HENDERSON CHAMBERS

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"Unfair Relationships" Revisited:

Black Horse Limited v Conlon

By Dennis Rosenthal

Judgment in *Black Horse Limited v Conlon* was delivered in the Leeds District Registry, Queen Bench Division of the High Court, on 7th November 2012. This was an appeal by Black Horse against a finding of unfair relationships in favour of the Respondent, Mrs Conlon, in the Manchester County Court. Mr Recorder Atherton had found for Mrs Conlon, to the effect that the non-disclosure of commission and extent of the commission payable to Black Horse in respect of a PPI policy in the sum of £1340 out of a premium of £3347.46, relating to a loan of £17,500 secured by second charge, gave rise to an unfair relationship under s140A Consumer Credit Act 1974("CCA 1974").

2. The appeal was largely a re-run of the principles enunciated by the Court of Appeal in *Harrison v Black Horse Limited* [2011] EWCA Civ1128. It will be recalled that the Court of Appeal dismissed the claim of Harrison who alleged that Black Horse's failure to disclose the fact of commission earned on the sale of a PPI policy, together with the substantial amount of commission, had resulted in an unfair relationship between Black Horse, as creditor, and Harrison, as debtor, under

s140A CCA 1974 , giving rise to a statutory remedy under s140B. After referring to the ICOB Rules that governed the sale of PPI at the relevant time Lord Justice Tomlinson, delivering the judgment of the court in *Harrison,* stated:

"In the absence of an explanation such as an element of cross-subsidy the commission here is on any view quite startling and there will be many who regard it as unacceptable conduct on the part of lending institutions to have profited in this way. I struggle however to spell out of the mere size of the undisclosed commission an unfairness in the relationship between lender and borrower. Moreover 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. In that regard it is clear that the ICOB regime after due consultation and consideration does not require the disclosure of the receipt of commission. 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 obliged to disclose it *pursuant to the statutorily imposed regulatory framework under which it operates."*

3. In allowing the appeal and quashing the decision of Mr Recorder Atherton, Mr Justice Wilkie in *Conlon* dismissed the relevance of Rule 4.6.1 in the Insurance Conduct of Business Rules (ICOB) in the FSA Handbook of January 2005, which applied at the relevant time as this Rule only required disclosure of commission if requested by a commercial customer, which Mrs Conlon was not .He further referred to the judgment of HHJ Waksman QC in the court of first instance in *Harrison* where the learned judge stated that, while non-disclosure of

commission is something that would fall within s140A (1)(c) , the test is still whether there is unfairness as a result and that specific evidence is required of the effect the amount of commission might have had or did have on the mind of the customer.

4. Wilkie J held that *Conlon* was not distinguishable from *Harrison* and that therefore he was bound by the Court of Appeal decision. He opined that, where the sole matter of complaint is non-disclosure and the regulatory framework has deliberately set its face against such a requirement, the Court of Appeal had concluded that it would be anomalous to hold that there is an "unfair relationship".

5. Counsel for Mrs. Conlon submitted that this Case was distinguishable from *Harrison* on two grounds: first, that Black Horse had adopted a policy of non-disclosure motivated by its commercial interests and secondly that there was evidence that this particular claimant would have shopped around had she known about the commission. The court rejected the submissions, adding that the Court of Appeal held that s140A requires the court not just to focus on the position of the debtor, but also on the position of the creditor.

6. In the judgment of Wilkie J:

> (a) Applying the Court of Appeal reasoning, 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". The fact that some customers might, if commission was disclosed, have wanted to shop around was not a groung to distinguish the Court of Appeal decision. By definition Black Horse would not know, unless the customer asked, 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. That decision could not be informed by whether there were particular customers who might want to shop around if that information was disclosed.

(b) If it was correct that the failure to disclose could on its own give rise to an "unfair relationship", the anomalous position described by the Court of Appeal would apply. Black Horse in order to avoid an "unfair relationship" finding would then always have to disclose the fact of 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 make disclosure to all its potential customers. That would undercut completely the ICOB regime, which was deliberately drawn in such a way for reasons which seemed proper to the FSA at the time.

7. Comment

The Respondent has indicated her intention to apply to the Court of Appeal for leave to appeal. Should the appeal proceed, the court might well be asked to revisit the earlier analysis and conclusion that compliance with relevant guidance or rules, notably the ICOB Rules, is a sufficient and conclusive shield to a challenge based on unfair relationships; to decide whether consideration should also be given to other provisions in the FSA Handbook relating to treatment of customers and their ultimate affect on unfair relationships; and to consider whether official guidance or rules should themselves be open to evaluation by the court, in so far as they might affect the ultimate relationship between creditor and debtor.

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