

B E T W E E N

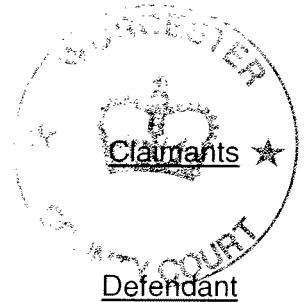
ANDREW HARRISON

-and-

ELAINE HARRISON

-and-

BLACK HORSE LIMITED



Reserved Judgment from hearing on 11<sup>th</sup> June 2010 to be handed down on

*19 July 2010*

**JUDGMENT**

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1. The hearing of this case took place on Friday 11<sup>th</sup> June 2010. The claimants were represented by Mr Cooke and the Defendants by Miss Bala. As a fast track matter it was listed for 1 day only. The claim relates to payment protection insurance ("PPI") which the claimants took out when they obtained a loan from the defendant.
2. A brief history of this case is as follows. In 2003 the Claimants took out a fixed sum loan with the Defendants for the sum of £46,000. In 2006 they took out a further loan for £60,000 with the Defendants. The claimants stated purpose of this second loan was to consolidate previous debts and the surplus monies were for the purposes of a holiday and home improvements. During the application process the Defendants made enquiries as to whether the Claimants would be interested in payment protection insurance, the claimants confirmed they were and accordingly a policy was taken out which cost

£10200 and paid for with a credit loan supplied by the Defendants. The total loan was repaid in March 2009.

3. The current proceedings were issued in July 2009. Originally the claim was based on both the 2003 and 2006 loans. However, during the course of the proceedings an amended particulars of claim was served and the claim proceeded only on the basis of the PPI taken out in 2006.
4. The claimants case is that the PPI purchased with the loan was sold to them by the Defendant in breach of its duties under the Insurance Conduct of Business Rule Book ("ICOB") issued by the Financial Services Authority pursuant to Section 150 of Financial Services and Markets Act 2000. The Claimant also maintains that the PPI, which was taken out in addition to a credit agreement gives rise to an unfair relationship within the meaning of Section 140A of the Consumer Credit Act 1974.
5. The Defendant's position is, as set out in the amended defence, that the PPI policy sold to the Claimants was suitable and that they carried out a proper assessment of the Claimants' demands and needs prior to recommending the policy. With reference to S140A Consumer Credit Act 1974 the defendants admit in paragraph 44 of the amended defence that it applies to the credit agreement in this case. However in final submissions it was argued that it could not be invoked because specific legislation, S 150 Financial Services Act 2000 provides a cause of action for breach of the ICOB rules and that the unfair relationship test could not also apply.
6. Various issues were raised during the course of the hearing and in support of those issues I was referred to and supplied with copies of the following:-
  - a. A bundle of documents comprising three lever arch files including witness statements.
  - b. An extract from the FSA Handbook – ICOB 2.3 on the issue of inducements.

- c. Extract from the FSA Handbook – ICOB 4.3 on the issue of suitability.
  - d. Extract from the FSA Handbook – ICOB 4.6 on the issue of commission disclosure for commercial customers.
  - e. Section 150 of the Financial Services and Markets Act 2000 together with attached notes.
  - f. The judgment in the Office of Fair Trading -v- Abbey National and Others 25 November 2009.
  - g. The Defendant's skeleton argument.
7. I heard oral evidence from Mr and Mrs Harrison, Mr Ian Cooke, a financial expert on behalf of the claimants and from Mrs Johnston for the Defendant. I also heard detailed submissions from both Counsel.
8. The oral evidence from the Claimants was in line with their written statements. Mr Harrison confirmed in his oral evidence that he had suffered from artery problems prior to taking out the PPI. He confirmed that he was familiar with PPI as he had taken out several policies and had not made any claims under them. He could not remember specifically the nature and content of the telephone calls that he had in 2006 when arranging the new loan and PPI but accepted that the Defendant's employee Lisa Hutcheson possibly did follow the set procedure as set out in the prescribed script and gave him the required information. In particular he accepted that he was not told that the policy was compulsory and could not explain why in the original particulars of claim it was specified that he was told that it was compulsory. He just thought he had to have PPI because he had it with previous loans. However, he also made the point that he was never told that he did not need a PPI but equally he could not recall that he had been told that he did need it. He confirmed that with the other loans that he had taken out, probably all of them, he had taken out PPI. He confirmed that he probably did receive various documentation from the

Defendant but could not recall it specifically and confirmed that he would probably have just scan read the documents including the Demands and Needs Questionnaire (DNQ), and the policy. He confirmed he did not read the Key Facts document because he had spoken on the phone about it to the Defendants. He confirmed that the paperwork had been sent to his home where he signed the credit agreement and that he would have scanned the contents. He agreed that he was not put under any pressure. He confirmed that what he was looking for was to see if what was in the documents was what he had been told on the phone. He confirmed that because he had not read the Key Facts he was not aware that the agreement was cancellable. In fact he said he had only found that out during the court hearing.

9. Mrs Harrison gave evidence. She confirmed that she was not aware at the time that cheaper personal protection insurance could be obtained on a stand alone basis. She was of the opinion that if they wanted cover it was part of the loan. She confirmed that she had heard Mr Harrison's evidence and did not disagree with what he had said. She confirmed that she worked as a home move adviser for the Halifax but that her experience was not on the money side. Her only experience was therefore with the previous loan contracts that they had taken out and she thought that PPI had been taken out with all five previous loans but she was not certain.
10. All information relevant to Mrs Harrison was supplied to the Defendants by Mr Harrison on the telephone. She confirmed that she did not read any documents received in detail and only scan read them. She relied on her husband to read them. Mr and Mrs Harrison were both very straightforward and honest with their answers.

11. Mr Cooke appeared as an expert witness for the Claimants and his witness statement appears in the bundle. In summary his evidence was that he was unable to obtain quotations for policies available in 2006 because insurers were apparently not prepared to give out such information. He stated that stand alone policies would have been available in 2006 in similar terms to that arranged by the Defendants. Various types of policies can be obtained including those where the premium stays the same per month and those where the premium could increase during the time of the policy. He confirmed that due to the current credit crunch sale of PPI's had been somewhat restricted. He said that he had never personally recommended a single premium policy to a client. He felt that monthly policies were much better.
12. I was satisfied from his evidence that both single sum policies and monthly policies were available at the relevant time and I accept Mr Cooke's evidence that the monthly policies give the same cover at a cheaper price.
13. In addition to this witness evidence the Claimants referred me to the report of the Competition Commission which appeared in the bundle.
14. I heard evidence from Mrs Johnston on behalf of the defendants. She explained that Lisa Hutcheson, who had dealt with the Claimants, was no longer working for the Defendant and was living in Holland. She explained that she did not carry out the same job as Lisa Hutcheson. She was a Team Manager and Lisa Hutcheson was a seller in a different team. Mrs Johnson had listened to the evidence given by the Claimants during the case and said that with her limited knowledge of what the sellers do she was satisfied that what was being described was what they did. Her witness statement described the training details provided to the sellers.

15. She conceded that some of the information in her written statement was not accurate. She explained that at the time she did her statement she had not been selling PPI for some time and would have had to have refreshed her memory as to exactly what was involved. She remembered that there were DNQ's and a script on everyone's desk. She confirmed that some sellers did ask other questions in addition to the questions on the demands and needs form but they were not encouraged to do this. It was policy to ask only the questions on the forms. She confirmed that there were sales targets in relation to PPI. She could not recall the precise target figure but thought that 30% of loans would be subject to a PPI. She confirmed that when judging how successful a seller was the sale of PPI was not the only thing to be assessed. Mrs Johnston said that anyone who received a negative assessment would be put on a coaching plan and she agreed that if they did not improve it could affect their job prospects and pay.
16. The records showed that the Claimants wished to refinance their borrowings and entered into the second loan agreement with the Defendants on 24 July 2006. The loan was secured by the existing charge on the property. On 17 July 2006, before entering into the agreement, Mr Harrison had a telephone discussion with the Defendant's sales representative, Lisa Hutcheson which involved going through a standard script including DNQ to identify whether a PPI was appropriate. The questionnaire identified that a PPI policy was appropriate and therefore the unexecuted agreement, the PPI policy and Key Facts summary were posted to the Claimants' home address to be signed and returned. The assessment of Mr Harrison's answers to the DNQ indicated that it was appropriate for him to purchase a PPI policy to provide joint life cover. Accordingly, having signed the requisite documentation the Defendants organised the loan of £60,000 and the policy. The purchase price of the PPI

policy was £10,200 and this was paid for by an addition to the loan. The total amount of credit therefore provided was £70,200. The loan was repayable over 23 years. The PPI policy was for a period of 5 years. The interest payable on the PPI premium over the 23 years was £10,638 which together with the premium of £10200 made a total payment of £20,838. There were 276 monthly repayments of £519.60 each which included the sum of £444.10 in respect of the personal loan and £75.50 in respect of the loan relating to the PPI. After entry into the agreement the Claimants had a 30 day period during which they were entitled to cancel the PPI free of charge. Mrs Johnston was honest and straight forward in her evidence and conceded that she did not have up to date knowledge of the procedures.

17. Having heard the evidence I am satisfied that the parties were largely in agreement as to the events that led up to the PPI policy being taken out. It is clear that the Claimants, as a result of their previous experience with taking out loans, expected there to be a PPI and paid no particular attention to the information that they received.
18. The Claimants accepted that the suggestion that they were under pressure to sign the agreement was wrong and concede that the paperwork was sent to their home for them to consider and sign if appropriate. I am also satisfied that the information that they received did set out the necessary notification that the PPI was optional and furthermore, that it could be cancelled within 30 days. I also noted that various parts of the documentation were highlighted in order to make important aspects of the agreement stand out. I am also satisfied that the Defendant's sales representative followed all the requirements of the procedure specified by Black Horse including going through the DNQ and the prescribed scripts.

## The issues

19. (a) Both parties accept that ICOB applies. The issue is whether the defendant complied with the ICOB rules. The burden is on the claimant to show the defendants did not.
- (b) Both parties agree that S140A of the Consumer Credit Act 1974 applies but the Defendants dispute that it can be invoked because of the existence of ICOB.
- (c) If Section 140A applies, is this an unfair relationship. The burden is on the defendant to show it is not.

## ICOB

20. Did the Defendants comply with the requirements of ICOB 4.3  
I was referred to the following rules in ICOB 4.3

### Rule 4.3.1:

(1) An insurance intermediary must take reasonable steps to ensure that, if in the course of insurance mediation activities it makes any personal recommendation to a customer to buy or sell any non-investment insurance contract, the personal recommendation is suitable for the customer's demands and needs at the time the personal recommendation is made.

(3) An insurance intermediary may make a personal recommendation of a non investment insurance contract that does not meet all of the customers demands and needs , provided that...

The insurance intermediary identifies to the customer ,at the point at which the personal recommendation is made, the demands and needs that are not met by the contract that it personally recommends.

### Rule 4.3.2:

In assessing the customer's demands and needs, the insurance intermediary must:

(2) seek such information about the customer's circumstances and objectives as might reasonably be expected to be relevant in enabling the insurance intermediary to identify the customer's requirements. This must include any facts that would affect the type of insurance recommended such as any relevant existing insurance.



(3) Have regard to any relevant details about the customer that are readily available and accessible to the insurance intermediary, for example, in respect of other Have contracts of insurance on which the insurance intermediary has provided advice or information; and  
(4) explain to the customer his duty to disclose all circumstances material to the insurance and the consequences of any failure to make such a disclosure, both before the non-investment insurance contract commences and throughout the duration of the contract; and take account of the information that the customer discloses.”

21. It is the claimants case that the ICOB 4.3 regulations require that any recommendation be objectively suitable for the borrowers and that the bank must seek information about the Claimants’ circumstances so as to identify their requirements taking into account existing insurance and the sufficiency of cover provided by the proposed policy. The DNQ has limited questions and does not meet the obligation to ask appropriate questions as set out in ICOB 4.3. The purpose of the £60,000 loan was for debt consolidation. The claimants say the Defendants were aware of this, and therefore cost was a very relevant consideration. The cost of the insurance was excessive bearing in mind the expert evidence of Mr Cooke and that the period of insurance of 5 years was not appropriate given that the loan was for 23 years. The claimants maintain that the Defendants did not take any reasonable steps to see if what they were recommending was suitable for the demands and needs of the Claimants.

22. The Defendant’s position is that ICOB 4.3 requires an “adequate assessment of suitability” The demands and needs questionnaire was created specially to meet compliance with Rule 4.3. Questions in the form amount to “taking reasonable steps” as required by ICOB 4. As a result of the questions asked a level of cover was recommended, namely “borrower 1: joint life, borrower 2.” The Claimants accept that the prescribed script was followed and that the demands and needs questionnaire were filled in. The credit agreement refers to the optional payment protection plan. This means that the issues now raised

were brought to the attention of the Claimants both at the time of the initial telephone conversation with the defendants' seller and subsequently in writing when the relevant paperwork was sent to the Claimants for their consideration at home

23. It is therefore the Defendants' position that they did comply with ICOB and that what was proposed was sensible given the history and that if the Claimants were not happy with the proposal then, given that it was all included in writing in the various documents sent to them, they were in a position to identify this and raise it with the Defendants. In the event the Claimants did not raise any query with the facts and figures upon which the recommendation was made.

24. I am satisfied that the steps and procedures implemented by the Defendant meet the strict requirements of ICOB 4.3 but go no further. The bank did fill in the DNQ and through a very specific and carefully designed script and DNQ they have ascertained the precise information prescribed by the regulation. I am not persuaded that the bank gave a false impression that the PPI policy was mandatory. The documents and evidence show otherwise. The Claimants confirmed that they did not read the contractual documentation in any detail. They assumed that the policy was compulsory and they continued to assume this notwithstanding that the documentation clearly said that the policy was optional. Indeed I note the 2003 loan documents also say it is optional. I am satisfied that this means the bank took reasonable steps to assess the suitability of the product for the Claimants pursuant to ICOB 4.3. I am not persuaded the bank is in breach of ICOB 4.3.

25. The Claimant also raised the point that under 4.3.6 (3) "the relevance of any exclusions, excesses, limitations or conditions in the contract must be taken into account". The point was raised that the procedure followed by the

Defendants did not assess whether it was suitable to recommend the product or assess whether it was suitable. Counsel did not give any examples of when it would be in order to recommend the PPI and when it would not. My view is that PPI is straightforward insurance. It covers payments when a policyholder is unable to make payment himself in specified circumstances. Nothing was brought to my attention that demonstrated what further assessment or questions could be made which were relevant. It seems to me that the questions asked were precisely on the points.

### ICOB 2.3

26. The Claimants referred to ICOB 2.3 which requires a firm to conduct its business with integrity and states it should ensure that it does not offer, give, solicit or accept an inducement which is likely to conflict to a material extent with any duty that the firm owes to its customers (ICOB 2.3.2). The Claimants maintained that an 87% commission rate (which is what the Defendants received in this case) raises a conflict to a material extent in connection with its duty to its customer. The Claimants argued that on an objective assessment the policy would not have been recommended because of:- the cost; the premium cost and interest charge take the cost up to £20,000; the policy was for 5 years instead of 23 years; and the Defendant knew the Claimant may have to refinance.

27. The Claimants' point is that whilst the Defendant was not obliged to say that the Claimants should get cover elsewhere they should have told the Claimants that the policy was not suitable for them (demands and needs). Under ICOB 2.3 there was a conflict and therefore the Defendants should not have made a recommendation. In breach of ICOB the Defendants made a recommendation, a positive recommendation and received commission. In response the Defendants pointed out that individual staff did not receive this

commission and that sales targets are only part of the criteria for satisfactory performance of staff.

28. I am not satisfied that the PPI policy was good value compared with pay as you go policies. In this case the Defendants offered a policy that lasts for 5 years as opposed to 23 years. This was clear from the documentation and oral information given during the telephone call. It was clear from the Key Facts document that it was a 5 year policy only and warning notices appeared on the top of the policy: "Joint life, please ensure this cover is required". In my view a 5 year policy was for too short a period and the price of the policy was expensive, however, it was what the Defendants offered and it is what the Claimants accepted and, as was pointed out by the defendants, it turned out, a 5 year policy was entirely appropriate as the loan was paid off in less than 3 years in March 2009. As the seller did not receive commission personally and as I have found she did keep to the script, I am not persuaded that it caused a conflict with its duty to its customers or resulted in unfair treatment. The defendants had set up a system that took reasonable steps to prevent this.

29. In this case the Claimants were given relevant information, they chose not to seek quotations from any other source, and they accepted that it was a 5 year policy at a price of £10,200. It was their choice, and they did not implement any precautionary steps of their own. The policy was as quoted and the Claimants chose to take it out. The question is was the policy unsuitable. I am not persuaded that the policy was of itself unsuitable. There were other policies, there were cheaper policies, but that does not make this policy as sold unsuitable. The defendants brought to my attention the comment of Lady Justice Hale in the case *The Office of Fair Trading -v- Abbey National Plc:-*

“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.” I am satisfied that in this case the claimants were given an informed choice.

30. I now turn to S140A Consumer Credit Act 1974. The parties accept that S140A applies to the loan in this case, even though at the time the loan was made it was not a regulated agreement. However the defendants maintain that due to the existence of ICOB specific insurance regulations S140A cannot be invoked. It was argued that the unfair relationship test does not apply because the ICOB rules do apply. The ICOB provisions put the onus on the Claimants to prove their case but where a debtor such as the claimants allege a relationship is unfair Section 140A Consumer Credit Act 1974 puts the onus on the creditor to prove to the contrary. If it had been the intention to reverse the burden of proof it was argued that Section 150 Financial Services and Markets Act 2000 would have provided for this. No authority was brought to my attention to support this contention.

31. The claimants maintained that S140A did apply and the effect was to reverse the burden of proof so that the defendants must persuade the court that this was not an unfair relationship. Having considered the argument and in the absence of any authority I am not persuaded that the existence of ICOB prevents the application of S140A. I am satisfied that under S140A and B the burden of proof is on the defendants, whereas when considering ICOB the burden is on the claimant.

32. S140A provides that the court may make an order under S140B if it determines that the relationship between creditor and debtor arising out of the agreement is unfair to the debtor because of (a) any terms in the agreement (b) the way in

which creditor has exercised or enforced rights (c) anything done or not done by or on behalf of creditor.

33. The claimant's case is set out at paragraph 22 of the amended claim. It is alleged that the relationship is unfair because of the PPI premium. The premium has to be paid in advance, it is too expensive being 17% of the amount borrowed and the defendants received commission of approximately 87% of the original premium. The policy is only for 5 years instead of 23 years. The premium for the policy was £10200 and the finance took the total sum owed to the defendant to in excess of £20,000, whereas because of the commission paid to the defendant the actual cost of the policy was about £1300. This was not made known to the claimants, and the claimant accepted there was no obligation to make it known, but the claimants argue that this demonstrates this is an unfair relationship. The claimants could not point to any case law on S140A
34. The defendants' response is that ICOB applies and that it cannot be supplemented with S140A. As I have previously indicated I do not agree with this position. I am persuaded that S140A can be applied in addition to ICOB. The onus is on the defendants pursuant to S140 B (3) (9) to prove that the relationship is not unfair. The amended defence sets out a number of paragraphs in response. It is pleaded that the policy is optional, the insurer not the defendants set the terms and it is also pleaded that the claimants should have realised that commission was payable. In the skeleton argument the defendants rely on compliance with ICOB to demonstrate that it is not unfair.
35. My view is that the issues raised by the claimants do not appear to be as to the relationship between the parties. They seem to be as to the principal terms agreed between the parties. The terms complained of are the terms that formed

the main points of the agreement and were specifically raised in the initial discussions and documentation. The PPI was not compulsory, it was optional .If the PPI was not taken the loan was still available. The claimants freely admit there was no pressure and no coercion. The claimants therefore had a choice. The terms complained of are the terms that form the basis of the agreement and which the claimants chose to accept. The claimants entered into the agreement and accepted the terms offered which with hind sight were possibly not the best terms available. The defendants have demonstrated that they complied with ICOB, and that their documentation and script brought to the claimants attention all those matters they were obliged to bring to their attention pursuant to ICOB and they rely on ICOB compliance in response to the unfair relationship allegation. I am satisfied that compliance with ICOB means that the rules have been complied with and I am persuaded that the relationship is not unfair to the claimants.

36. For the reasons stated I am persuaded that there is not an unfair relationship .I am also satisfied that ICOB has been complied with. The claim is therefore dismissed.

DJ Marston

14<sup>th</sup> July 2010