

Listen...before you Speak...

Black Horse Limited –v- David Speak and Caroline Speak [2010] EWHC 1866

■ Ian Norman, 30 July 2010

■ Background

Mr. and Mrs. Speak were a married couple who approached Black Horse Limited for a loan of £5,000. On 13 October 2006 they obtained a loan for a total of £7,012.39, made up of (1) a £5,000 cash loan and (2) £2,012.39 to fund a single premium payment protection insurance policy (PPI). The agreement was set out in the form of a fixed-sum credit agreement regulated by the Consumer Credit Act 1974 ('the Act'). It documented the financial and related particulars for the cash loan and the PPI separately. Both Mr and Mrs Speak signed a declaration confirming that they wished to purchase the PPI.

On 12 March 2009, as a result of arrears under the terms of the loan agreement, Black Horse issued proceedings against the couple for recovery of the total balance outstanding plus costs. Mr. and Mrs. Speak sought to defend the proceedings.

■ The Issues

The court was asked to determine the following issues:

1. Whether the PPI policy taken by Mr. and Mrs. Speak was a condition of the loan and therefore compulsory. If so, did this render the loan agreement irredeemably unenforceable;
2. If the PPI was not compulsory, whether Black Horse, or its sales agent, had represented that it was;
3. Whether Black Horse had breached the Insurance Conduct of Business (ICOB) rules in the sale of the PPI; and
4. Whether the way in which the PPI was sold to Mr and Mrs Speak made the relationship between them and Black Horse unfair within the meaning of s.140A of the Act.

Taking each question in turn, using the above numbering; the court decided, as follows:

1. Enforceability of the Agreement

As the loan agreement was entered into before 6 April 2007, if it was deemed not to have contained the 'prescribed terms' contained in Sch 6 to the Consumer Credit (Agreements) Regulations 1983, it would, by virtue of s.127(3) of the Act be rendered "irredeemably unenforceable."

Mr. and Mrs. Speak argued that the PPI was compulsory and as a result of this, it should have been documented as a charge for credit in the loan agreement rather than as credit, in accordance with Regulation 4(c) of the Consumer Credit (Total Charge for Credit) Regulations 1980. As a result of the error, the amount of credit was miss-stated (which is one of the prescribed terms) and therefore the loan agreement was, in their view, unenforceable.

At the trial of the matter, His Honour Judge Waksman QC heard evidence from Mr. and Mrs. Speak and on behalf of Black Horse, a Ms O'Halloran, who had sold the PPI to the borrowers. As a result of this, he decided that:

- a. The PPI was not compulsory; it was not required by Black Horse as a condition of the loan. There was therefore no requirement to document it as a charge for credit;
- b. The Judge preferred the evidence of Ms O'Halloran rather than that of Mr Speak on this issue;
- c. Ms O'Halloran had taken Mr Speak through the appropriate demands and needs questionnaire for the PPI and his answers were correctly recorded;
- d. Mrs. Speak could not greatly contribute to the evidence; she had not been present at the consultation which closed the deal on the loan

and PPI. She had given Mr. Speak full authority to agree terms on her behalf.

As a result of the above findings of fact, the PPI was not deemed to be compulsory and the loan agreement was enforceable.

2. Misrepresentation

In light of the above findings of fact, the court determined that there was no misrepresentation on the part of Black Horse, or its sales agent, Ms. O'Halloran.

Very helpfully, the court stated that a finding of misrepresentation would in these circumstances be very difficult to uphold, particularly where the borrowers fail to prove that the PPI was compulsory. In fact, even if the court had decided that the PPI was compulsory, then Black Horse's representation that it was compulsory would have been true.

3. ICOB

Mr. and Mrs. Speak alleged that Black Horse had failed to communicate in a clear, fair and not misleading way in breach of ICOB 2.2.3(1). As the misrepresentation argument had failed, so too must this cause of action.

The borrowers also alleged that Black Horse had breached the terms of ICOB 4.3.1 as it had, according to them, failed to ensure that its recommendation in respect of the PPI was suitable. Mr. Speak had been taken through a demands and needs questionnaire and had his wife's authority to answer for her and so there was no breach of this requirement either.

What is encouraging is that the court shared Black Horse's view, and that of other Lenders; that it is difficult to show evidence of loss resulting from a breach of ICOB.

4. Unfair Relationship?

As the court had already found that there was no misrepresentation or breach of ICOB; there was no basis for a finding that the relationship between Black Horse and the Speaks was unfair within the meaning of s.140A of the Act.

In addition to the above, the court gave guidance in respect of various other arguments advanced by both parties, as follows:

1. If a borrower is told by a lender that PPI is mandatory but the agreement documents the same as being optional, it must be documented as a charge for credit;
2. Where PPI is compulsory it must be logged as a charge for credit even if it is cancellable within 30 days; and
3. Black Horse argued that because the Cash Loan and PPI were documented separately, the amount of credit was correctly stated (the Cash Loan amount of £5,000 appeared on the agreement). The court disagreed, stating that s.9(4) required credit and charges for credit to be separated and such argument would mean the PPI was treated as both.

Summary

This case is on the whole good news for lenders facing a torrent of claims loaded with causes of action. It shows that the courts will carefully scrutinise such allegations as misrepresentation and breaches of ICOB. The court's view that it will be difficult to uphold allegations of misrepresentation in such circumstances is to be welcomed. Also to be welcomed is the view that it is difficult to show loss resulting from breaches of ICOB.

Whilst not binding on lower courts, the guidance above on unenforceability is not so welcome. The "prescribed terms" of the agreement, which are essential to an agreement made before 6 April 2007 if it is to be enforceable, merely require "a term stating the amount of credit" and a combination of information which defines how a debtor is to discharge his obligations under the agreement. Black Horse's argument, that the sum of the credit was separately stated (and therefore compliant with Schedule 6) in our view has considerable force.

Whilst if the PPI was deemed compulsory by the court (it was not in this case), it is acknowledged that the agreement would only be enforceable under an order of the court; the court would still have discretion. No doubt this is a question that will raise its head again in the near future given the volume of litigation arising out of these matters.

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