Neutral Citation Number: [2011] EWHC 1416 (QB)

Case No: 1MA40018

IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
MERCANTILE COURT

Date: 31 May 2011

Before:

HIS HONOUR JUDGE WAKSMAN QC
(sitting as a Judge of the High Court)

(1) SHELLEY BARNES
(2) DARREN BARNES

Claimants

and

BLACK HORSE LIMITED

Defendant

Hearing dates: 26 April and 6 May 2011

Nathan Banks (instructed by Miller Gardner Solicitors) for the Claimant
James Ross (instructed by SCM Solicitors) for the Defendant

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

INTRODUCTION

1. On 26 April 2011, I heard an application by the Claimants Mr and Mrs Barnes ("the Barnes") to re-amend their Particulars of Claim. This was resisted by the Defendant lender ("Black Horse") on the basis that the claim as amended was not arguable and/or was devoid of particulars in material respects. On that day I gave a brief judgment which I said would be supplemented by a fuller judgment if the parties required it. I refused the application insofar as it sought to introduce claims for breach of fiduciary duty, negligence and breach of contract on the part of Black Horse in relation to its sale to the Barnes of a PPI (payment protection insurance) policy. I allowed a claim that the agreements in question were unenforceable under the Consumer Credit Act 1974 ("the Act"). In relation to a claim that there was an unfair relationship under s140A of the Act, arising out of this sale, I allowed (with certain modifications) that claim in its amended form on the basis that as a matter of law it was at least arguable that the Barnes were entitled to bring the claim at all as formulated (the Points of Law) and that the facts alleged were arguably sufficient to mount such a claim.

2. Subsequent to that hearing it was agreed that I should in fact determine finally, at this interlocutory stage the Points of Law, and that I should incorporate such findings in my written judgment on the other matters. To that end, because the original hearing was somewhat truncated on the Points of Law, a further hearing took place on 6 May. This is now my full judgment on all matters.

3. These proceedings ("the Barnes Claim") commenced on 28 January 2009 and the Claim Form was accompanied by the original Particulars of Claim. Black Horse filed a Defence on 27 February 2009. This claim concerns PPI policies sold in relation to three different loans made by Black Horse to the Barnes. The first loan, covering the principal amount lent and the single premium for the PPI, in the respective sums of £2,000 and £563, was made on 31 July 2002 ("the First Agreement"). This was then rolled-up into and discharged by a further written loan agreement made on 27 October 2003 ("the Second Loan") which provided a further loan of £4,500 and credit for a new PPI policy of £2,021.48. This was in turn rolled-up into and discharged by a further written agreement dated 8 June 2004 ("the Third Agreement") which provided credit for that settlement and credit for a further PPI policy of £2,694.48. All of the agreements were made with both Mr and Mrs Barnes.

4. There are still monies owed under the Third Agreement which remains extant. On 3 April 2008 Black Horse had brought a claim against Mr Barnes only to recover those monies ("the Black Horse Claim"). He filed no defence to that claim but instead an Admission, and offered to pay off the loan at £150 per month. Judgment was entered against him on 7 May 2008. Both the Barnes Claim and the Black Horse Claim had been made in the Chester County Court.

5. On 21 May 2009 Mr Barnes applied to have the judgment against him in the Black Horse Claim set aside, given the existence of the Barnes Claim, and he and his wife applied to have both claims consolidated. On 30 June 2009 HHJ

Halbert granted the application, set aside the judgment in the Black Horse Claim, joined Mrs Barnes as a Defendant to that claim and consolidated it with the Barnes Claim. Certain other directions were made. Trial was set for 23 October 2009. The Judge recorded that the issues which then appeared to arise were whether the Barnes were entitled to a declaration under s142 of the Act, whether there was an unfair relationship ("UR") thereunder, whether the agreement was in the prescribed form and contained all the prescribed terms and whether the parties were in a fiduciary relationship and if so whether Black Horse was in breach of its fiduciary duty and was bound to account for any undisclosed commission taken in respect of the PPI policy.

6. On 13 October 2009 the Barnes applied to amend their Particulars of Claim and on 21 October HHJ Halbert vacated the trial and listed the amendment application for 21 January 2010. On that day and by consent, the Barnes were permitted to serve the Amended Particulars of Claim. This is the last permitted version of the claim. The case was now allocated to the fast track with a trial to take place after 2 June. But by consent on 21 April 2010 the case was stayed because a decision given by HHJ Langan QC in *Soulsby v First Plus* on 5 March 2010, which was directly in point on some aspects of the UR claim was going to the Court of Appeal and it was thought sensible to await that court's decision. However on 10 December 2010 the Barnes applied first to lift the stay because the appeal in *Soulsby* had been compromised and because it was said that another decision, in the case of *Patel v Patel* [2009] EWHC 3264, covered the point anyway. An application was also made to re-amend the Particulars of Claim and a Draft was included with the application. In response Black Horse made an application to strike out the existing claim on the basis that the further amendments should not be permitted and without them the claim in its current form could not survive.

7. The applications were originally due to be heard at Chester on 9 February. By then the Barnes had served further versions of the proposed Re-Amended Particulars of Claim. The third version was served on 21 January 2011. In circumstances more fully explained below, the hearing on that date was vacated and the applications were transferred to the Manchester Mercantile Court where, ultimately, they were heard by me as noted above.

THE APPLICATION TO AMEND

8. The application to amend is now based on what is the fourth Draft of the proposed Re-amended Particulars of Claim, itself only served on 21 April 2011 without any prior notice ("the Draft"). By then Counsel for Black Horse had prepared a Skeleton Argument directed to the third version and so a Supplemental Skeleton Argument was filed. The Draft replaces the earlier Amended Particulars of Claim in its entirety.

The Essential Facts alleged

9. The key facts are relatively narrow. They are that the Barnes entered into the three agreements referred to above and that in respect of the First Agreement the representative of Black Horse offered them a PPI policy and intimated to

Mrs Barnes that it was in effect compulsory if they wished to have the loan they were seeking. This was not repeated in terms when the Second and Third Agreements were made but it was said to have been implicit on those occasions. When Black Horse offered the PPI policy it was the only such product that it had to offer and in doing so it acted on behalf of the actual insurers, being (at least in the case of the Third Agreement, the earlier PPI policies not having been put into the hearing bundle) Lloyds TSB General Insurance Limited ("Lloyds"), another member of the Black Horse group and Prudential Assurance Company Limited ("Prudential"). Although there are some references in the Draft to the Black Horse representative being an "adviser" this does not appear to have been pleaded so as to allege that advice was either being sought or given by Black Horse. Indeed no act of advice is pleaded, although a failure to advise is. The ambit of the discussions and sales is made clear by the witness statement (WS) of Mrs Barnes dated 10 March 2010 which emerged at the hearing although it had not been served previously. It was not suggested that this did not represent the essence of the Barnes' factual case. The WS does not suggest that they sought or expected, or received any advice or recommendation. This was therefore a case of Black Horse simply offering a PPI product alongside the loan, to be the subject of an additional loan itself.

10. The Draft is not set out as helpfully as it might have been. The facts of the three loans and PPI policies and then the Black Horse Claim are pleaded in paragraphs 2-6 and 11-21. Paragraph 22 then recites a list of what are effectively the Barnes's complaints; these are that

    (a) they were sold PPI policies when they already had sickness benefit,

    (b) the policies were very expensive,

    (c) Black Horse did not advise them to shop around for PPI policies,

    (d) they were told the policies were compulsory when they were not,

    (e) Black Horse did not establish that the policies were in their interest, and

    (f) Black Horse failed to follow the terms of certain documents described below.

11. Paragraphs 23 and 26 then allege that Black Horse took a commission from Lloyds which was not disclosed and paragraph 24 alleges that the true cost of the policy was only a small part of the premium paid over.

12. Only in later paragraphs, however are the duties pleaded which, if they existed were broken by the matters complained of earlier. I deal with those below. A separate charge of UR is then made in paragraph 38. Other allegations made are dealt with in context below.

Breach of Fiduciary Duty

13. A claim of this kind was originally made in an extremely bald form when the Barnes Claim commenced in January 2010. This was before I gave some general case management guidance which emphasised the fact that such claims were frequently being made on an inadequate basis and the courts should be vigilant to weed out unsustainable allegations of breach of fiduciary duty at an early stage. The breach of fiduciary duty claim was then re-pleaded in the first version of the proposed Re-Amended Particulars of Claim appended to the application notice dated 10 December and remained in the third Draft dated 21 January 2011. On 8 February 2011, Counsel then instructed by the Barnes produced a Skeleton Argument suggesting that the hearing for the following day be vacated and a yet further Draft be produced so as to make it clear that the only claims now being pursued were in relation to non-enforceability and UR. In paragraph 11 it was stated that all references to "fiduciary" or "fiduciary duty" would be deleted as would any reference to breach thereof. The further Draft making those excisions was apparently served along with that Skeleton Argument. The suggestion therefore was that the claim for breach of fiduciary duty was being abandoned. But in fact it has been very clearly retained in the fourth Draft served on 21 April. Somewhat remarkably, I was told at the hearing before me that this skeleton argument and the Draft accompanying it had not even been read by the Barnes' solicitors prior to service and had not been considered by them and was made or perhaps filed without instructions. I have had no evidence as such from those solicitors and in the absence of hearing from Counsel I am certainly not going to assume that Counsel acted otherwise than entirely properly. All I will say is that, for present purposes and present purposes only, I accept that for some reason not connected with Counsel the skeleton argument had not been read or fully considered by solicitors prior to it being lodged. The only significance of this is that it may therefore be that when the breach of fiduciary claim resurfaced subsequently (as it did in the final Draft, not pleaded by Counsel instructed for the hearing on 9 February 2011, or indeed by Counsel instructed on this hearing, Mr Banks but by the solicitors themselves), the solicitors may not have thought that they were resiling from a concession earlier made. In any event the amendment is objected to on its merits.

14. I was also told that the reason why the final Draft only arrived on 21 April was because between February and April, and again somewhat remarkably, there have been continuing problems in obtaining instructions from these claimants as to the nature of the re-amended particulars of claim. Given that most of them are matters of law I find that surprising, but there it is.

15. As noted above, this is a case where the lender offered a single PPI policy from insurers which included one of its associated companies. The policy was simply offered as a product, not recommended or advised after an assessment of needs. Paragraph 29 of the Draft accepts that no fiduciary obligations could arise by reason simply of Black Horse providing a loan. And Mr Banks accepted that in this sort of situation it is exceptional for a lender to have any fiduciary duty to the borrower at all.

16. As Millett LJ put it in *Bristol and West Building Society v Mothew* [1998] Ch 1, 18:

> "A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary."

17. The single-minded duty of loyalty means that the party who owes the duty is said to put his interests after and not before or alongside the interests of the principal whom he serves. In *James v Black Horse* 16 September 2009, where a claim for breach of fiduciary duty was also made against a lender had sold a PPI policy, HHJ Holman also noted what Professor Finn said in his article *Commercial Aspects of Trusts and Fiduciary Obligations* to the effect that the mere giving of advice does not of itself import a fiduciary relationship and that for the most part commercial relationships which may involve the giving of advice or stating opinions are unrelated to any consideration of loyal service. Only exceptionally will the line be crossed from that of mere honesty care and skill and the like to a fiduciary obligation such that the adviser is held to be acting in the other party's interest in terms of advice, information and so on. In *James* HHJ Holman struck out allegations of breach of fiduciary duty where no factual matrix was alleged which could generate the required duty.

18. Notwithstanding all of that, and as refined in argument, Mr Banks says that there are in this case three matters which give rise, exceptionally to the claimed fiduciary relationship. They are referred to in paragraphs 35 (b) and (c) and 36 of the Draft. Mr Banks accepted that paragraphs 28 – 34 simply made some general points but were not key to this allegation.

19. The first fact relied upon is that there was in force at the time of all of these agreements a voluntary Private Customer Code ("the Code") produced by the General Insurance Standards Council ("GISC"). GISC was an independent organisation set up to regulate the sales, advisory and service standards of members who included insurers, intermediaries, brokers, agents and anyone acting for them. It was abolished in 2004 (I assume for present purposes after making of the Third Agreement) and was then replaced by a scheme of statutory regulation under the FSA which included the introduction of the ICOB (Insurance Conduct of Business) Rules in January 2005. The way the Code worked was that if anyone was dissatisfied with the service given by any of its members they could make a complaint to the GISC. The Code covers a very wide variety of situations, including where advice or recommendations are given. This is not so here because on the Barnes' own case there was no advice or recommendation about any of the PPI policies sold. In relation to the Second and Third Agreements, according to the WS, nothing was said about the PPI policy at all other than it was being offered, and in relation to the First

Agreement it was simply pointed out that the single PPI product offered was required if a loan was to be granted. In other words, putting it at its highest, it had to be taken.

20. It is said that one of the insurers here, Lloyds, was a member of GISC at the relevant time and that is certainly true for the policy at p75 of the bundle, which was incepted at the time of the Third Agreement. And for present purposes I will assume that Lloyds was a member at the time of the First and Second Agreements also. There is no evidence that Black Horse was a member. But Mr Banks says that Black Horse would have been bound by the Code because it acted for Lloyds – see the first page of the Code at p216. But even if it was I cannot see how that fact and the Code can entail the claimed fiduciary relationship. Paragraph 35 (b) of the Draft lists a number of the Code's obligations assumed by GISC members which include acting fairly and reasonably when dealing with the party obtaining the insurance, not giving misleading information, avoiding conflicts of interest or, if this cannot be avoided explaining the position fully. In a context where no advice or recommendation is given I cannot see how any such assumed voluntary obligations can possibly give rise to fiduciary obligations. The fact that the member (or a person acting on its behalf) agrees (with GISC) that it will make sure that any advice or recommendation made was aimed at meeting the interests of the other party (see paragraph 3.5 of the Code) cannot be relevant absent the giving of any such advice. And even if there was such a duty, which amounts to advising only a suitable product, that does not of itself connote a *fiduciary* duty.

21. The voluntary nature of the Code is emphasised by the fact that paragraph 10.2 says the Code forms part of the membership contract between GISC and the relevant insurer and nothing in it would give any person any right to enforce any term of such a contract by reason of the Contracts (Rights of Third Parties) Act 1999 ("the 1999 Act"), although I accept of course that this provision is only dealing a potential claim under that Act. And the fact remains that at best any breach of the Code can only be invoked by means of a complaint to the GISC.

22. The notion that without regard to the circumstances of the particular case, one can infer a fiduciary relationship between the lender and the customer taking out a loan with PPI simply because the lender (or the insurers for whom it acted as agent in offering the policy) was a member of GISC is absurd, in my judgment.

23. I then turn to the second factor, pleaded at paragraph 35 (c), which is the OFT Non Status Lending Guidelines for lenders and brokers revised in 1997. These are guidelines which are specifically said to be operable where there is secured lending to non-status customers. But the Barnes are not non-status borrowers and this is not secured lending, so that is itself an end of the matter. Mr Banks relied however on paragraph (iii) of the introductory note which said that even outside this context the OFT "hoped that all lenders and brokers would consider the extent to which the principles of good business practice contained

in the guidelines might be applied to all aspects of their business activity." He then referred to certain principles including those of transparency, no high pressure selling, no misleading advertising disclosure of commissions by brokers, no unfair practices and serving the best interests of the borrower.

24. But none of this is sufficient to constitute support for a fiduciary obligation - principally because it is a document containing guidelines which is at best the subject of a hope that it might be adopted outside its specific context. And second because the principles enunciated in truth are not consistent only with fiduciary duties with the reference to brokers being inapposite here since Black Horse was not a broker, and nor was this an advised sale. And the fact that there is a reference to the "best interests of the borrower" does not when read in context indicate a single-minded duty of loyalty in the fiduciary sense. It is referring to recommending or advising a product suitable for the borrower where such a product is advised or recommended.

25. The third matter relied upon is the allegation that in respect of the PPI policies sold to the Barnes, Black Horse was in truth the agent for them rather than for the insurer. See paragraph 36 of the Draft. But no authority was cited to me in support of that proposition. The logical and common sense interpretation of the position here when one product only was being offered to the Barnes without any prompting (on their case) by them and absent any request for advice, is that it was being offered by Black Horse on behalf of the insurer. The fact that there might arise some specific agency relationship between the Barnes and Black Horse further down the line, for example in relation to handling a claim under the policy, does not, in my judgment, establish any agency relationship at the critical time which is when this policy was being offered to the Barnes. There is no material at all to suggest that Black Horse was acting as agent for the Barnes in any real sense and therefore there is nothing in this point either.

26. Mr Banks placed considerable reliance upon the recent decision of Ouseley J in *R (on the application of British Bankers Association v FSA and others* 20 April 2011. He argued that this case showed that even where certain rules were not actionable themselves they could still lead to certain obligations being owed to customers, here fiduciary obligations. I am not assisted by that decision which was concerned with a challenge to new guidance published by the FSA concerning the handling of complaints relating to PPI. The first ground of challenge was whether the Ombudsman to whom the complaints would be addressed was entitled by virtue of the new guidance to take into account not merely breaches of the ICOB rules (which gave rise to actionable breaches of statutory duty) but also of the stated Principles, which did not. Ouseley J held that the fact that the overarching Principles were not actionable in the sense of creating a claim that could be tried in a court of law did not mean that they could not be taken into account by the Ombudsman when dealing with a compensation claim. I do not see how that conclusion assists on the question of fiduciary duty here.

27. Mr Banks then relied on some other observations made by Ouseley J in the context of a second ground of challenge which was that even if the Principles could be taken into account by the Ombudsman in theory, they should not, if their effect was to augment or contradict the underlying rules. In this context Ouseley J was at one point referred to observations which I made about a claimed duty of care in the case of *Harrison v Black Horse* [2010] EWHC 3152 to the effect that the existence of such a duty was negated by the detailed code contained in ICOB insofar as its scope went further than the ICOB rules. He did not agree with that proposition although he did concur with my overall conclusion that there was no wider duty for other reasons. See paragraph 182 of his judgment. But all of this was again in the context of what the Ombudsman could and could not take into account. See in particular his paragraph 184. I simply do not see that his rejection of the second ground of challenge entails anything about what materials may or may not give rise to the existence of a fiduciary duty.

28. Of much more assistance is the fact that essentially the same claimed fiduciary duty between lender and customer, based on the same three matters, and in the same context of the sale of a PPI policy have recently come before two judges with considerable experience in this field in two different cases. In both cases the allegation was found not to be arguable. In *Lawson v Black Horse Limited* 15 April 2011, HHJ Langan QC concluded that there was nothing in the allegation at all. He observed that the same three points as were argued before me were all entirely generic and none depended on an allegation tied to the facts of the dealing in question. I do not accept that in upholding on appeal the decision of the District Judge who refused permission to amend on these points because they were not arguable, HHJ Langan QC was not in truth agreeing that they were unarguable. That is plain from the note of his judgment placed before me and which was not challenged.

29. In addition, on the same day in the case of *Carson & Hazell v Black Horse* HHJ Moloney QC struck out essentially the same claim for a fiduciary duty, describing it as a "travesty". Both these cases were in the County Court but they are nonetheless instructive. In truth this case comes nowhere close to "crossing the line" described in the extract from Professor Finn's article referred to in paragraph 17 above.

30. In addition, while it is not conclusive, it is worth noting that if the Barnes were right on this point, it would follow that every time a lender sold a single product PPI policy to accompany a loan agreement, then, without more (assuming the insurer was a member of GISC) fiduciary obligations would arise. I would find that a surprising proposition and I am fortified in my view that the proposition does not exist as a matter of law.

31. I reject the claim that whether taken together or separately the three matters relied upon can arguably give rise to a fiduciary duty. Therefore all the amendments concerned with this and any alleged breach thereof are disallowed.

Duty of Care

32. The same paragraph 35 also alleges a duty of care owed by Black Horse to the Barnes in relation to its sale of the policies. This puts the claimed duty on a fairly narrow basis because the only matters relied upon are those set out in that paragraph. Sub-paragraph (a) relates to fiduciary duty only so it is not relevant. Sub-paragraph (c) is the reference the OFT Guidelines referred to in paragraphs 23 and 24 above. But, again, I cannot see how guidelines applicable to a different context which at best were hoped might be adopted in this context can themselves establish a duty of care. Just as they do not support a fiduciary obligation I see nothing in them which generates a duty of care.

33. Paragraph 35 (b) concerns the GISC Code. The actual duties of care relied upon are said to be the duties to act as set out in paragraph 35 (b) (i) to (ix) although, strictly speaking it could only be a duty to take reasonable steps to achieve those particular ends. Again, given its voluntary nature and the ambit of any complaint being limited to one made to the GISC, I cannot see that this can of itself establish a duty of care. And while not itself conclusive, the fact that the Code itself makes clear in paragraph 10.2 that it only forms part of the contract between the member and the GISC and excludes any rights to others under the 1999 Act, emphasises that the only recourse contemplated for any breach of the Code was to GISC.

34. What is conspicuously absent from the plea of a duty of care here is any factual basis relating to this particular case from which it could be drawn. It is not said, for example, that Black Horse assumed a responsibility here to give particular advice on the facts of the case. Indeed, as can be seen from the WS, it is not suggested that Black Horse was either asked to, or was expected to or purported to, give advice of any kind. The whole thrust of the Barnes' case is that on the first occasion Black Horse said in effect that purchase of the policy was mandatory and that this was implicit on the second and third occasions.

35. There might have been a claim made based on the breach of a duty to take reasonable care not to make false statements, in other words negligent misstatement, in respect of the allegation that Black Horse falsely said that the policy was mandatory when it was not. But such a plea has not been articulated in this pleading and therefore I need to say no more about it. Otherwise since the only basis for the claimed duty of care consists of references to general documents whose relevance for these purposes is highly limited, I am quite satisfied that there is no arguable case presently pleaded in negligence.

Breach of Contract

36. Paragraph 37 alleges that the terms of the PPI policies "may" offend the Unfair Contract Terms Act 1977 and/or the Unfair Terms in Consumer Contract Regulations 1999. An example given was the inability to secure a proportionate rebate of the premium where the policy was surrendered early. That of course would *prima facie* be a complaint against the insurer not Black

Horse. But it is also alleged that Black Horse would be jointly and severally liable because of s75 of the 1974 Act.

37. In fact the contractual claim was put on a different and to some extent unpleaded basis in Mr Banks' written and oral submissions. What he said was that the whole of the GISC Code had been incorporated into the PPI contract made between the Barnes and Lloyds and if so, then there were breaches thereof as set out in paragraphs 22 – 26 of the Draft, which could be alleged as against Black Horse also because of s75.

38. The basis for alleging incorporation of the Code is the fact that, stated at the bottom of the second page of the terms and conditions of the policy and after details of the underwriters, there is a reference to the fact that Lloyds is a member of GISC and "adheres to" the Code. (There is no similar statement from Prudential.) Precisely the same argument for incorporation was made before HHJ Langan QC in *Lawson*. He was of the view that this statement coming after two pages of detailed terms could not possibly amount to a contractual term itself. He also noted that paragraph 10.2 of the Code made it clear that it did not give third parties (ie here the policyholders) contractual rights under the 1999 Act. I agree that for those reasons the alleged incorporation is not arguable. All the reference to the Code means is that since Lloyds is a member of GISC and is subject to the Code it will be open to the insured, if he considers that there was a breach of the Code, to complain to GISC. And it is very hard to see how the Code could be incorporated when there are in fact two underwriters one of whom is not a member of GISC. Moreover, if the Code was incorporated into the PPI contract, when it was made, it is hard to see how there could be a breach of contract by reason of breaches of the Code which occurred before the contract was made, which is actually the essence of the complaints made here. Even if I was wrong on this last point I would still find the incorporation allegation unarguable for the reasons earlier given.

39. If the Code was not even arguably incorporated then any claim for breach of contract based upon it and s75 falls away. The amendments in this regard must therefore be rejected also.

Unenforceability

40. The Barnes allege that in relation to the First Agreement, although not the subsequent agreements, there was a statement by Black Horse in a conversation with Mrs Barnes on the telephone to the effect that the PPI policy was "needed". See paragraphs 14 and 15 of the Draft and paragraph 10 of the WS. For present purposes I accept that this might well be interpreted to mean a necessary condition of having the loan. I certainly cannot make any further finding about that at this preliminary stage.

41. If that statement was made, it is accepted that it is clearly arguable that taking the PPI policy was a condition of taking the principal loan. But if so, the cost of the PPI premiums should have comprised part of the total charge for credit

in relation to the main loan. As this was not done in the First Agreement that agreement was improperly executed because the correct amount of credit and charge for credit were not shown in the First Agreement. See paragraphs 7 – 9 of the Draft.

42. Black Horse resists this claim. It challenges the factual basis for it and it also says that on any view there was no incorrect statement of the credit being provided because the amount of the cash loan was correctly stated on the face of the document. Further, and, unlike the position in the case of *Black Horse v Speak* [2010] EWHC 1866, which bears a resemblance as far as these arguments are concerned, it will be the intention of Black Horse to raise a "multiple agreements" point under section 18 of the 1974 Act which could dispose of the unenforceability argument.

43. However, it is simply not possible for me to pronounce upon this issue finally at this stage. The amendment to claim that the First Agreement was unenforceable should be allowed. Of course that agreement has now been discharged. But it is alleged that the Second and Third Agreements were similarly unenforceable because it was implicit in the discussions surrounding them that the PPI policy offered on those occasions was also mandatory as the first one had been. I accept that on the face of it there is no allegation of any positive statement in relation to the Second and Third Agreements but there is something in relation to the First Agreement and it would not be right at this stage to prevent the Barnes from relying on that in connection with its unenforceability arguments in respect of the later one. There are issues of fact and inference here which will be matters for trial. Furthermore, and for reasons which I will explain below it is at least possible for what happened in relation to the First Agreement to be invoked in connection with the UR claim.

44. However, some further particulars must be provided. First, full particulars of the factual allegation in relation to what exactly was said on the occasion of the First Agreement and what was said and/or understood in relation to the Second and Third Agreements about the necessity or otherwise of the PPI policy, must be given. And secondly, under paragraph 8 of the Draft, particulars must be given as to how precisely the claim that there has been a failure to state the credit is put.

Mistake

45. Paragraph 10 (c) of the Draft makes a claim for the return of all monies paid under the First and/or Second and/or Third Agreement by reason of an alleged mistake as to their enforceability. But Mr Banks no longer pursues this claim so that particular amendment will not be permitted in any event.

Unfair Relationship

Introduction

46. Here there are three issues. The first two are matters of law (the Points of Law). The third is an issue of fact.

Relevant Statutory Provisions

47. Prior to the introduction of the UR regime by the Consumer Credit Act 2006 a loan agreement (whether regulated by the Act or not) could be re-opened by the Court if there was an extortionate credit bargain ("ECB"). S139 of the Act provided that:

> "(1)A credit agreement may, if the court thinks just, be reopened on the ground that the credit bargain is extortionate—
>
> (a)on an application for the purpose made by the debtor or any surety to the High Court, county court or sheriff court; or
>
> (b)at the instance of the debtor or a surety in any proceedings to which the debtor and creditor are parties, being proceedings to enforce the credit agreement, any security relating to it, or any linked transaction; or
>
> (c)at the instance of the debtor or a surety in other proceedings in any court where the amount paid or payable under the credit agreement is relevant."

48. The ECB provisions were replaced by s140A-D, introduced by the 2006 Act. The following parts are relevant here:

> "140A Unfair relationships between creditors and debtors
> (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—
>
> (a)any of the terms of the agreement or of any related agreement;
>
> (b)the way in which the creditor has exercised or enforced any of his rights under the agreement or any related agreement;
>
> (c)any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or 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)….
>
> 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)require the creditor, or any associate or former associate of his, to repay (in whole or in part) any sum paid by the debtor or by a surety by virtue of the agreement or any related agreement (whether paid to the creditor, the associate or the former associate or to any other person);
>
> (b)require the creditor, or any associate or former associate of his, to do or not to do (or to cease doing) anything specified in the order in connection with the agreement or any related agreement;
>
> (c)reduce or discharge any sum payable by the debtor or by a surety by virtue of the agreement or any related agreement;
>
> (d)direct the return to a surety of any property provided by him for the purposes of a security;
>
> (e)otherwise set aside (in whole or in part) any duty imposed on the debtor or on a surety by virtue of the agreement or any related agreement;…

(2)An order under this section may be made in connection with a credit agreement only—

(a)on an application made by the debtor or by a surety;

(b)at the instance of the debtor or a surety in any proceedings in any court to which the debtor and the creditor are parties, being proceedings to enforce the agreement or any related agreement; or

(c)at the instance of the debtor or a surety in any other proceedings in any court where the amount paid or payable under the agreement or any related agreement is relevant…

140C Interpretation of ss. 140A and 140B

..

(2)References in this section and in sections 140A and 140B to the creditor or to the debtor under a credit agreement include—..

(b)where two or more persons are the creditor or the debtor, references to any one or more of those persons…

(4)References in sections 140A and 140B to an agreement related to a credit agreement (the 'main agreement') are references to—

(a)a credit agreement consolidated by the main agreement;

(b)a linked transaction in relation to the main agreement or to a credit agreement within paragraph (a);

(c)a security provided in relation to the main agreement, to a credit agreement within paragraph (a) or to a linked transaction within paragraph (b)…..

(7)For the purposes of this section a credit agreement (the 'earlier agreement') is consolidated by another credit agreement (the 'later agreement') if—

(a)the later agreement is entered into by the debtor (in whole or in part) for purposes connected with debts owed by virtue of the earlier agreement; and

(b)at any time prior to the later agreement being entered into the parties to the earlier agreement included—

(i)the debtor under the later agreement; and

(ii)the creditor under the later agreement or an associate or a former associate of his.

(8)Further, if the later agreement is itself consolidated by another credit agreement (whether by virtue of this subsection or subsection (7)), then the earlier agreement is consolidated by that other agreement as well."

49. The relevant transitional provisions are contained in Schedule 3 to the 2006 Act. The relevant provisions here are the following paragraphs:

"14 (1) The court may make an order under section 140B of the 1974 Act in connection with a credit agreement made before the commencement of section 20 of this Act but only—
(a)on an application of the kind mentioned in paragraph (a) of subsection (2) of section 140B made at a time after the end of the transitional period; or

(b)at the instance of the debtor or a surety in any proceedings of the kind mentioned in paragraph (b) or (c) of that subsection which were commenced at such a time.

(2) But the court shall not make such an order in connection with such an agreement so made if the agreement—

(a)became a completed agreement before the commencement of section 20; or

(b)becomes a completed agreement during the transitional period.

(3) Expressions used in sections 140A to 140C of the 1974 Act have the same meaning in this paragraph as they have in those sections.

(4) In this paragraph "the transitional period" means the period of one year beginning with the day of the commencement of section 20.

15 (1) The repeal by this Act of sections 137 to 140 of the 1974 Act shall not affect the court's power to reopen an existing agreement under those sections as set out in this paragraph.
(2) The court's power to reopen an existing agreement which—

(a)became a completed agreement before the commencement of section 22(3) of this Act, or

(b)becomes a completed agreement during the transitional period,

is not affected at all.

(3) The court may also reopen an existing agreement—

(a)on an application of the kind mentioned in paragraph (a) of subsection (1) of section 139 made at a time before the end of the transitional period; or

(b)at the instance of the debtor or a surety in any proceedings of the kind mentioned in paragraph (b) or (c) of that subsection which were commenced at such a time…

(6) Expressions used in sections 137 to 140 of the 1974 Act have the same meaning in this paragraph as they have in those sections.

(7) In this paragraph—

- "existing agreement" means a credit agreement made before the commencement of section 22(3) of this Act;
- "the transitional period" means the period of one year beginning with the day of the commencement of section 22(3)….

16 (1) It is immaterial for the purposes of section 140C(4)(a) to (c) of the 1974 Act when (as the case may be) a credit agreement or a linked transaction was made or a security was provided.
(2) In relation to an order made under section 140B of the 1974 Act during the transitional period in connection with a credit agreement—

(a)references in subsection (1) of that section to any related agreement shall not include references to a related agreement to which this sub-paragraph applies;

(b)the reference to a security in paragraph (d) of that subsection shall not include a reference to a security to which this sub-paragraph applies;..

(3) Sub-paragraph (2) applies to a related agreement or a security if—

(a)it was made or provided before the commencement of section 21 of this Act; and

(b)it ceased to have any operation before the order under section 140B is made.

(4) In relation to an order made under section 140B after the end of the transitional period in connection with a credit agreement—

(a)references in subsection (1) of that section to any related agreement shall not include references to a related agreement to which this sub-paragraph applies;

(b)the reference to a security in paragraph (d) of that subsection shall not include a reference to a security to which this sub-paragraph applies;..

(5) Sub-paragraph (4) applies to a related agreement or a security if—

(a)it was made or provided before the commencement of section 21; and

(b)it ceased to have any operation before the end of the transitional period.

> (6)Expressions used in sections 140A to 140C of the 1974 Act have the same meanings in this paragraph as they have in those sections.
>
> (7)In this paragraph "the transitional period" means the period of one year beginning with the day of the commencement of section 21."

50. For all these purposes the transitional period commenced on 6 April 2007 and ended on 5 April 2008.

Issue 1: Is the unfair relationship claim ruled out altogether?

51. Black Horse contend here that the court has no jurisdiction to entertain the Barnes' UR claim at all. This is because, properly interpreted, paragraphs 14 and 15 of Schedule 3 exclude the making of a separate unfair relationship claim by the debtor (as made here by them in the Barnes Claim in January 2009) where one or both of them had the opportunity to make that claim in the context of proceedings brought by Black Horse to enforce the loan prior to the end of the transitional period. I refer to this claimed effect as "the exclusionary rule". Black Horse contend that such proceedings were brought here because it issued the Black Horse claim against Mr Barnes on the 3 April 2008 ie two days before the end of the transitional period. It says that the fact that the two claims were later consolidated and that Mrs Barnes was made a Defendant to the Black Horse Claim by order of HHJ Halbert cannot alter that conclusion.

52. If paragraph 14 (1) is read by itself it does not entail the exclusionary rule. It merely explains that a UR claim in respect of any pre-commencement credit agreement (ie made before 6 April 2007) may be brought in one of the two ways described and the Barnes did make such an application within paragraph 14 (1) (a) here. But paragraph 15, dealing with the "old" ECB regime provides that an existing agreement (also one made before 6 April 2007) can be the subject of an application to re-open as an ECB, even if not completed, by an application so to do made by the debtor before the end of the transitional period i.e. 6 April 2008, or at the instance of a debtor in proceedings brought by the creditor within that period.

53. Black Horse contend that the fact that the ECB regime may be invoked by or in proceedings commenced before the end of the transitional period means that if such proceedings <u>are</u> commenced, then that is the regime which must apply to the relevant credit agreement and it is not open to a debtor to invoke the UR regime at a later date by bringing his own claim after the end of the transitional period. Black Horse says that this exclusionary rule applies (a) whether the defendant debtor in the original creditors' proceedings chose to plead the ECB point then or not and (b) where there is more than one debtor, whether the debtor who is now to be excluded from advancing his own later claim was the debtor sued by the creditor previously. That is of particular importance here since Mr but not Mrs Barnes was a defendant to the original Black Horse claim.

54. Mr Banks accepts that had both Mr and Mrs Barnes been defendants to the original Black Horse claim issued on 3 April 2008, the exclusionary rule would apply. They could have made an ECB allegation in those proceedings

(and in fact they still can now) but they cannot bring a fresh UR after 6 April 2008 and such claim as they have made should be struck out. However the only original defendant here was Mr Barnes. It is accepted that he cannot bring a fresh UR claim, and strictly, he should be removed as a claimant to the claim made by the Barnes in January 2009. But Mrs Barnes is said to be untramelled by the exclusionary rule and was entitled to bring the Barnes Claim, as it applied to her. It is argued that for the exclusionary rule to operate against a debtor, that particular debtor had to have been a defendant to the original claim made by the creditor or at least was added as a defendant to that claim prior to any separate UR claim being brought by that debtor.

55. Since neither paragraph 14 nor 15 expressly states or defines the exclusionary rule, which both sides accept exists while disagreeing over its ambit, the issue is not straightforward. But in my judgment the rule is limited in the way contended for by Mr Banks for the reasons set out below.

56. If the earlier proceedings were commenced against one debtor it would be very odd and potentially unfair if they set the exclusionary rule in motion against another debtor (or a surety) who may have no notice of those proceedings at all. Although such other parties might well be notified this cannot always be assumed and while s141 (5) prescribes that all such other parties be joined at the same time, that applies only to regulated agreements and even here, that provision may not always be followed (as it was not here). Applying the exclusionary rule to a case where the relevant debtor was a party to the first claim is fair, however, because he then had the opportunity to make an ECB claim - whether he took it up or not is a matter for him.

57. This does not mean that a debtor who has joined later cannot be made the subject of the exclusionary rule, if joined after the end of the transitional period. Once joined, paragraph 15 (3) (b) would then permit that debtor, now "in" those proceedings to raise an ECB claim.

58. The critical time is when that debtor issues or purports to issue his own later UR claim. If, at that time, he is not and has not become a party to the creditor's earlier proceedings then his own claim is not subject to the exclusionary rule and it can proceed

59. That is Mrs Barnes' position here. As at the date of her own claim, she was still not a party to the Black Horse Claim. The fact that she was later made a party cannot affect the position. That is so, in my judgement, even if the doctrine of "relation back" means that once joined, she was treated as always having been a party. This is because, again, at the actual time of issue of her own proceedings, there was no obstacle to them.

60. Mr Ross's fundamental objection to this narrow interpretation of the exclusionary rule is that it leads to absurdity because in this case, for example, Mr Barnes would be confined to raising an ECB argument against Black Horse while Mrs Barnes could raise the more wide-ranging (and easier to

prove) allegation of UR. The court would have to adjudicate on both challenges. That would fly in the face of the aim of the transitional provisions to achieve two mutually exclusive regimes for transitional purposes. In my judgement the absurdity is overstated:-

(1) if the court has to make two decisions, so be it - but it is not an impossible task. In some cases, depending on the relief awarded, it may be sufficient for the purposes of both debtors if one debtor only can show a UR and so there would be no need to proceed with the ECB claim. In other cases, given the case - law, the debtor who would have to allege ECB might have to accept that any such claim is hopeless;

(2) the situation here is an unusual one and will probably arise only very rarely; so this wrinkle in the transitional regime does not threaten the intention of having in general two mutually exclusive regimes;

(3) no bank or other lender will face these difficulties if it had commenced proceedings against all relevant debtors in the first place. Had Black Horse done that here (as in fact required by s 141 (5)) the exclusionary rule would have applied to Mrs Barnes as well.

61. Moreover if the position were otherwise, then the debtor not sued first time round would or might be prejudiced if the creditor's proceedings against the other debtor ended in a compromise, or judgment was obtained against that debtor before the other debtor had become aware. If the other debtor could not be joined in those proceedings he would neither be able to make an ECB claim under paragraph 15 (3) (b) nor bring a new UR claim under paragraph 14 (1) (a). Mr Ross says that this scenario is unlikely because such a debtor could always be joined to the original proceedings after judgement - or he could apply to set judgement aside and thereby revive them for his purposes at least. Having heard his oral submissions on this point and read his recent note on it, I do not intend to embark upon a lengthy procedural discursus as to whether this is possible at all under the CPR save to say that and I certainly do not accept that paragraphs 14 or 15 themselves create such a procedural right outside the CPR. Otherwise it is sufficient to say that on the face of it, there may very well be difficulties in the way of the other debtor seeking to be joined in proceedings already terminated by compromise or judgment, after the event. He is therefore still at risk on Mr Ross's analysis of the exclusionary rule.

62. Mr Ross also relied upon the fact that at least under the UR regime the reference to "debtor" under s 140B (2) (b) means one or more of the debtors where there are more than one. See s140C (2) (b) above. So, if proceedings had started against one debtor that is sufficient to activate the exclusionary rule against the other. But first, the operative provision here is paragraph 15 (3) (b) referring back to the ECB regime and here there is no equivalent definition of "debtor". Second, even if that definition is to be assumed, it does not affect the ambit of the exclusionary rule which is implicit rather than explicit. And in any event, an ECB claim made at the "instance" of a debtor in the original proceedings could only be made once they had been made a party.

If they are a party then the exclusionary rule will apply assuming that they have not already issued their own separate claim. In this context, I did not find s 185 of the Act, relied upon by Mr Ross, to be of any assistance. Finally, even if, as I accept, the word "commence" within paragraph 15 (3) (b) refers to the time of the original commencement of the proceedings this does not assist Black Horse if at the time of the separate action commenced by the debtor he was not then a party to such proceedings. The operative date for these purposes is when he was joined and not when they first started.

63. For all those reasons therefore I conclude that while Mr Barnes was and is not entitled to mount his own UR claim, Mrs Barnes was. I am pleased to have been able to reach this conclusion because although no formal argument based on some kind of procedural estoppel or waiver was run by Mr Banks, it remains the case that at the time of the order made by HHJ Halbert, Black Horse (represented then as now by Mr Ross) did not take the exclusionary rule point at all which emerged only shortly before the first part of the hearing before me. So Mrs Barnes is not prevented from raising a UR claim although Mr Barnes is.

Issue 2: exclusion of the first and second agreements from consideration of UR in relation to the third agreement

64. The First and Second agreements are “related agreements” in respect of the Third agreement because the first was consolidated into the second and the second into the third – see s140C (4) (a), (7) and (8) above. There could be no direct claim that they gave rise to a UR because they were both completed before 6 April 2007 – see paragraph 14 (2). But if the Third Agreement gave rise to a UR then, *prima facie*, when the Court gave relief in respect thereof, it could also do so in respect of any related agreements. However, it cannot do so here because of the operation of paragraph 16 (4) which removes from the ambit of s140B any reference to a related agreement which ceased to operate before 6 April 2007 as the first and second agreements did here. This much is common ground. Any order under s140B in this case can be made in connection with the Third Agreement only.

65. But the Barnes contend that when considering whether the relationship arising out of the Third Agreement is unfair the Court can still take account of the earlier two in the sense expressly permitted by s140A. Black Horse denies this and seeks an order which would essentially excise any reference to these agreements when s140A is considered in respect of the third. Such references should not be permitted in the Re-Amended Particulars of Claim either. I shall refer to this contention as “the s140A Exclusion”.

66. On the face of it neither paragraph 16 (4) nor 16 (5) says this. However Mr Ross contends that they must have this effect as a matter of construction and moreover, the decision of HHJ Langan QC in *Soulsby* is to this effect. I deal with the latter point first.

67. In *Soulsby* the Claimants asked the Court in their claim to make an order under s140B directly against any of the three relevant agreements. However the Defendant argued that first two had been made before the start of the transitional period and ceased to operate before it ended so they were caught by paragraph 16 (4). That was the essential point before HHJ Langan QC. Unsurprisingly he held that the paragraph applied and so no direct order could be made. I have seen a copy of what was in paragraph 23 of the proposed pleading in that case which was the only relevant paragraph. It alleged that there was a UR in relation to the first and/or second and/or third agreements and for the avoidance of doubt the first and/or second were related agreements. On the face of it, then the Court was being invited to make an order against them directly as the credit agreements in question or as related agreements, for the purpose of s140B. This was impermissible. The pleading does not suggest, as a further or alternative argument, that the relationship arising out of the third agreement was unfair, taking into account the earlier agreements. Only that argument would have attracted the s140A Exclusion. So when HHJ Langan QC ordered that all references to the earlier agreements should be removed from paragraph 23, as he did in paragraph 35 of his judgment, it is far from clear that he was deciding the separate question as to the existence or otherwise of the s140A Exclusion. Mr Ross however relies first on paragraph 31 of the judgment when HHJ Langan QC refers to the Claimants' argument that the earlier agreements "are to be treated as related and can be reviewed along with the third agreement when the court is applying the unfair relationship provisions to the third agreement." For my part, I do not see this as a reference to s140A but rather to the power under s140B to make an order in respect of a related agreement where the main (third) agreement has given rise to a UR.

68. Mr Ross then refers to paragraph 34 of the judgment where HHJ Langan QC agrees with the propositions stated on behalf of Black Horse in paragraph 33 including that "the first and second agreements are protected from attack as related agreements under s140B." But again that is surely a reference to orders which could otherwise have been made against them under s140B which are admittedly impermissible.

69. On that basis the decision in *Soulsby* simply does not touch the purported s140A Exclusion. I have been told however that some Courts have treated it as having approved the s140A Exclusion and when the Claimants in *Soulsby* appealed they did so on the footing that it had done so, wrongly. The appeal was compromised so the point was never decided in that case. That being so I need also to consider *Soulsby* in case HHJ Langan QC had decided and approved the s140A Exclusion. In that event, and for all the reasons set out below, and with the greatest respect, I would hold that this aspect of the decision was clearly wrong. On any view, HHJ Langan QC was not treated to the same extensive arguments on the s140A Exclusion that have been placed before me.

70. First, paragraphs 16 (4) and (5) do not themselves do more than disapply s140B to related agreements. There is a logic to confining them to this because

they then simply reflect the consequences of paragraphs 14 (1) and (2) which relate specifically to completed credit agreements, albeit that they apply to other forms of related agreement as well.

71. As against that Mr Ross says that it would be illogical so to confine them because the result would be arbitrary. Although the Court could take them into account under s140A to determine a UR in relation to the main (here the third) agreement it could only give limited effect to any unfairness in the early agreements since no order affecting them directly could be made. So, for example if the first agreement involved an unfair overpayment of £100,000 and the remaining indebtedness of say £10,000 was rolled over into the current agreement where only £1,000 had been paid thus far, the Court could now order at best the return of the £1,000 paid under that agreement with perhaps some adjustment to the debt still outstanding. But this would not begin to address the initial unfair overpayment. I see that consequence in that particular case but it assumes that this is the only kind of case where related agreements may be taken into account under s140A. In truth they can be taken into account in many different ways and they do not themselves have to have been unfair in order to contribute to a UR which results when the current agreement is considered alongside them. S140A affords the Court the broadest kind of consideration of the current credit agreement along with others or other relevant matters.

72. Indeed if the s140A Exclusion were to be given full force it could have some odd results. For example if there had been an express mis-statement on the first agreement to the effect that the PPI was compulsory but on two latter apparently innocuous agreements the PPI was simply presented, the Claimant might wish to rely upon the first agreement to show that impliedly the mis-statement continued. But it is hard to see how he could show this without referring to the prior related agreement. Yet the s140A Exclusion would not permit it. Mr Ross recognised the problem and sought to avoid it by saying that where the reference to the related agreements was simply a matter of historical narrative it would be permitted. On that basis he had to accept that it would not necessarily follow that all references to the related agreements in the Re-Amended Particulars of Claim in this case should be excised. But the distinction between narrative and reference to related agreements in some other way may not be easy to apply in practice.

73. Another unexpected consequence of the s140A Exclusion was shown in the example given by Mr Banks where the first agreement was for a modest loan of say £5,000 but with a very high rate of compound interest of say 20% per month and where the first year's interest was added to the debt immediately so that the debt was now over £15,000 – and then without any repayments the debt was later consolidated into a new loan which itself had an unexceptional interest rate so that the current loan was innocuous. Taken together with the related agreement however, a UR would have arisen and the Court could then redress this by reducing the amount outstanding. It is hard to see why a Claimant should not be entitled to seek relief that way.

74. Mr Ross then says that if there were no s140A Exclusion then a Claimant could get through the back door (a s140A consideration of related agreements) what it could not get through the front door (ie s140B). But first, as already shown, in many cases, the Court will not be able to provide complete redress in respect of unfair related agreements and second it ignores the fact that the processes involved under s140A and s140B are simply different. Once the Court has found a UR it can then fashion a remedy to the extent permitted by s140B. I simply do not accept that the fact that Parliament chose to limit the operation of s140B in the case of related agreements which no longer operated meant that it also intended to exclude them from any s140A consideration of whether a UR arose out of the current agreement. The first does not follow from the second. So the criticism that the "back door" effect is somehow flouting the legislative intent does not follow.

75. Mr Ross also invoked the principle that where a statute had retrospective effect it should be construed in such a way that this effect was kept to the minimum necessary. See *Bennion on Statutory Interpretation* at pp316 and 317. The s140A Exclusion gave effect to this principle. But this rather leaves out of account that the focus is still on the current agreement – the earlier agreements come in only as an adjunct to that focus. Moreover, it is hard to see how the retrospectivity argument has any force at all where the related agreements are not themselves unfair because that places the focus even more emphatically on the current agreement. Furthermore, paragraph 16 (1) makes it clear that in general it makes no difference how old a related agreement is, thereby emphasising the wide power to review given to the Court when assessing unfairness. Mr Ross however says that paragraph 16 (1) does not say that when the agreement ended is immaterial. That is true but the point is that the paragraph shows that in general the intended retrospectivity is quite extensive. Furthermore, the whole of paragraph 16 is concerned with the transitional provisions and related agreements. If its reach was beyond s140B so as to create the s140A Exclusion it remains very hard to see why it would not have said so expressly. On the Barnes's case, but not on Black Horse's, the statute is very clear. What Black Horse's case on this point amounts to is that without the s140A Exclusion there will be some situations where in an indirect sense, relief may be given which redresses unfairness in related agreements which is anomalous because any s140B direct relief is ruled out. But (a) the anomaly is not likely to be significant because the scope of s140A in respect of related agreements is far wider than this (b) the broad differentiation between the old ECB and the new UR regimes is still maintained and (c) to the extent that some situations may arise which do not quite fit with this, that is simply insufficient reason to add words to paragraph 16 (4) and (5) so as to create the s140A Exclusion.

76. I have also been addressed on the effect of the decision of George Leggatt QC sitting as a Deputy High Court Judge in the case of *Patel v Patel* [2009] EWHC 3264. In this case the Judge clearly considered that he was entitled to consider as part of the UR claim in respect of the main extant agreement, two earlier completed related agreements. See paragraph 67 of his judgment. This supports the notion that there is no s140A Exclusion although it is right to note

that in the case before him, he did not find the earlier agreements unfair in themselves. Nonetheless he considered them. It is said that it must be the case that he was not referred to paragraphs 16 (4) and (5) and therefore any consideration of the related agreements was *per incuriam*. I do not agree. He may not have been referred to those paragraphs because (rightly in my view) neither side thought that they had any bearing on the exercise being conducted by him. I agree that there is no express consideration of the issue about the s140A Exclusion in the way that there has been before me but it can at least be said that the general approach taken in *Patel* reflects the approach which I have taken above.

77. Accordingly, where the proposed Re-Amended Particulars of Claim refer to the First and Second agreements I would not refuse permission to amend to make such references on the basis of the claimed the s140A Exclusion which I find does not exist in law.

Issue 3: Factual Matters

78. What that leaves is the detail of the UR arguments. Here I need to make reference to the Draft. I deal first of all with the matters that are pleaded in paragraph 22. I have set them out in paragraph 10 above. So far as (a) is concerned, the point made by Mr Ross is that sickness payments relate to one of the claimants only and not the other one. That may be and I accept the fact that the ICOB rules were not in force so there was no ICOB requirement for suitability, but I have to proceed, at least at this stage, on the basis, as has been noted in a number of decisions as well as by the OFT, that UR jurisdiction is a very wide one, and there are matters which may well not be sufficient to found duties of a fiduciary or tortious nature, or breaches thereof, but which may conceivably be relevant on UR. The sickness benefit point may be one of them. It depends on how the evidence falls. But I am not prepared to rule it out at this stage.

79. Sub-paragraph (b) relates to excessively expensive policies of insurance. In and of itself this does not seem to me to go anywhere because there is an Appendix said to contain quotations from Gardner Finance Limited (a company which appears to be associated with the Barnes' solicitors) as to the costs of other comparable PPI policies. But the Appendix was never attached to the Draft, so it is impossible to know what the case really is as far as cost is concerned. I am not going to allow an amendment in this respect. Given that the case will go to trial and there will be some significant time elapsing before then, it will be open to the Barnes, if they wish, to apply to make a further amendment to set out precisely how their case runs on the question of the cost of other policies. I do not think it right simply to leave the point in and require further particulars. The Barnes have had enough opportunity to get their pleading in order and if they wish to pursue the cost point they will need to make a further application to amend.

80. Points (c) and (e) are not very strong allegations and I accept Mr Ross's point that it may be said that if there is no underlying fiduciary duty or duty of care,

then there can be no UR point when what is alleged is simply an omission. But that rather assumes that there has to be a duty in the tortious or fiduciary (or contractual) sense before these points can be relevant on UR. However, since UR is a broader concept it is not inconceivable that those matters may be relevant. So they may be pursued.

81. The amendment to allege (d) clearly ought to be allowed in the light of the factual allegations made in paragraph 14 which will have to be particularised as I have indicated.

82. Sub-paragraph (f) alleges failure to observe three different documents. The first refers to "FSA Principles" but the Draft does not say which such principles were current and are relevant here so I do not allow that amendment. Nor do I allow (ii) which refers to the OFT Lending Guidelines because they do not cover this context as already noted above. Sub-paragraph (iii) refers to the GISC Code. I will allow the amendment here only, again, because the UR concept can be a good deal broader than breaches of duties of care or fiduciary obligations. It is not inconceivable that something may be relevant there. Whether the Code actually is or is not relevant here is something which I imagine can be dealt with fairly swiftly at trial, and I say that having taken into account that it is not a document which the Barnes even say they were aware of.

83. Then one comes to the question of commission as an element of the price which is how it is put in paragraph 24. On the facts of the case before me in *Harrison*, having found that there were no other factors impelling a UR, I did not think that non-disclosure of the large commission there gave rise to a UR. One of the matters that I adverted to in that context specifically was the lack of any evidence from the claimants as to what their position would have been had they known of the commission element. That is not the same as the position here because of the WS. At paragraph 16 Mrs Barnes refers to what she has been told by her solicitors as to what the "real cost" of the policy was which was said to have been a fraction of the premium as compared with the monies retained within the Black Horse group. The paragraph does not refer to commission as such but it seems to me at least on a fair reading that the "monies retained" is a reference to the commission, and she says had she known about this she would not have taken the policy. Certainly for what are effectively strike-out purposes that seems to me to make a difference from the case of *Harrison*, a case decided at trial. But again, it seems to me that there are further particulars which will required from both sides in relation to the commission claim. I can understand why the Barnes do not plead precise figures or proportions in respect of commissions because they do not know what the position actually is. I will remedy that by ordering Black Horse to give particulars of the commission paid to Black Horse (if any). Therefore, I will allow in paragraph 24, on the basis that it has been supplemented by the WS. Paragraph 26 should be permitted as well, given the contents of the WS.

84. The only other aspects of UR come back in at paragraph 38 and here effectively they are dealing with the question of rebates of premium. Mr Ross

says the rebates in relation to the First and Second Agreement cannot be in issue but that is largely because he says that the First and Second Agreements' relevance is already ruled out; however I am against him on that point as explained above. Mr Banks does not pursue sub-paragraph (vi) of paragraph 38 because it is mere repetition. Otherwise the UR claim may be pursued.

Conclusion

85. The result of all of that is that with a little more work, effectively the only viable claim which will go forward to trial is the claim for unfair relationship (alongside the narrow unenforceability claim). It comes as no surprise to me that all the other claims have been stripped away. They were unnecessary embellishments in the first place, something I pointed out in my case management note of early 2010. If there is to be a battleground in this case it will be UR (plus unenforceability) but nothing that I have said in allowing that claim to go forward should give any particular encouragement to the Barnes in terms of its prospects of success.

86. Following the giving of my oral judgment, Counsel agreed what needed to be done in terms of a Re-Amended Particulars of Claim redrafted to give effect to my judgment above and in terms of directions about Further Information. If they consider that further changes are necessary as a result of this written judgment, they should raise those matters along with any other post-judgment matters which will be the subject of a further hearing.