SQUIRE SANDERS

APPEAL JUDGE MAKES FIRST DECISION REVERSING "UNFAIR RELATIONSHIP" FINDING: CONLON V BLACK HORSE LIMITED

November 2012

Introduction

On 7 November 2012, Mr Justice Wilkie (sitting in the Leeds High Court and on an appeal) handed down an *extempore* judgment in *Conlon v Black Horse Limited* following an appeal by Black Horse Limited (**"Black Horse"**) against the finding by Mr Recorder Atherton (sitting in the Manchester County Court) that there was unfairness within the relationship between the parties within the meaning of Section 140A of the Consumer Credit Act 1974 (the **"CCA 1974"**) resulting from the sale of payment protection insurance (**"PPI"**) to Mrs Conlon. The hearing of the appeal had been stayed pending the borrowers' appeals to the Court of Appeal and Supreme Court in *Harrison & Harrison v Black Horse Limited* [2011] EWCA Civ 1128. The appeal to the Supreme Court has now, of course, been withdrawn by the borrowers and leaves the two extremely positive (and binding) judgments of the High Court and Court of Appeal in place.

The Facts

Mrs Conlon is an auxiliary nurse who took out a loan of £17,500 with Black Horse in 2007. At the time of taking the loan, Black Horse sold her a PPI policy. The premium was £3,347.46. The APR on the loan was 12.5%. When she bought the PPI policy, Mrs Conlon was not told that 40% of the premium would be paid to Black Horse by the insurer as a commission.

Before Mr Recorder Atherton, it was alleged by Mrs Conlon that the circumstances of the PPI's sale meant there was an unfair relationship within Section 140A of the CCA 1974. No allegations were made by Mrs Conlon to suggest that Black Horse's procedures had not been correctly followed. Instead, it was argued that failing to tell Mrs Conlon that Black Horse would receive a commission meant there was unfairness. Mrs Conlon alleged that if she had been told that a commission of 40% would be paid to Black Horse, she would have "shopped around".

After hearing evidence and submissions, Mr Recorder Atherton (in a reserved judgment handed down by HHJ Holman) decided that there was an unfair relationship between Black Horse and Mrs Conlon because of (a) the failure to disclose the commission and (b) Mrs Conlon's evidence that she would have "shopped around". He went on to decide that this failure to disclose was motivated primarily by the financial benefits Black Horse stood to gain. Mr Recorder Atherton's judgment wrongly categorised the FSA handbook as a set of "*industry standards that tended to benefit the industry to the disadvantage of consumers.*"

The Decision in *Harrison*

For anyone involved in PPI litigation, the facts of *Conlon* will be extremely familiar. Indeed, the leading case on PPI litigation, *Harrison*, involved an almost identical set of facts. Mr & Mrs Harrison had bought a PPI policy when they took out a loan and were not told that 87% of the premium would be kept by Black Horse as commission. Mr & Mrs Harrison claimed that this gave rise to an unfair relationship under Section 140A of the CCA 1974. After hearing submissions, the Court of Appeal decided that the receipt of an undisclosed commission did not create an unfair relationship.

In fact, Lord Justice Tomlinson noted that if a lender complies "*with the statutorily prescribed regime, it is not easy to see from where unfairness in the relationship is to be derived*" and went on to say that the "*touchstone*" of fairness is the standard set out in the regulatory regime.

Conlon: the Appeal

Black Horse's grounds for appeal were that Mr Recorder Atherton erred by failing to apply *Harrison* correctly. In particular, and by the time of the appeal, Mr Justice Wilkie was now bound by the Court of Appeal's decision in *Harrison* meaning there was no unfairness in the relationship where commission was not disclosed even where the borrower's evidence was that it would have made her "*shop around*".

Leading counsel for Mrs Conlon argued that the appeal should be dismissed because:

- Firstly, disclosure of the commission would have caused Mrs Conlon to act differently, as she said in evidence before Mr Recorder Atherton that had she known about the commission she would have opted to "shop around" for a better deal.
- Secondly, Mr Recorder Atherton had properly considered that the primary motivation for non-disclosure was the commercial benefit, which Black Horse sought to achieve from non-disclosure of the commission.

Conlon: the Decision

After hearing submissions, Mr Justice Wilkie decided that:

- he was unable to distinguish *Conlon* from *Harrison* on the basis of Mrs Conlon's submissions because "*the decision of the Court of Appeal on this issue is binding on me on this point. It cannot properly be distinguished by me. In those circumstances, I am obliged by precedent to uphold the appeal of Black Horse in this case and I do so*";
- the Court of Appeal's decision on the unfair relationship provisions "*requires the court not just to focus on the position of the debtor, but also on the position of the creditor*" and that "*if the only matter of complaint said to give rise to an "unfair relationship" is conduct which complied with the regulatory requirements or statutory obligations, it should not on that basis alone give rise to a conclusion that there is an unfair relationship*";
- creditors should not have to do more than was required under the relevant regulations to avoid a finding of an unfair relationship;
- when introducing ICOB 4.6.1R "*the FSA had deliberately and after due consultation not imposed such a requirement to disclose [the existence of commission]*" and if failing to disclose a commission created unfairness, where there was no requirement to do so, then a creditor "*would be put in an anomalous position*";
- while Mrs Conlon's evidence was that she would have "shopped around" had she been aware of the commission that Black Horse was paid, the "*fact that some customers might, if commission was disclosed, have wanted to shop around does not enable me to distinguish the Court of Appeal's decision. By definition Black*

Horse will not know, unless the customer asks, whether potential customers would want to shop around. The decision of Black Horse, not at that time to disclose commission, was one it was free to take without breaking the ICOB rules"; and

- it would be contrary to the limited scope of the ICOB rules if "*Black Horse, in order to avoid an 'unfair relationship' finding would always have to disclose the fact and extent of the commission, as it would not know whether its customers would wish to have this information. In that case in order to avoid the risk of an 'unfair relationship' finding, Black Horse would have to disclose to all its potential customers. In that case, that would undercut completely the ICOB regime, which was deliberately drawn in such a way for reasons which seemed proper to the FSA at that time*".

The appeal was therefore allowed with costs. Mr Justice Wilkie also quashed Mr Recorder Atherton's decision. In so doing, the specific finding of an unfair relationship by Mr Recorder Atherton was set-aside. The recorder's erroneous categorisation of the FSA rulebook was also quashed.

Comment

For creditors and intermediaries (and those advising them), Mr Justice Wilkie's sensible and binding decision is extremely welcome. It now makes it clear, beyond any doubt, that the scope for distinguishing *Harrison* is almost non-existent. In coming to his decision, Mr Justice Wilkie plainly noted Lord Justice Tomlinson's comment in *Harrison* that it was a "*test case to provide guidance in many other cases which have been stayed pending [the Court of Appeal's] decision*". It therefore follows that a failure to disclose a commission, whether or not that would have caused a borrower to do anything different, does not create any unfairness in the relationship.

It is also useful to note that the High Court has said once again that if a creditor complies with a regulatory framework like the FSA's Insurance: Conduct of Business Rules (**"ICOB"**), there can be no finding of unfairness. This must plainly be right: if a creditor complies with the rules, it is difficult to see how there could be any unfairness. We have recently seen borrower's solicitors try to argue for claims which pre-date the introduction of ICOB that there must be an unfair relationship where a commission is received because there is no "touchstone" and, therefore, there must be some higher standard. ICOB was introduced by the FSA because it perceived failings in the sale of general insurance. It cannot be right that if ICOB did not require a commission to be disclosed, and this resulted from a review of the market, that a creditor or intermediary was somehow required (before the introduction of ICOB) to disclose the existence and amount of a commission to avoid a finding of unfairness.

This is the first time an appeal court has reversed an "unfair relationship" finding. Although it is difficult to persuade an appeal court to do so, it is not impossible. The Courts have always reversed decisions which are made on a legally incorrect basis. The argument about commission in reality amounts to saying that courts should look at pricing or that the court should decide on the mark up on a wholesale price in assessing whether a relationship is unfair or not. In both *Harrison* and *Conlon* the appeal courts have been careful to avoid straying into pricing. It is clear that the unfair relationships provision is not an economic test.

In oral submissions, Black Horse's counsel referred Mr Justice Wilkie to the decision in another test case of the Supreme Court of Alabama called *Re Bramlett* 717 So 2d 781. The facts were similar. The US court considered whether there had been concealment in not telling a customer buying a car on hire purchase about the dealer commission. In *Re Bramlett* the US court said:

> "*Whilst the law still requires, even in the present adversarial world of commercial transaction, that direct questions be responded to truthfully and accurately, the law also generally allows a business to keep confidential its internal operating procedures….The 3% commission agreement at issue here is nothing more that Adamson's profit on the loan transaction which had a wholesale price and a retail price. We decline to recognize a common law duty that would require the seller of a good or service, absent special circumstances, to reveal to its purchase a detailed breakdown of how the seller derived the sale price of the good or service, including the amount of profit to be earned on the sale*".

Creditors are in business to provide loans and make a profit on these transactions. They are entitled and owe a duty to their shareholders to earn profit. This binding judgment makes clear that the fact or amount of any profit earned is not disclosable and does not render the relationship between a creditor and a borrower unfair.

Further Information

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