**IN THE LUTON COUNTY COURT** **Case No: 1LU90044**

2nd Floor, Cresta House
Alma Street
Luton
Bedfordshire
England
LU1 2PU

**19th December 2011**

BEFORE:

**HIS HONOUR JUDGE KAY QC**

BETWEEN:

Mr Gordon Gillies **Appellant**

- and -

Black Horse Limited **Respondent**

APPEARANCES:

For the Appellant: Mr Matthew Winn-Smith
(instructed by Messrs Wixted & Co, London, SW18 1NP)

For the Respondent: Mr Iain MacDonald
(instructed by Messrs SCM Solicitors, Cockfosters, EN4 0DY)

**APPROVED JUDGMENT**

Transcript provided by:

Posib, Y Gilfach, Ffordd y Pentre, Nercwys, Flintshire, CH7 4EL
Posib, DX26560 MOLD
Tel: 01352 757273
Fax: 01352 757252

**JUDGMENT** **19th December 2011**

**HIS HONOUR JUDGE KAY QC**

1. This is an appeal against the Order of Deputy District Judge Perry made at a hearing on 24th May 2011. I will not rehearse the procedural background as to how the parties arrived at that hearing because it is, for the purposes of this appeal, not relevant. The Order that is appealed is the allocation of this claim to the small claims track. The appeal is based on a submission that the Deputy District Judge was wrong to continue the allocation of the matter to the small claims track and should have allocated it to the fast track. I granted permission to appeal in July of this year.

2. The case that is brought by Mr Gillies is one of many thousands that have been brought across the country concerning the selling of 'PPI' (or Payment Protection Insurance) by banks and other lending institutions to their customers. The legal arguments in those cases have been considered at levels higher than this court and certain principles have emerged. Mr Gillies' claim is based on a number of familiar grounds; he alleges (amongst other things) misrepresentation, breach of the Insurance Conduct of Business Rules amounting to a breach of statutory duty under Section 150 of the Financial Services and Markets Act 2000, an unfair relationship pursuant to the Consumer Credit Act, negligence and breach of contract. Those are all certainly pleaded allegations and they are issues raised in many of these cases.

3. There is before me the witness statement prepared by Mr Gillies in support of his claim. When one reads that one sees that the principal matter that is advanced is that there was here a misrepresentation as to whether the PPI policy was, in effect, compulsory or whether there was an option in relation to it. There is a difference between the parties on the evidence as to whether the financial arrangement, including the PPI policy, was concluded over the telephone or whether Mr Gillies went into a branch of the Defendant in order to make the arrangement. There is an argument raised about his knowledge of the commission that was being paid but it has been accepted on both sides before me that the argument has been resolved by the Court of Appeal's decision in the case of ***Harrison***; that argument, as I understand it, is no longer available to the Claimant.

4. The matter came before the Deputy District Judge in relation to allocation and there was considerable argument before him about the matter; the transcript of the hearing runs to many pages. As far as the value of the claim is concerned, there is no dispute that the claim comes within the ambit of the small claims track. The Deputy District Judge was required to have regard to CPR 26.8 in deciding to which track the claim should be allocated. I will not set out all the matters he is to have regard to but it is quite plain, when one looks at his Judgment, that he was well aware of CPR 26.8 and was plainly referred to it and considered it. He says (in paragraph 5 of his Judgment) that three things are, in essence, at the heart of the issue before him. They are the complexity of the case, disclosure and unfairness. As regards disclosure, that issue was dealt with at the hearing and it is not pursued as a matter before me on this appeal. On the appeal, I have heard submissions made on behalf of the appellant concerning the Deputy District Judge's conclusions as to fairness and complexity. The Deputy District Judge, having identified those three issues, said he took into account those matters *"…in particular when considering whether or not to change this to the fast track."* He then went on to deal with fairness (in paragraph 8 of his decision) and complexity (at paragraph 9).

5. Before I deal with the submissions I have heard today, I should, of course, say that the matter before me is an appeal and I can only interfere with the Deputy District Judge's decision if I am satisfied that it is wrong. When it comes to a question of the exercise of discretion, which the allocation to a track plainly is, then I can only interfere on grounds which are referred to in the case of *G v G 1995 1 WLR 647*, and again it is accepted on this appeal that they are the principles which apply. As was stated by Lord Fraser (at page 652):

> *"…the appellate Court should only interfere when they consider that the Judge of first instance has not merely preferred an imperfect solution which is different from an alternative imperfect solution which the Court of Appeal might have or would have adopted, but has exceeded the generous ambit within which a reasonable disagreement is possible."*

6. It has been argued before me that the Deputy District Judge did exceed that ambit in relation to fairness and equality of arms. The Deputy District Judge indicated that this being a case at the *"lower level"* (or perhaps the small claims track is what he meant) it might be dealt with, on the bank's part, by a "bank employee" and not necessarily by Counsel. It is, of course, a matter of speculation as to how the case will actually be dealt with. It is right to say that at the hearing before the Deputy District Judge where, because of its procedural history, the case had actually been listed for a small claims hearing, the bank appeared by Counsel. One would have to look into the future when the actual hearing of this matter takes place to know whether the bank chooses to appear by Counsel or not. Of course, if it does and it wins, it will not recover the costs of appearing by counsel. The whole point of the small claims track jurisdiction is that the use of lawyers is discouraged or at least, if lawyers are instructed, the losing party will not have to pay their fees. Of course, one should be aware of the realities. Banks, which have great financial power, may well choose to have lawyers representing them at such hearings and not care as to whether the costs are recoverable. It is evident from his Judgement that the Deputy District Judge did consider those matters in reaching his conclusion.

7. As far as complexity is concerned, the criticism of the Deputy District Judge is that, although he may well be right to say that the factual issues are not complex in this case, as perhaps in many of these types of cases, the legal argument is much more complex and ought to be advanced within the fast track regime. I have been referred to the decision of His Honour Judge Waksman QC in the Manchester County Court concerning allocation of cases before that Court and his view that the 'natural home' or the starting point for these cases is the fast track. That is not to say, of course, that his decision is determinative of all such claims.

8. The Deputy District Judge, having dealt with the question of the complexity of the factual issues in this case, said this:

> *"There may then be legal arguments relating to those matters, but I think the factual situation is simple and in my view this is a matter that can be dealt with on the small claims track…"*

9. I have heard Counsel about the question of complexity. Certainly a number of different legal claims are pleaded but I am persuaded by the Respondent's argument that the essence of the Claimant's case is that a misrepresentation was made to him about whether the PPI policy was compulsory or not. If the bank loses on that factual issue, which is a simple one, then the Claimant will have a strong case and will succeed. If the

Claimant loses on that issue, any other argument is going to be extremely difficult but I cannot say it is impossible for there to be some other form of argument open to him. The bank says there is no available argument in those circumstances whereas the Claimant says there may still be some argument as a matter of law based on an unfair relationship. However, I am not persuaded that the Deputy District Judge did not have it in mind that there might be some complexity of legal argument or at least some legal argument that might survive the decision on the factual issue. He exercised his discretion on the basis that once the factual issue, which is relatively simple, had been decided, such legal arguments as remained did not justify a conclusion that the case should be allocated to the fast track.

10. So, although another court might have reached a different conclusion as to which track this claim should be allocated, I am not persuaded that the Deputy District Judge went beyond the generous ambit within which a reasonable disagreement on this point is possible and I, therefore, refuse the appeal.

*End of judgment*