UNFAIR RELATIONSHIPS:

HARRISON V BLACK HORSE [2011] EWCA CIV 1128

By Andrew Davies

On 6 April 2007 new provisions were inserted into the Consumer Credit Act 1974 giving the court far reaching powers in relation to any credit agreement[1] if it determines that the relationship between the creditor and the debtor arising out of the agreement is unfair to the debtor (the "unfair relationships" provisions in ss. 140A – 140D). The provisions were effectively retrospective: that is, they apply to agreements made before as well as after the new provisions came into force, provided the agreement was not completed prior to 6 April 2008.

In *Patel v Patel* [2009] EWHC 3264 (QB); [2010] 1 All ER (Comm) 864, the High Court decided that an application for relief under s. 140B was not statute-barred, even though the relevant agreements had been made between 1979 and 1992, and the application itself was not made (by way of counterclaim in an action for repayment of the original loan and interest) until mid 2008. Such an application could be made at any time during the currency of the relationship arising out of a credit agreement, based on an allegation that the relationship was unfair to the debtor at the time when the application was made, or any later time until the expiration of the applicable period of limitation after the relationship had ended. The debtor's cause of action was a continuing one that accrued from day to day until the relevant relationship ended.

The High Court also decided that the relationship between the parties was unfair within the meaning of s. 140A, as a result of the terms of a consolidation agreement in 1992, and the subsequent conduct of the creditor (including failing to provide any calculation of the amount outstanding; the almost complete lack of reminders and requests for repayment for many years; and the general imbalance in the relationship). Relief was granted to the debtor to reduce the money payable from almost £5 million to £207,465, comprising the principal sum due in 1992.

Following *Patel v Patel* the unfair relationships provisions have been regularly invoked in both commercial and consumer credit cases, on occasion successfully (eg., *MBNA Europe Bank Ltd v Thorius*, Newcastle County Court, Sept 2009; *Wollarton v Black Horse* Ltd, Northampton County Court, 29/3/10; *Yates v Nemo Personal Finance*, Manchester County Court, HHJ Platts, 14/5/10); more often not (eg., *Khodari v Al Tamini* [2008] EWHC 3065 QB; [2009] EWCA Civ 1109; *Vernalls v Black Horse Ltd* , HHJ Harris QC 4/11/10; *Harrison*

[1] Unless the borrower is corporate or the agreement is an FSA regulated mortgage contract

v Black Horse [2010] EWHC 3152 (QB); *Sealey v Loans.Co.UK Ltd*, Mold County Court, HHJ Milwyn Jarman QC, 15/8/11); *Paragon Mortgages Ltd v McEwan-Peters* [2011] EWHC 2491 (Comm)).

On 12 October 2011 the Court of Appeal delivered judgment in *Harrison v Black Horse Ltd* [2011] EWCA Civ 2011. This is the first time that the Court of Appeal has looked in detail at the unfair relationships provisions. The context of the appeal was narrow, albeit important given the number of similar claims – it concerned a claim by a borrower to recover the cost of Payment Protection Insurance ("PPI") sold at the same time as they negotiated a loan. The decision of the Court (delivered by Lord Justice Tomlinson, with whom Lord Justice Patten and Lord Neuberger MR agreed) was a resounding rejection of the borrowers' arguments, which centred around the failure by the lender to disclose to the borrower that it would receive from the insurer a handsome commission (in that case, 87% of the apparent cost of the insurance) on sale of the PPI.

The Court of Appeal drew attention to three points at the outset. First, it is the relationship between the parties which must be determined to be unfair, not their agreement, although it is envisaged that the terms of the agreement may themselves give rise to an unfair relationship. Second, although s. 140A is directed at determining unfairness to the debtor, in reaching that determination the court must have regard to matters relating to the creditor as well as matters relating to the debtor. Third, unlike provisions such as UCTA 1977 or the UTCCR 1999, s. 140A offers no guidance in respect of factors which either may or must be regarded as rendering a relationship unfair to the debtor.

The Court of Appeal drew attention to the OFT guidance (OFT 854, first published in May 2008 and recently revised), which points in the direction of the relevant regulatory framework specific to the transaction in question. This was the ICOB Rules, introduced in 2005 by the FSA following extensive consultation, in order to implement the Insurance Mediation Directive. Neither the Directive, nor ICOB, required commission disclosure. Indeed, the FSA expressly considered and rejected disclosure (see FSA CP 187 and PS 04/01). Black Horse were found to have complied with the relevant rules and guidance in ICOB.

This compliance provided the key to the appeal. Lord Justice Tomlinson struggled to spell out of the mere size of the undisclosed commission (although it was described as "startling") an unfairness in the relationship between lender and borrower. The touchstone must 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. 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, but yet not obliged to disclose it pursuant to the statutorily imposed regulatory framework under which it operates. Nor could the circle be squared by arguing that a recommendation of suitability cannot be objective if given by a lender in receipt of a large commission.

Moving away from misselling of PPI, *Paragon v McEwan-Peters* is an interesting example of reliance on the unfair relationships provisions in a large commercial claim. Paragon sought repayment of £3,198,061 under 10 guarantees of buy to let mortgage loans made to a company, and £3,654,482 in respect of 14 different mortgage loans made to the defendants personally. The defendants' primary contention was that Paragon was estopped from making a demand when less than three months' arrears were outstanding. This defence was dismissed on the evidence. It was accepted that the unfair relationships argument could not run in relation to the guarantees, as they do not constitute credit agreements (approving *Paragon Mortgages v Hyah*, 29 November 2010, HHJ Pelling QC).

The court rejected the argument that demands made on the personal loans were unfair for the following reasons:

(a) The mere fact that the mortgages were payable on demand is not unfair. Such terms were commonplace in the industry.

(b) It was not suggested that demand was prompted by an improper motive or was the consequence of an arbitrary decision.

(c) Although the original demand in August 2008 was made at a time when the personal portfolio was not in arrears, by May 2009 the position was entirely different.

(d) In any event the company portfolio had been substantially in arrears since February 2008 with regards to 70% of its properties.

(e) Overall, the whole of the defendants' personal and corporate buy to let business was in terminal trouble. The intervention by way of demand in May 2009 could not "remotely" be categorised as unfair.

In conclusion, while the potential scope of the unfair relationship provisions are now much better appreciated than when they first came into force, *Patel v Patel* remains a relatively unusual example of a business, rather than consumer, relationship, involving large sums of money due over a long period of time, being categorised as unfair. It is clear that the court is likely to require a significant imbalance in the relationship, or at least other unusual factors, before it will intervene (bearing in mind, of course, that if the debtor or surety alleges that the relationship is unfair, the burden is on the creditor to prove that it is not, on the basis of the particular facts and matters relied on by the debtor – s. 140B (9), as interpreted in *Carey v HSBC Bank plc* [2009] EWHC 3417 at para [134]). *Harrison v Black Horse* appears to mark the end of the narrow PPI argument that non-disclosure of commission is, in itself, indicative of unfairness. Whether or not the court will intervene in a particular case, however, remains difficult to predict, and arguments as to what terms and what business practices are sufficiently unfair to result in relief (and, if the grounds for intervention are met, what is the appropriate remedy) will continue to be tested at trial.

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