenders will also be encouraged by the Court's comments on loss: often it is difficult to see what loss (if any) the borrowers have suffered by any breach of ICOB.

The Court's comments on enforceability are unhelpful and, it is respectfully suggested, do not properly tackle Black Horse's argument. It must, of course, be remembered that these comments do not form part of the Court's decision and are therefore not binding on other Courts. If the point is fully argued, it is suggested that Black Horse's position should be preferred. The Court of Appeal recently approved Mr Recorder Douglas QC's judgment in *Hurstanger Limited v Wilson* [2007] 1 WLR 2351 that the objective of Schedule 6 (and therefore the requirement to state the amount of credit) is to "ensure that, as an inflexible condition of enforceability, certain basic minimum terms are included which the parties (with the benefit of legal advice if necessary) and/or the court can indentify within the four corners of the agreement". By contrast, Schedule 1 is considerably more tightly drafted.

Black Horse's argument was simple: if the Court determines that the Policy was compulsory then the premium must form part of the charges for credit. In such a case, it may have wrongly (but separately) recorded the premium as credit and charged interest on it (as it is allowed to do so following the Supreme Court's decision in *Southern Pacific Securities 05-2 plc (formerly Southern Pacific Personal Loans Limited) v Michael Walker & Suzanne Walker* [2010] UKSC 32) but the agreement still correctly (and separately) indentifies the amount of credit (ie the loan). It should not follow (as the Court suggested) that the premium is part of the charge for credit and the credit: Section 9(4) does not allow that. It is, instead, simply a charge for credit. This may mean that the lender will need the Court's permission to enforce the agreement under Section 127 of the CCA 1974, but it should not mean that the agreement is irredeemably unenforceable. Given the amount of litigation on this point currently before the Courts, it will undoubtedly be a point which the Court of Appeal will need to tackle in the near future.

FURTHER INFORMATION:

For further information on this article, or for advice with any of the matters raised or any other issue arising out of consumer credit law, please contact:

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