IN THE HIGH COURT OF JUSTICE
LEEDS DISTRICT REGISTRY

Claim No. 9LV56347

The Courthouse
1 Oxford Row
Leeds

Wednesday, 7th November 2012

Before:

THE HONOURABLE MR. JUSTICE WILKIE

Between:

SHELAGH CONLON

Claimant/Respondent

-v-

BLACK HORSE LIMITED

Defendant/Appellant

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Counsel for the Claimant/Respondent: MR. HODGE MALEK QC & MR. J. STRACHAN

Counsel for the Defendant/Appellant: MS R. BALA

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JUDGMENT APPROVED BY THE COURT

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APPROVED JUDGMENT

1. MR. JUSTICE WILKIE: This case concerns a payment protection insurance policy entered into by the respondent to the appeal ("the claimant"), Mrs Shelagh Conlon, in order to protect repayments that she was to make to the appellants, ("the defendant"), Black Horse Limited, It was entered into without the defendant disclosing to the claimant the fact of, or the extent of, a commission which they would be entitled to be paid by the insurance company providing the insurance cover.

2. The claimant commenced proceedings seeking, amongst other things, relief pursuant to section 140A of the Consumer Credit Act 1974. By an order of the Manchester County Court dated 3rd May 2011, judgment having been given in reserved form by Recorder Atherton, it was declared that the credit agreement, taken together with the payment protection insurance, gave rise to an unfair relationship. A series of orders followed giving Mrs Conlon the relief which she sought. The defendant sought and obtained permission to appeal. Today is the hearing of that appeal.

3. As will appear in due course, Recorder Atherton had to consider the extent to which assistance was given by the decision of his Honour Judge Waksman QC, on appeal from a District Judge's decision in the case of *Harrison v Black Horse [2010] EWHC 3152 (QB)*. Both the District Judge and His Honour Judge Waksman had dismissed claims under section 140A and had concluded that there was no unfair relationship.

4. The decision of His Honour Judge Waksman was dated 1st December 2010. That decision went, by way of second appeal, to the Court of Appeal. It decided that further appeal on 12th October 2011, after the decision of Recorder Atherton but after leave to appeal had been given.

5. I am informed by the parties that the Supreme Court gave Mrs Harrison permission to appeal the Court of Appeal decision but that appeal has been withdrawn because Mrs Harrison and Black Horse settled the dispute, apparently on terms which gave Mrs Harrison all the relief that she had been seeking in the action together with her costs.

6. The issue concerns a claim under section 140A of the Consumer Credit Act 1974 (as amended by the Consumer Credit Act 2006) on the basis that the relationship between Mrs Conlon and Black Horse was unfair to her, being the debtor, because of a thing done or not done/by or on behalf of Black Horse, the creditor. In particular, the thing said not to have been done, as described in the judgment of the Court of Appeal in the *Harrison* case, was the failure by the lender to disclose to the borrower that it would receive, from the insurer, a handsome commission upon the sale of the PPI.

The Facts

7. Recorder Atherton found a number of facts which are set out succinctly and conveniently in his judgment as follows:

> "The claim arises from the sale by the defendant to the claimant of Payment Protection Insurance (PPI) in respect of a regulated, fixed sum, loan agreement dated 3rd April 2007 (a credit agreement) secured by a second charge over the claimant's home. The claimant, who is employed as a full-time auxiliary nurse in the NHS, borrowed £17,500 to discharge a previous loan and to finance the

renovation of her bathroom. On 16th June 2006 she had borrowed £15,000 and paid £5,237.32 for the PPI premium which was to be repaid over a period of ten years. That was the first loan. On 22nd December 2006 she had borrowed £16,000 and paid £4,897.12 for the PPI, again to be repaid over a period of ten years. That was the second loan. The second loan discharged the first loan. The third loan, (with which Recorder Atherton was principally concerned), discharged the second loan."

8. Recorder Atherton then set out his findings of fact as to what had happened in terms of the process by which the PPI was discussed and eventually entered. There was nothing untoward in the procedure adopted by the defendant in relation to those discussions or the issuing of documentation. Recorder Atherton made two further findings of fact of some significance to which I shall return in due course.

Law

9. The claim was brought under the Consumer Credit Act 1974 (as amended by the Consumer Credit Act 2006), section 140A, which describes unfair relationships between creditors and debtors in the following terms:

> "(1) The court may make an order under section 140B in connection with a credit agreement if it determines that the relationship between the creditor and the debtor arising out of the agreement (or the agreement taken with any related agreement) is unfair to the debtor because of one or more of the following... (c) any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement of any related agreement).
>
> (2) In deciding whether to make a determination under this section the court shall have regard to all matters it thinks relevant (including matters relating to the creditor and matters relating to the debtor)...
>
> Section 140B: **powers of court in relation to unfair relationships –**
>
> (1) An order under this section in connection with a credit agreement may do one or more of the following... *[A series of powers are there set out and the order made by Recorder Atherton was in accordance with these powers.]*
>
> (9) If, in any such proceedings, the debtor or a surety alleges that the relationship between the creditor and the debtor is unfair to the debtor, it is for the creditor to prove to the contrary."

10. Part X of the Services and Markets Act 2000 provides for rules and guidance. Chapter 1 concerns rule-making powers and, in brief terms, the Financial Services Authority is the body empowered to make the relevant rules and issue guidance. In particular, section 150 of the 2000 Act provides as follows:

> "A contravention by an authorised person of a rule is actionable at the suit of a private person who suffers loss as a result of the contravention, subject to the defences and other incidents applying to actions for breach of statutory duty."

11. Acting pursuant to the powers to make rules and issue guidance the FSA, by its handbook in January 2005, issued a document entitled *Insurance Conduct of Business*

*Rules* (ICOB). Those rules included, at 4.6, provision for commission disclosure for commercial customers and, in particular, ICOB rule 4.6.1 provides the following:

> "Before the conclusion of a non-investment insurance contract, or at any other time, an insurance intermediary that conducts insurance mediation activities for a commercial customer must, if that commercial customer asks, promptly disclose the commission that he and any associate of his receives in connection with the non-investment insurance contract in question, in cash terms or, to the extent it cannot be indicated in cash terms, the basis for the calculation of the commission, in a durable medium."

12. ICOB 4.6.2, which is by way of guidance, says:

> "ICOB 4.6.2 rule does not replace the general law on the fiduciary obligations of an agent. In relation to contracts of insurance the essence of these obligations is generally a duty on the agent to account to his principal. However, in certain circumstances, the duty is one only of disclosure. Where a customer employs an insurance intermediary by way of business and does not remunerate him, and where it is usual for the insurance intermediary to be remunerated by way of commission paid by the insurer out of premium payable by the customer, then if the customer asks what the insurance intermediary's remuneration is, the insurance intermediary must tell him. ICOB 4.6.1 rule is additional to this requirement in that it applies whether or not the insurance intermediary is an agent of the commercial customer."

13. It is to be pointed out that ICOB 4.6.1 does not apply in this case because the customer in question was not a commercial customer and there is no ICOB rule requiring Black Horse to disclose to its customers the existence of, or the amount of, commission earned by it from the insurer in the event that a customer takes out a PPI contract in the context of a loan made by Black Horse to its customer.

*Harrison v Black Horse* in the Queen's Bench Division

14. His Honour Judge Waksman QC identified the issues, including a claim for a statutory remedy under section 140B of the Consumer Credit Act 1974. At paragraph 47 he began to deal with the unfair relationship claim and set out the relevant statutory provisions. At paragraph 50 he described the role of the court in deciding whether or not there was an unfair relationship, as well as the limited role of an appellate court in respect of such an exercise. In so doing he was citing principles identified in *Aldi Stores Limited v WSP Group plc [2008] 1 WLR 748* and *George Mitchell (Chesterhall) v Finney Lock Seeds Limited [1983] 2 AC 803*. He said as follows:

> "Whilst it would be wrong to describe the exercise undertaken by a court in determining whether there was an unfair relationship as the exercise of a discretion, the very broad terms in which section 140A is couched, 'provides the courts with maximum flexibility in considering unfairness' (paragraph 3.12 of the OFT Guidance on Unfair Relationships, May 2008). 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."

15. At paragraph 52 the Judge identified what it was that the Harrisons said pointed to the existence of an unfair relationship and identified how the District Judge had approached those issues. At paragraph 57 he pointed out that it was correct to say that the District Judge appeared not to have dealt with the issue of the large commission and its non-disclosure to the Harrisons and he indicated that that was a potentially significant factor.

16. In the next few paragraphs he referred to a decision of His Honour Judge Platts in a case of *Yates*, but, by reason of the way in which the Court of Appeal dealt with this part of the judgment, I need not further refer to it.

17. At paragraph 61 he started dealing with the undisclosed commission which was very large, being 87 % of the premium. He said the following:

> "I also accept that if this had been disclosed to the Harrisons they may well have been interested to learn of it. Beyond that, how they may have reacted is a matter of speculation because, again, it was not something dealt with in their evidence. I accept that the non-disclosure of commission is something that would fall within section 140A (1)(c) but the test is still whether there is unfairness as a result. There may be, if the fact of the commission has led or might have led to some significant misrepresentation on the part of the adviser, as His Honour Judge Platts found in *Yates* but the system here did not allow for that..."

18. At paragraph 62 of his judgment he said as follows:

> "For my part, if it is to be said that the amount of commission might have had or did have an effect on the mind of the customer, there should be specific evidence from the customer on that point. As with any other allegation of non-disclosure the court should know what the relevant party would have done or thought had it known what it did not know."

19. In the light of the absence of evidence on that issue, His Honour Judge Waksman, at paragraph 64, concluded that, although the District Judge did not deal with the question of non-disclosure of commission, it did not matter because it would not have caused an unfair relationship, whether taken by itself, or together with the other features of the transaction. Accordingly, he dismissed the appeal.

<u>*Conlon v Black Horse* before Recorder Atherton</u>

20. Recorder Atherton, having set out the facts, turned, at paragraph 20 and following, to deal with the authorities. Of ICOB, at paragraph 21, he said as follows:

> "Paragraph 4.6.1 is expressed as a requirement that an insurance intermediary must comply with the request by a commercial customer for disclosure of commission received in connection with the non-investment insurance contract. There is no corresponding requirement in respect of consumers."

21. In succeeding paragraphs he rehearsed briefly the relevant provisions of other sources, either of persuasive guidance or legal authority. They included: two guidelines issued by the OFT; a Competition Commission report on PPI; and certain cases, to which I need not refer in any detail, including the case of *Yates v Nemo Personal Finance.*

22. In paragraph 31 of his judgment he turned to deal with the *Harrison* decision of His Honour Judge Waksman. He cited the paragraphs to which I have already referred, including paragraph 62. At the conclusion of that part of his judgment, Recorder Atherton said, at paragraph 36:

> "As appears below, both counsel take comfort from different aspects of these judgments. Mr Clark, who appeared for the claimant, submits that he has the trump card in the form of the evidence from Mrs Conlon as to the effect that knowledge of the commission would have had upon her."

23. That is a reference to evidence which was given at the trial and which was recorded by Recorder Atherton at paragraph 46 in the following terms:

> "I heard evidence from Mrs Conlon and Sharon Jones, who is employed by BH as a quality assurance analyst. Mrs Conlon had stated in her witness statement that she would not have purchased the PPI if she had known that the total cost was three times the cost of equivalent stand alone cover and that the commission element accounted for over 40 percent of the PPI premium."

24. He then, briefly, recorded what she had said in cross-examination which included, at paragraph 49, the following:

> "Mrs Conlon said, and I accept, that if she had known that she would be paying BH's commission with interest she would have shopped around and searched the internet for a cheaper quotation."

25. At paragraph 51 of his judgment, Recorder Atherton set out what he called the defendant's disclosures which involved an internal document entitled "COG03 sales and marketing version 34 – 17.5.06." He then set out a series of statements within that document, including the following:

> "The policy of the company is to introduce appropriate credit protection to all our customers and to ensure that our supporting dealers also recognise the importance of introducing appropriate protection to their customers. Dealers should be aware of the potential commission income... Credit protection insurance provides significant fee income and profit to the company, as well as worthwhile benefits to our dealer and customer base... Considerable extra income and profit is generated... Payment protection from sources not approved by Black Horse should not be financed under Black Horse agreements as this could result in considerable loss of commission earnings for Black Horse... Benefits to BH include high percentage of premium retained, claims dealt with by insurance company, claims paid to BH."

26. In recording counsel's submissions, Recorder Atherton recorded Ms Bala, who appeared for the defendant below and before me, had made a number of points including:

> "It is important that the court takes account of the fact that no breach of the ICOB recommendations has been alleged against BH..."

27. At paragraph 60, Recorder Atherton recorded Mr Clark's submissions as including the following:

> "This is an important case as it is the first of this type in which the court has received evidence from the borrower as to the effect of the non-disclosure of commission and in that respect it is distinguishable from *Harrison.*"

28. Recorder Atherton then set out his reasoning in paragraph 62 and following. He set out a series of matters which I do not need to rehearse but I have, of course, had regard to them. At paragraph 68 he said this:

> "...It is sufficient to find that the cost of the commission in relation to the cost of the premium was of such significance to Mrs Conlon that with such knowledge she would have considered and explored the options which were available to her."

29. At paragraph 71 he came to a conclusion as to the importance to the defendant of commissions on PPI sales as emphasised in the staff training documentation to which he had already referred and from which he quoted. He went on, in paragraph 72, to record that the defendant had not adduced any evidence to explain the decision not to disclose any information about the commission to the purchasers of PPI. At paragraphs 73 and 74 he said as follows:

> "73. The Competition Commission report and the defendant's disclosures shine a light upon the profitability and commercial importance of that business and the barriers to competition in that market. I consider that it is reasonable to infer that the question as to whether to disclose the facts about commissions would have been considered and decided by the defendant at a high level. In the absence of any evidence from the defendant on this issue I consider that it is also reasonable to infer that it was decided that it was not in their own commercial interests to do so because disclosure might cause potential borrowers to decline the PPI offered and explore other options with consequent delay or disruption to the business.
>
> 74. That is precisely what Mrs Conlon said she would have done if she had known that she would be paying 40 percent of the premium to BH as commission with interest. She said that she did not expect that BH would earn so much commission and she feels she was not told the entire truth. I accept her evidence about that."

30. At paragraph 76 he reached the nub of his reasoning on this issue:

> "In my view the decision to withhold the facts about the commission would have brought valuable commercial advantages to the defendant but it ran contrary to good ethical practice and, when considering fairness in the present context, it is no answer to say that the defendant was not obliged to make such disclosure in law or by industry standards. The industry standards tended to benefit the industry to the potential disadvantage of consumers. I consider that Mrs Conlon was entitled to know what she was paying for."

31. I skip paragraph 77, which deals with certain aspects of the matter which are not central to this appeal,

> "78. In fairness to the defendant, it is possible that in considering whether information about PPI commissions should be included in or omitted from the information they provided to borrowers, they may have taken the view that it was unlikely that better value products could be found in the market and that they were saving borrowers unnecessary time and trouble by alerting them to the commission aspect which may have caused disquiet. However, this is speculation and no evidence has been offered to me that the defendant had any or proper regard to the rights of borrowers to seek alternative products in the market. It is more likely that the defendant would have seen such disclosure as likely to disrupt their smooth, efficient and highly profitable business arrangements. I accept that the expeditious arrangement of good quality PPI brought benefits to borrowers but, by the non-disclosure of information about the commission, they were denied the opportunity to make an informed choice."

32. He then noted, in paragraph 79, that the Competition Commission had proposed that the business practice at the core of the case should be prohibited. This appears to be a reference to something to which the Court of Appeal adverted and to which I shall return.

33. In conclusion, at paragraph 80, he said as follows:

> "Whatever may have been the motivation for not disclosing the commission, the burden of defeating the allegation of an unfair relationship rests upon the defendant and, in my judgment, it has failed to do so."

<u>*Harrison v Black Horse* in the Court of Appeal</u>

34. In the introduction to his judgment, with which the other two members of the court agreed, Lord Justice Tomlinson, at paragraph 2, described that concern about the conduct of lending institutions in selling PPI had been rife for some years. In paragraph 3 he recorded that the court was concerned with a loan advanced and associated PPI sold in 2006, since when the landscape has changed. He pointed out that, since April 2011 *(I think that must be 2012 but am open to correction on that)* the sale of PPI has been prohibited at the point of sale of credit, as has the sale of PPI within seven days before the sale of credit. The sale of single premium PPIs has also been prohibited. At paragraph 4, however, he was concerned to explain and emphasise the very narrow ambit of the appeal. It focussed upon a single aspect of the typical transaction which has not attracted the regulatory comment, namely, the failure of the lender to disclose to the borrower that it would receive from the insurer a handsome commission upon the sale of the PPI.

35. Lord Justice Tomlinson rehearsed the facts between paragraph 7 and 21. At paragraph 22 and following, he referred to the judgments. In relation His Honour Judge Waksman's judgment he referred to provisions of the ICOB rules and how Judge Waksman had dealt with them. He also referred to the way in which His Honour Judge Waksman had considered *Yates* and made comments suggesting that *Yates* was really of little or no assistance in relation to the problem with which the Court of Appeal was dealing.

36. At paragraph 32, Lord Justice Tomlinson considered that the appeal to the Court of Appeal had been brought solely in relation to the dismissal of the claim under section 140A. He indicated that, in their grounds and argument, the Harrisons, were challenging conclusions about compliance with the ICOB rules. At paragraph 33 he said:

> "It was, I think, inevitable that in pursuing this appeal the appellants would attempt to demonstrate non-compliance by Black Horse with its duties owed under the ICOB regime. If the 'things done or not done by the creditor before the making of the agreement', cf section 140A(1)(c) of the Act, are in compliance with and involve no non-compliance with the statutorily prescribed regulatory regime, it is not easy to see from where unfairness in the relationship is to be derived..."

37. Lord Justice Tomlinson then set out the legislative history and, in relation to section 140A made, at paragraph 37, three points:

> "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 section140A 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."

38. His third point was that there was no guidance offered within the terms of the Act or in other guidelines specifically related to the concept of unfair relationship under section 140A.

39. Lord Justice Tomlinson referred to a number of other sources of potential guidance and, in particular, from the OFT , a document headed "Unfair relationships – Enforcement action under Part 8 of the Enterprise Act 2002." Having referred to a number of paragraphs within that guidance, at paragraph 41 Lord Justice Tomlinson said:

> "That guidance is, in my judgment, significant in that it points one, not unnaturally, in the direction of the regulatory framework specific to the transaction in question. There was at the relevant time no regulatory guidance specific to the selling of linked insurance products such as PPI. However, those selling such products were subject to the ICOB rules, which in turn contain guidance as to their application. The ICOB rules, introduced in 2005, had evolved through a process in which specific consideration had been given to the problems thrown up where insurance is sold as a secondary purchase and in particular to the question whether there should be disclosure of the receipt of a commission by an insurance intermediary."

40. At paragraphs 42 to 47, Lord Justice Tomlinson went through the background to the ICOB rules, starting with the European Directive 2002/92/EC on Insurance Mediation in which, although Article 12 provided for information to be provided by the insurance intermediary, there was no requirement for commission disclosure. He described the processes by which, from 2002 through to the introduction of the ICOB rules in 2005, the FSA went through a series of consultation exercises in the course of which it explicitly dealt with commission disclosure where the intermediary is the agent of the customer so as to give rise to a fiduciary relationship where the intermediary must

disclose the amount it receives from the product provider, if asked, but need not otherwise do so. He set out passages in various consultation documents in which the FSA had specifically considered whether it should require all firms to disclose commission, regardless of whether they are acting as agent of the customer, or whether the customer asked for it, and had come, consistently, to the conclusion that it should not impose any such requirements. In paragraph 47, summarising the ICOB rules as published in 2005, he referred to rule 4.6.1 and the fact that, by way of contrast to that rule, there was no general requirement to disclose, either the receipt of commission, or its extent.

41. In summarising the arguments which had been advanced on the appeal, at paragraph 48 Lord Justice Tomlinson said that counsel for Black Horse not unnaturally placed much reliance on the considered absence from the ICOB rules of any requirement for commission disclosure. He referred to the fact that counsel for the appellant, (the claimants below) was seeking to introduce a new line of argument, the details of which I need not refer to, but, at paragraph 51, in declining to allow such a point to be raised for the first time on the appeal, Lord Justice Tomlinson said the following:

> "If we were to allow Mr Doctor now to run this point it would deprive this case of any usefulness as a test case to provide guidance in the many other cases which had been stayed pending our decision."

42. It is to be observed that this case is one where the appeal hearing has been stayed pending the decision of the Court of Appeal in *Harrison.*

43. Lord Justice Tomlinson, at paragraph 57, turned to the principal argument in the case. He described the appellant/claimant's argument as resolving to a single point, namely:

> "In the absence of an explanation, the commission is so egregious that it gives rise to a conflict of interest which it was the lender's duty to disclose. Only disclosure could give the borrowers the opportunity to decide whether they wished to purchase a product in circumstances where the lender derived so significant a benefit from the purchase."

44. At paragraph 58 he said:

> "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 section 140A of the Act, but yet, not obliged to disclose it pursuant to the statutorily imposed regulatory framework under which it operates. Mr Doctor had no answer to this point."

45. That constituted the reasoning and the conclusion of Lord Justice Tomlinson in relation to the limited point with which the Court of Appeal was required to grapple in that case. What it amounts to is that an unfair relationship cannot be said to arise where the only matter of complaint is the fact that the lender has acted in a manner which is in compliance with, or is not in non-compliance with, the ICOB regulatory regime which has deliberately, and after proper consultation, decided not to impose any such requirement. Were it otherwise, the lender would be in an anomalous position. The Court of Appeal rejected that that should be the case.

46. The defendant says that this conclusion of the Court of Appeal in *Harrison*, is binding on me and that, accordingly, this appeal must succeed. Recorder Atherton, in reaching his conclusion, erred, as a matter of law, on the extent to which compliance with the ICOB regime should inform his exercise of considering whether the relationship was unfair under section 140A. Where the sole matter of complaint, said to give rise to an unfair relationship for the purposes of section 140A, is non-disclosure of the fact and/or extent of commission, and where the regulatory framework, at the time, had deliberately set its face against such a requirement in this kind of case, the Court of Appeal has concluded that it would be anomalous to find that the relationship was unfair. To conclude otherwise would be to fall foul of the reasoning of the Court of Appeal and its conclusion in paragraph 58 of the judgment of Lord Justice Tomlinson. I am bound by a Court of Appeal authority, its conclusion binds me. I must conclude that Recorder Atherton was in error in finding an unfair relationship in the circumstances of this case.

47. The claimant says that the decision of the Court of Appeal in *Harrison* can be distinguished on two, linked, bases, which derive from findings of fact which informed Recorder Atherton's decision. First, the policy of non-disclosure was motivated by the defendant's commercial interest: its fear that otherwise a significant number of customers would be discouraged from entering into a PPI arrangement which was thought to be highly profitable. Second, this particular claimant would have wanted to shop around had she known of the fact and extent of commission. Thus, it is said, the Court of Appeal decision and reasoning in *Harrison* is not binding on me because it can be distinguished. On that basis this is not a case where I should overturn the carefully balanced and reasoned conclusions of Recorder Atherton.

48. In my judgment, and despite the attractive arguments that have been put forward, this case is not distinguishable from the reasoning in *Harrison*. The Court of Appeal pointed out that section 140A requires the court not just to focus on the position of the debtor but also to focus on the position of the creditor. It follows that the Court of Appeal's reasoning was that, if the only matter of complaint said to give rise to an unfair relationship pursuant to section 140A (1)(c) was conduct which complied with the lender's statutory and regulatory obligations, it should not, on that basis alone, be susceptible of a conclusion that the relationship was unfair.

49. In my judgment, the fact that some customers might, if commission were disclosed to them, have wanted to shop around, does not enable me to distinguish the conclusion or the reasoning of the Court of Appeal because, by definition, Black Horse will not know, if the customer does not ask them, whether the customer may or may not want to shop around if the fact and extent of commission were to be disclosed.

50. The decision, at that time, of Black Horse not to disclose commission was one which it was free to take without breaking the ICOB rules and was a decision which could not be

informed by any information as to whether a particular customer, or customers, might wish to shop around if that information were disclosed. If a failure to disclose could, on its own, give rise to an unfair relationship then the anomalous position described by the Court of Appeal would apply. The defendant, in order to avoid a finding that a relationship entered into was unfair, would always have to disclose the fact and extent of commission because it would not know whether, or not, a customer would, or would not, wish to shop around if the fact of/or extent of commission were disclosed. In that case, in order to avoid the risk of a finding of an unfair relationship, Black Horse would, in practice, have to disclose to all its potential customers the fact and/or extent of the commission. That would undercut the ICOB regime which was in force at the time and which had been deliberately drawn, for reasons which seemed proper to the FSA at the time, not to require such disclosure in that type of business.

51. In my judgment, therefore, the decision of the Court of Appeal on this issue, and the reasoning supporting it, is binding on me. It cannot properly be distinguished. In those circumstances, I am obliged by precedent to uphold the appeal of the defendant. The order made by the court, pursuant to the decision of Recorder Atherton, must be quashed.

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