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LITIGATION NEWSLETTER

Supreme Court Grants Permission to Appeal on Unfair Relationship Provisions in *Harrison & Harrison v Black Horse Limited*

Introduction

On 21 February 2012, the Supreme Court of the United Kingdom gave Mr & Mrs Harrison permission to appeal the Court of Appeal's emphatic decision in *Harrison & Harrison v Black Horse Limited* [2011] EWCA Civ 1128 which considered whether the taking of an undisclosed commission (when there was no regulatory obligation to disclose the existence or amount of the commission) created an "unfair relationship" under Section 140A of the Consumer Credit Act 1974 (the "**CCA 1974**"). This will be the first time that the unfair relationship provisions have been considered by the Supreme Court.

The unfair relationships provisions came into force on 6 April 2007 as a result of a change in the law made by the Consumer Credit Act 2006. They replaced the "extortionate credit bargain" test which had previously applied under the CCA 1974.

Court of Appeal's Decision

Facts

Mr & Mrs Harrison are a married couple. In 2003 they applied for, and obtained, a second mortgage with Black Horse Limited ("**Black Horse**"). In 2006 they applied for, and obtained, further credit from Black Horse and repaid the first agreement. This later agreement was for £60,000 meaning the agreement was not regulated by the CCA 1974. Mr & Mrs Harrison also opted to take further credit of £10,200 to pay the premium for payment protection insurance (the "**Policy**"). The APR was 7.4%. They were provided with:

- an initial disclosure document (setting out Black Horse's status);
- a "demands and needs" statement;
- a key facts document; and
- a copy of the Policy's terms.

Black Horse also completed a questionnaire recording Mr & Mrs Harrison's answers to Black Horse's questions. The documentation was sent to Mr & Mrs Harrison by post. They had ample time to consider them. Lord Justice Patten in the Court of Appeal commented during oral argument that all the details "*were there in black and white – if they had bothered to read it*". District Judge Marston, who tried the case in Worcester County Court and who heard both Mr & Mrs Harrison give evidence, found as a fact that Mr & Mrs Harrison were under no pressure. The loan was repaid in March 2009.

Decision

Delivering the leading judgment, Lord Justice Tomlinson decided that:

- the legislative provisions in Sections 140A to 140D of the CCA 1974:
  - required the Court, when determining unfairness, to look at matters relating to the creditor and the debtor: it is not a one-sided consideration;
  - do not offer any guidance (unlike the Unfair Contract Terms Act 1977 or the Unfair Terms in Consumer Contracts Regulations 1999);
- the Office of Fair Trading's guidance on unfair relationships was "*significant*" because it *"points one, not unnaturally, in the direction of the regulatory framework"* (ie ICOB);
- there *"is no requirement for commission disclosure"*. Indeed, the EU Insurance Mediation Directive (adopted on 9 December 2002), the FSA's consultation papers in December 2002 and June 2003, the FSA's policy statement 04/01, ICOB and the Insurance: Conduct of Business Sourcebook (which replaced ICOB) did not require commission disclosure;
- while the *"commission here is on any view quite startling … I struggle however to spell out of the mere size of the undisclosed commission an unfairness in the relationship between the lender and borrower";*
- 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"*; and
- 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 s.140A of the Act but yet not obligated to disclose it to the statutorily imposed regulatory framework under which it operates"*.

The appeal was therefore dismissed by Lord Justice Tomlinson (and Lord Neuberger and Lord Justice Patten agreed).

Comment

The test for granting permission to appeal in the Supreme Court is not whether the Court believes there is a real prospect of success or not. Instead the test applied by the Supreme Court is the one set out in its own Practice Direction 3. This test is whether a proposed appeal *"in the opinion of the Appeal Panel raises an arguable point of law of general public importance which ought to be considered by the Supreme Court at that time"* (see PD 3 paragraph 3.3.3). The Government decided it would not provide a list of indicative unfair relationships and, instead, simply thought that the Court will *"know an unfair relationship when it sees it"*. It is therefore perhaps unsurprising that permission has been granted.

The House of Lords previously decided in *George Mitchell (Chesterhall) Limited v Finney Lock Seeds Limited* [1983] 2 A.C. 803 that *"in my view … when asked to review such a decision on appeal, the appellate court should treat the original decision with the utmost respect and refrain from interference with it unless satisfied*

that it proceeded upon some erroneous principle or was plainly and obviously wrong". On the first appeal to HHJ Waksman QC, he decided that the *"process involves an assessment of facts and the balancing and weighing of different factors which is classically an exercise for the Judge at first instance. For my part, save where it is quite plain that the Judge has failed to consider an obviously relevant matter or taken into account an obviously irrelevant factor, or proceeded on an erroneous view of the law, an appellate court should be most reluctant to interfere. After all, UR claims are often made in relatively low value cases, frequently heard in the fast track, and it is desirable that they should be conducted simply and speedily"*.

The Court of Appeal was at pains to explain the detailed (and thoughtful) history of insurance regulation and, in particular, the fact that commission disclosure is not required (and never has been) for retail customers. It was no accident that the decision was made to not require the disclosure of commission: it was clearly an issue on the FSA's radar but not one which warranted a rule. The FSA does require there to be a statement of price which Black Horse provided to Mr & Mrs Harrison. There was therefore no unfairness in the relationship. This must be right given that (a) Black Horse told Mr & Mrs Harrison that the Policy was optional, (b) the overall and separate price of the loan and the Policy was given to Mr & Mrs Harrison, (c) the agreement separately showed the cost of the main loan and the PPI and (d) the APR was 7.4% which was a "best buy" rate at the time. The trial judge decided that Black Horse had complied with all the requirements of the Insurance: Conduct of Business Rules ("ICOB"). She decided that the Policy was expensive but when weighing up all the other factors, District Judge Martston decided that this on its own was not enough to render the relationship unfair. Mr & Mrs Harrison now concede in the Supreme Court that the Court of Appeal's decision on ICOB is correct and will not be appealed.

It must, however, be remembered that Mr & Mrs Harrison have already lost their argument before District Judge Marston in the County Court, His Honour Judge Waksman QC in the High Court (who has considerable experience of consumer credit issues) and Lord Neuberger and Lord Justices Tomlinson and Pattern in the Court of Appeal. All of those judges came to the same conclusion: the taking of an undisclosed commission does not create an unfair relationship. It is difficult to see how the Supreme Court will come to a different conclusion given the careful judgment of five other judges in the three courts below. The Supreme Court will not be able to interfere with the factual findings made in Black Horse's favour.

Although the Supreme Court of the United Kingdom has not had to consider this issue before, similar issues have been considered by courts at that level in other common law jurisdictions. For example, the Supreme Court of Alabama had to consider whether it was unfair not to reveal to a customer taking out finance for a car that the car dealer would retain some of the profit on the financing transaction when the loan was sold to a finance company. Giving the lead judgment in *Ford Motor Credit Company v Adamson Ford Inc & Robert Bramlett* 717 So 2d 781 (Ala. 781) Mr Justice Butts said (which all 7 Supreme Court justices agreed with) that the *"3% commission agreement at issue here is nothing more than Adamson's profit on the loan transaction, which had a wholesale price and a retail price. We decline to recognise a common law duty that would require the seller of a good or service, absent special circumstances, to reveal to its purchaser a detailed breakdown of how the seller derived the sales price of the good or service, including the amount of profit to be earned on the sale"*.

The Supreme Court gave judgment in the banks' favour in the recent test case of *Office of Fair Trading v Abbey National plc & Others* [2009] UKSC 6. The statement of Baroness Hale of Richmond is now well known. She said that as *"a very general proposition, consumer law in this country aims to give the consumer an informed choice rather than to protect the consumer from making an unwise choice. We buy all sorts of products which a sensible person might not buy and some of which are not good value for the money. We do so with our eyes open because we want the product in question more than we want the money"*.

There are three things that should be noted about the facts in Harrison which clearly demonstrate that they were given an informed choice. Firstly, Black Horse told Mr & Mrs Harrison that the purchase of PPI was optional. Secondly, the overall and separate price of the main loan and the PPI premium were given to them orally over the telephone. Thirdly, they were made aware of the cost of the main loan and the cost of the Policy, which were shown separately on the credit agreement.

Whoever hears this appeal in the Supreme Court in 2013 may well find the words of Lady Hale extremely prescient.

Further information

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