Neutral Citation Number: - [2010] EWHC 1866 (QB)

IN THE HIGH COURT OF JUSTICE Case No: 9XV56363

QUEEN'S BENCH DIVISION

MANCHESTER DISTRICT REGISTRY

MERCANTILE COURT

Date: 21 July 2010

Before:

HIS HONOUR JUDGE WAKSMAN QC

Sitting as a Judge of the High Court

B E T W E E N:

BLACK HORSE LIMITED

Claimant

and

(1) DAVID SPEAK
(2) CAROLINE SPEAK

Defendants

Ian Wilson and Iain MacDonald (instructed by SCM Solicitors) for the Claimant

David Berkley QC and Jonathan Butters (instructed by Levys Solicitors) for the Defendants

Hearing dates: 6 and 8 July 2010

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 13 October 2006 the Defendants, Mr and Mrs Speak entered into a regulated consumer credit agreement with the Claimant, Black Horse Limited ("the Bank") by which they received a loan of £5,000, repayable over 62 months ("the Agreement"). By the same agreement they took out a single premium payment protection insurance ("PPI") policy. The insurer under the policy was one of the Banks' associated companies, namely Lloyds TSB General Insurance Limited. The premium was financed by the Bank as part of the Agreement. It cost £2,012.39 which was payable over the same 62 months at the same rate of interest. The total monthly repayment was £152.22.

2. The Defendants failed to maintain their repayments and on 16 February 2009 the Bank sent out default notices. The sums due were not paid and on 12 March 2009 the Bank issued proceedings in the Northampton County Court for £7,179.66 plus costs. That claim is admitted subject to the various defences and counterclaims raised by the Defendants. Following a case management conference on 11 March 2010 when I dealt with a large number of claims involving the sale of PPI policies by banks when making loan agreements, this case was transferred to the Manchester Mercantile Court for trial along with two others. It was thought that although the very many PPI cases by then proceeding in various County Courts were essentially fact-sensitive, it would be useful to have a group of cases tried by me which might result in some general guidance being given. In the event I dealt only with this case as the other two were settled.

The Issues

3. The Defendants contend as follows:

   (1) They were required to take out a PPI policy being offered by the Bank as a condition of obtaining the loan. They would not have got the loan otherwise. That being so, the PPI premium being financed by the Bank should have been shown in the Agreement as part of the total charge for credit ("TCC"). Moreover it should not have been shown as part of the "Amount of Credit" in the Agreement. But it was, and as a result one of the prescribed terms of the Agreement was mis-stated so that the Agreement was "irredeemably unenforceable" with the effect that the Bank cannot obtain judgment for the monies now claimed – or obtain any such judgment in the future;

   (2) In the alternative, if the PPI was <u>not</u> required by the Bank as a condition of entering the Agreement, the Bank's employee Ms O'Halloran nonetheless represented that it was and the Bank, through her, is liable to the Defendants in damages for misrepresentation;

   (3) Further, the Bank was in breach of statutory duty as against the Defendants in relation to the sale of the PPI because it contravened Rules 2.2.3 (1) and/or 4.3.1 of the rules of Insurance Conduct of Business ("ICOB") contained in the FSA Handbook, as applied to insurance intermediaries (of which the Bank is admittedly one) as from 14 January 2005;

   (4) Further or alternatively by reason of its conduct in respect of the sale of the PPI, an unfair relationship arose between the Bank and the Defendants under section 140A of the Consumer Credit Act 1974 ("the Act") which entitles the Court to award a wide range of relief.

The Key Documents

4. It is common ground that on 13 October 2006 Mr Speak had a meeting with Ms O'Halloran at the Bank's Bolton branch. They discussed the loan being sought and PPI and the result was that the terms of a joint loan to be made to Mr Speak and his wife were agreed along with the purchase of the PPI. He went out to collect his wife who had been shopping nearby and they both signed a number of documents as follows.

5. First there is the Agreement itself. The top section reads thus:

"PERSONAL LOAN	PAYMENT PROTECTION PLAN
KEY FINANCIAL INFORMATION Amount of Credit (A) £5000 Minimum duration of agreement 62 months Total amount payable...(B) £6544.20 Amount of monthly repayment (C) £109.7 APR 10.9%	**KEY FINANCIAL INFORMATION** Amount of Credit (E) £2012.39 Minimum duration of agreement 62 months Total amount payable...(F) £2589 Amount of monthly repayment (G) £43.15 APR 10.9%
OTHER FINANCIAL INFORMATION Total Charge for Credit (D) £1544.20 Interest rate 0.866% per month.....	**OTHER FINANCIAL INFORMATION** Optional Payment Protection Plan –total cash Price £2012.39 Total Charge for Credit (H) £576.61 Interest rate 0.866% per month...."

6. The Defendants then both signed where it said that it was a regulated credit agreement which should be signed only if they wished to be bound by its terms. Underneath that, on the right hand side was the following within a box:

> "I wish to purchase Optional Payment Protection Plan √
> Borrower
> Level of cover LIFE ACCIDENT SICKNESS UNEMPLOYMENT
> Joint Borrower..
> SPEAK CAROLINE
> Level of cover LIFE ACCIDENT SICKNESS UNEMPLOYMENT
>
> I understand that I am purchasing the product(s) ticked above on credit provided by you and that the terms relating to the credit for the products can be found in each of the terms of the agreement"

with the Defendants' signatures below.

7. Underneath all of that was the statement of the "total monthly repayment" of £152.22. At the bottom the Agreement was signed on the Bank's behalf by Ms O'Halloran.

8. They also signed a document headed "Personal Finance Payment Protection Plans Demands & Needs Questionnaire & Statement" ("the D.A.N Questionnaire"). This gave the names of the Defendants and the agreement number. The following is common ground:

   (1) It contains a list of 9 questions in respect of both borrowers and Yes/No answers are given for questions 1-4 and 8-9;

(2) The form stated that the answers given enabled the Bank to recommend as suitable, PPI in the form of accident, sickness unemployment and life cover for both;

(3) A box which said that "You agree to our personal recommendation" was ticked by Ms O'Halloran; other boxes including where PPI was not being purchased at all, were not ticked;

(4) Ms O'Halloran did not ask the questions of Mrs Speak but only of Mr Speak;

(5) Mrs Speak had however given full authority to Mr Speak to deal with the proposed loan at the Bank on her behalf as one of the joint borrowers including answering any questions.

(6) Both Defendants signed this document as did Ms O'Halloran.

9. A joint direct debit form was also signed by the Defendants.

10. I will deal with other documents as they arise, in context below.

Background matters

11. Ms O'Halloran was employed by the Bank for about 9 years until she left in April 2010. For 8 of those years she was a Senior Customer Account Manager and therefore held that position at the time of the Agreement.

12. Mr Speak is an employed bookmaker and has been so at all material times. His wife is a part-time cleaner and has suffered from bipolar disorder. At various points in time she has been on medication.

13. Mr Speak had dealt with Ms O'Halloran before. On 7 December 2005 he and Mrs Speak signed a loan agreement with the Bank in the same format as the Agreement, on that occasion for £3,000 with PPI as well, repayable over a 5 year period ("the 2005 Loan"). Ms O'Halloran was the Bank's representative on that occasion. In addition he obtained finance for the acquisition of a car pursuant to a loan agreement signed on 23 April 2004 although on that occasion the option to take PPI was not exercised.

The Key Factual Issues

14. The only persons present at the meeting were Ms O'Halloran and Mr Speak. He gives an account of what he says he can recall happened. Ms O'Halloran, who has dealt with such matters on a daily basis cannot recall this particular meeting but gave her evidence on the basis of what she said her practice would have been, assisted by the contemporaneous documents and the computerised notes for that day which include matters inputted by her. Before dealing with their evidence I need to set out the gist of their competing accounts.

15. Ms O'Halloran says that at the beginning of the meeting she gave to Mr Speak a sheet called an Initial Disclosure Document ("the IDD") at p119 of the Bundle which referred to PPI saying that the Bank could only offer a PPI product from Lloyds and it would advise and make a recommendation once it had assessed the borrowers' needs for PPI. She explained this according

to a script she had printed on a laminated piece of paper (p121). As part of her sales script she would explain the features and benefits of the policy together with the exclusions.

16. Later she went through the D.A.N. Questionnaire with Mr Speak. She filled it in, correctly giving his age as 46 and his wife's as 37 as at the end of the agreement. She answered questions 3 and 4 so that they wanted repayment of the loan to be made if they could not work due to accident or sickness for more than 30 days, and the same if they were involuntarily unemployed. Under question 8, neither had sufficient additional insurance to cover repayments on the loan in the eventualities described above. Under Question 9 "Have you sought or received medical treatment for any condition over the last 24 months? If you have, this condition will not be covered by the insurance." Ms O'Halloran circled the "No" box. She says that she specifically asked Mr Speak whether he was going to answer for his wife as well and he said he was. She thus tailored the questions so as to apply both for example in relation to Question 9 "have either of you sought....". She recommended PPI cover and Mr Speak accepted on behalf of his wife and himself.

17. She then discussed the repayment terms. She first gave him a quote with an APR of 12.9% which included the loan in respect of the PPI. He said that it was too much and she came back with a lower rate of 10.9%. In both cases the monthly repayment figures included PPI because he had said that they wanted PPI. It was however made quite clear to Mr Speak that the PPI was optional. Mr Speak agreed the transaction on the 10.9% basis to include PPI. He then went to collect his wife and came back shortly afterwards so that they could sign. Ms O'Halloran explained to Mrs Speak what the documents were before she signed, including the D.A.N. Questionnaire, so that Mrs Speak knew that she was taking PPI financed by the Bank. But Ms O'Halloran did not ask the questions in the D.A.N. Questionnaire of Mrs Speak. This is because she had obtained the relevant information about both Defendants from Mr Speak already.

18. Mr Speak gives a very different account. He says that at the meeting Ms O'Halloran said that she remembered him from before and might already have the relevant details. At an early stage she made it clear that there was no guarantee that he could get a loan for £5,000 unless he and his wife took PPI. Having left the room for a while to do some checks she returned and said that the Bank regarded him as "high risk" so that it required them to take out PPI otherwise they could not have the loan. Although at one point he suggested that the need to take PPI was only for the loan at the lower rate, ultimately his evidence was that it was clearly stated to him that he could not have <u>any</u> loan for £5,000 without PPI. He also said that the D.A.N. Questionnaire was never put to him. Ms O'Halloran only asked him whether he was still working. He assumed that all other details she had obtained from the computer files relating to the earlier loan. He felt he had no choice but to take the PPI because otherwise he would not get the loan. Although he signed the D.A.N Questionnaire he did not know what it was, he never read it or asked to read it, and it was never explained to him. He said that had he been asked about his wife's medical history and Question 9 in particular, he would have said she was bipolar. Had he been aware that the PPI was only optional he would not have taken it. This is because the total monthly repayment was above his budget - £150 per month was too much.

Factual Findings

19. Even though Ms O'Halloran was necessarily reliant upon her usual practice in these situations as opposed to having a specific recollection I found her to be a clearly more reliable witness than

Mr Speak. I had the opportunity to observe them both giving evidence for some time. Where their evidence conflicts I prefer her account. I say that for the reasons set out below.

Mr Speak

20. Mr Speak gave inconsistent or implausible evidence in a number of important respects. First he said very clearly in cross-examination that he had chosen to take PPI on the 2005 loan – it was his decision. But in re-examination he said that actually the Bank had insisted upon PPI on that occasion as well. Then he said that he had ticked the box for PPI on the Agreement – later he said that he had not and that Ms O'Halloran had. Next he gave differing accounts of how the Bank had required PPI. In his first witness statement ("WS") he said that Ms O'Halloran said that he was "high risk" but in the second he said that he was told he was "a" risk and then that he was a "higher" risk customer. In this context it then transpired that the first WS was a result of a question and answer session with someone at his solicitors on the telephone and that the person asking the question had introduced the topic of high risk because they asked him whether he was a high risk customer. Although Mr Speak maintained that nonetheless Ms O'Halloran did use the expression "high risk" I consider that Mr Speak has picked up on it from what was said to him when making the first WS. Moreover the notion of the Bank requiring PPI as a condition of a loan because he was a high risk, in the sense of a person likely to default, did not make much sense to me. If a person is likely to default because he does not earn enough to support his spending or takes on too many commitments PPI will not assist him or the Bank because it operates only within the narrow confines of illness, accident unemployment or death. I appreciate that the rules of strict logic may not necessarily apply when a customer goes to his bank for a loan and the Bank seeks to sell him a product, but even allowing for that I find the notion of Ms O'Halloran calling him a high risk, where there was no evidence to justify that appellation anyway and where PPI was not really an answer if he was, to be implausible. At one stage in his evidence Mr Speak said that Ms O'Halloran simply said when telling him he had to take out PPI that he was considered a high risk but did not elaborate. But according to paragraph 20 of his second WS, she did explain why and he could see some logic in what she said. Of course Ms O'Halloran may well have used the word "risk" but in the context of describing the risks for which PPI would cover a customer.

21. Mr Speak also said that £150 per month was too much and above his budget and yet he agreed to it. This was not an urgent loan or one to repay some other arrears. It was for home improvements, and even if desirable then because of their small children, I found it very odd that on his own account, Mr Speak did not even attempt to challenge his status as a high risk (on which he said he was "perturbed slightly") or argue his corner at least initially. He did not strike me in the witness box as shy or inarticulate. All he could say on this point was that there was "limited dialogue" about why the Bank really needed PPI and he elaborated no further. He also said in his first WS that he received the loan monies the same day but in his second that he actually received them the following Tuesday – but nonetheless he was promised them the same day by Ms O'Halloran. Indeed she "dangled the carrot of funds that day to tempt me." But, as Ms O'Halloran explained, the customer would never receive the money that day. If a cheque was given it would need two days to clear and even a BACS payment (as in fact effected here on 13 October) would take two working days to come through. What Mr Speak said here struck me as unlikely and an embellishment.

22. He also denied that Ms O'Halloran went through his and his wife's earning position with him. All she asked was whether he was still working, or "still working at the bookies". Yet the income figures are stated in the Bank's internal records for this transaction. See p. 128. His reply was

that she must have taken them from existing information for example on the 2005 loan, although he accepted that they were indeed current as at 2006. While Ms O'Halloran accepted that she might have taken information from existing records she would still need to go through those figures with the customer on this occasion. I cannot see why she would not have done so. It would have been foolhardy otherwise, and I accept that she did. I also find it very unlikely that Mr Speak would have signed the D.A.N Questionnaire without even knowing or asking what it was.

23. The difficulties with Mr Speak's evidence described above go far beyond mere "differences in emphasis" between his various accounts, as suggested by Mr Berkley QC for the Defendants.

Mrs Speak

24. Mrs Speak's evidence was naturally of very limited value since she was not at the meeting and only attended to sign. However she did say that in respect of this loan she was entirely happy to leave all the discussions with the Bank to Mr Speak. She would have discussed the loan before Mr Speak went to the Bank and then left it all to him. But she does say that if she had been asked about medical treatment she would have referred to her bipolar disorder and the fact that as at the time of the meeting she was taking both anti-depressant and anti-psychotic drugs. In the event she was not asked and could not say what Mr Speak's response actually was. She also said that although she signed the D.A.N Questionnaire she did not know what it was and it was not explained to her. However she also said that she had no specific recollection of this occasion and her memory may have been affected by her medication at the time. She also said that she would have discussed the fact that there was PPI in respect of the loan with her husband, but she could not recall him saying that he was told that he had to take it out. Her evidence cannot be described as any meaningful corroboration for Mr Speak's account and indeed it was not suggested that it was.

Ms O'Halloran

25. Generally I thought that Ms O'Halloran was a clear and reliable witness who gave her evidence candidly and carefully. I did not find her generally to be defensive or cautious as was suggested. She was prepared to make concessions, for example that her training and practice was that where there were joint borrowers she would not go through the D.A.N Questionnaire with the second borrower provided that the first confirmed that he was fully authorised to deal with all of the questions for both of them. That is what she says happened here, and it is consistent with Mrs Speak's evidence that she was entirely happy to leave such matters to Mr Speak. Equally she accepted that there was some incentive on her part to sell a PPI policy if she could since it was one element in her monthly targets. She also accepted that the training materials (see below) said that staff should try and "overcome objections" raised by a customer to the purchase of a PPI policy if they could. But she stated very firmly and I thought persuasively that she would never tell a customer that PPI was compulsory in an effort to sell it. From the Bank's point of view it was indeed an optional product as the training materials make clear (see below). She said without prompting in cross-examination that when she had read in Mr Speak's WS the allegation that she had said he was high risk and that he had to have PPI, she was "shocked" because she would never say that to a customer.

26. She did one or more of these loan transactions each day and was therefore very experienced. She received regular training and was assessed by a Finance Centre manager every quarter which involved him sitting in on an actual loan negotiation and closure. In the last assessment before

this transaction, for the last quarter of 2006, she achieved a 100% score, 22 points out of 22 – see p 224.

27. By the time of this agreement, the sale of PPI policies had received considerable publicity and the ICOB rules were in force. Although, of course, one cannot rule out the possibility of an errant bank representative ignoring clear internal rules or guidance, Ms O'Halloran did not strike me as such a person. Accordingly I am satisfied that she did indeed give to Mr Speak the IDD at the outset and followed the instructions on the laminated document at p121. This makes it clear that the Bank simply recommends a PPI. The Sales Process document (p 122) then says that after dealing with credit checks and lending limits the next step is the D.A.N Questionnaire. She says that she took that step and I accept that her account as summarised in paragraphs 15 - 17 above is accurate. Mr Speak was recommended PPI and he agreed to take it. In this particular case therefore, there was no need for Ms O'Halloran to "overcome objections". This basic sequence of events is confirmed by the internal notes. The first actual offer was inclusive of PPI because that is what he had sought – see the reference to "advance 7141" ie the loan of £5,000 and the PPI premium. The initial rate offered was 1.016% per month, effectively 12.9% APR. A later offer had the same components but a slightly reduced figure of £7,012.39 and a monthly rate of 0.866%, effectively 10.9% APR. See p131 then p130. A later entry probably after the time when it happened, records that "rate dropped to get deal" with "RR [right rate] 12.9%" and "RD [rate drop] 10.9%". I accept Ms O'Halloran's evidence that she did not come back with a lower rate having quoted a higher rate and then to say the lower rate is only available if PPI is taken. She says that she would often come back with a lower rate to fit a client's budget irrespective of whether PPI was to be taken or not. Mr Speak had agreed to take PPI at the outset following the D.A.N Questionnaire and after that it was simply a question of giving him a rate which meant that the monthly instalments were ones which he was prepared to accept. He did accept the instalments entailed by the lower rate and that is what appears on the Agreement.

28. In this context I need to refer to an internal Bank document which Ms O'Halloran said she recognised and which contained training in respect of PPI (here referred to as "PPP" – Payment Protection Plan). See p226. It states that PPI is advantageous to customers and its benefits should be explained to them. It also says that there are benefits for the Bank because commission from the insurance company adds to its income (though in this case there was no commission) and because "Our financial risk is reduced as the customers monthly repayments are paid by the insurance company protecting us against potential bad debts". (I have taken this into account when making my observations above about "high risk" – I do not see why this should entail that the Bank was likely to have told Mr Speak that he was a high risk customer.) It emphasises the need to do the D.A.N Questionnaire. Under "Cancellation" it says that it is important that the customer fully understands the features and benefits of PPI and that it can be cancelled after 30 days. It then says this at p232:

> "**Dropping the rate to sell PPI**
>
> Sometimes, during price negotiations with a customer your manager may agree to drop the interest rate on a new customer loan as an incentive for the customer to take PPP cover.
>
> Should we make a reduced interest offer to a customer you **MAY NOT** then increase the interest rate back up again, regardless of whether the customer takes PPP or not.
>
> **All insurance is optional and cannot be made a condition of a customer's loan.**"

29. Ms O'Halloran confirmed that she had been told in training that they could drop the rate to meet the customer's budget for PPI but that once dropped it could not be put up. But she did not

accept that this document meant, or it was the case, that she would not reduce the rate without also offering, or requiring PPI. She had often reduced the rate to be competitive even where PPI was not sought. She did not accept that Mr Speak's budget included PPI because it had to – as required by the Bank. She agreed that part of her training was to "overcome objections" about PPI but consistently resisted the suggestion that it followed that she insisted he take it. I see no reason not to accept this evidence. I do not see that the part of the document quoted in paragraph 28 above meant that it was not open to bank representatives such as Ms O'Halloran to offer a reduced rate where PPI was not involved. And as for the incentive, if the customer has thus far declined PPI (not this case) and is then offered a reduced interest rate so that the package inclusive of PPI becomes cheaper I do not see that as impelling the conclusion that the representative is going to insist on PPI, either. There is a clear difference between offering an incentive to take PPI and saying it is compulsory. The whole point of this document is surely that if a reduced rate is offered so as to make the package inclusive of PPI more attractive to the customer – in the hope that they will then take PPI – if the customer still declines, the lower rate must continue to be offered. The obvious reason for that is as set out in the final sentence – the PPI is always optional. If the customer was told that the lower rate was only available <u>if</u> PPI was taken as well then PPI would indeed be required for that particular loan. I will return to this issue below but for present purposes all I need say is that I see nothing in this document to make it more likely that Ms O'Halloran in fact presented the lower rate on the basis of "PPI-included" only, as alleged by Mr Speak. Or that he had not by that time already agreed to take the PPI. Moreover what this document does make clear is that if a member of staff suggests that PPI is <u>not</u> optional, they are clearly breaking the rules. From an internal point of view therefore, to say that PPI was compulsory would be a serious and deliberate breach of bank policy. I see no reason to think that Ms O'Halloran would have done that here.

30. Ms O'Halloran was also referred to paragraph 9 of the Amended Reply and Defence to Counterclaim. This was in response to an allegation in paragraph 5 of the Defence and Counterclaim that Mr Speak was told that he could have the loan at the lower rate of 10.9% only if he took out PPI. Otherwise he could only have the loan at the higher rate. In fact his final position was that he could not have <u>any</u> loan for £5,000 unless he took PPI. Paragraph 9 states in relation to paragraph 5 that "..the Claimant originally offered the Defendants an agreement without PPI at 12.9% per annum and then subsequently an agreement with PPI at the same rate. The Claimant then offered the Defendants an agreement with PPI at 10.9% to compete in the market." The alleged representations were denied. Ms O'Halloran said that while she may have provided information for the Amended Reply and Defence to Counterclaim she did not agree with paragraph 9 as a summary of the position. She said she could elaborate and later she did when explaining the sequence of events. See paragraphs 16 and 17 above. The inaccurate part seems to be an offer of 12.9% without and then with the PPI because by the time of the offer Mr Speak had requested PPI. This is in fact borne out by the internal records referred to above. The second sentence of paragraph 9 was in fact accurate in the sense that she <u>did</u> offer 10.9% with PPI included but that was because Mr Speak was going to take it not because it was a requirement. Possibly some confusion arose in the drafting of paragraph 9 but in any event I do not accept that it amounts to a real reason not to accept the account she gave.

31. She was also asked if an entry referring to "mandatory" in the internal record at p130 meant that the PPI was compulsory. She said it had nothing to do with PPI and was all about a maximum lending limit of £7,000 and I accept that evidence. It was also put to her that if the rate was dropped the Bank would make less money than if it stayed higher which was obviously the case as she accepted. But she did not accept the proposition that because the sale of PPI may generate

additional income for the Bank it followed that if a lower rate was offered it was likely that bank staff would say that it was mandatory or that they might seek to pressurise customers. Nor do I. I did not see this point as adding at all to the likelihood that Ms O'Halloran did what she is alleged to have done here with Mr Speak. It was also suggested that because the training document said that there would be a benefit to, or some protection for, the bank, if PPI was taken, she would have put this to Mr Speak in the form of saying that he had to take it because the bank needed it or because indeed he was high risk, or some such. She emphatically denied this. What she would refer to was the benefit to the customer. That approach is entirely logical because she was trying to sell it to the customer.

32. I also accept Ms O'Halloran's evidence that she went through the D.A.N Questionnaire with Mr Speak. On this account he did not tell her about his wife's bipolar condition. She accepted that if he had it would have constituted a pre-existing medical condition so that inability to service the loan as a result of that condition would not have been covered. But I do not accept that Mr Speak told her. Why he might not have told her was not explored with him, since he was denying that he was asked the D.A.N Questionnaire questions at all, but it is not inconceivable that he may not have wished to disclose it. Here it needs to be remembered that on Mr Speak's case, since PPI was obtained on the 2005 loan, he accepted that Ms O'Halloran may well have done a D.A.N Questionnaire then even if not now. But if so, it does not appear that a bipolar condition was reported then. If it had been then, on Mr Speak's case Ms O'Halloran would have picked it up when taking the details from the last occasion. In fact, of course, if she did the D.A.N Questionnaire for the 2005 loan it is rather difficult to see why she would not have followed standard procedure for this loan as well. I further accept that Ms O'Halloran explained to Mrs Speak the nature of although not the questions in the D.A.N Questionnaire.

Conclusions

33. I therefore find that:

(1) Ms O'Halloran did not in any sense require the Defendants to take out PPI as a condition of granting the loan of £5,000 to them, whether at 10.9% or any other rate;

(2) She went through the D.A.N Questionnaire with Mr Speak in respect of both he and his wife and correctly recorded his answers;

(3) She told Mrs Speak what the D.A.N Questionnaire was and that PPI was recommended and selected;

(4) Mrs Speak had previously given her husband full authority to discuss the proposed loan with the Bank, answer any questions and agree terms. Ms O'Halloran sought confirmation of this in the meeting and was given it.

The Unenforceability Claim

Statutory Framework

34. By s60 of the Act the Secretary of State would make regulations as to the form and content of documents embodying regulated agreements. The Agreement here is one such agreement. The Consumer Credit Act (Agreements) Regulations 1983 provide as follows in relation to the Agreement:

(1) By reason of paragraph 19 of Schedule 1 the document embodying the Agreement had to contain prescribed information which included "the total charge for credit with a list of its constituent parts";

(2) By reason of paragraph 2 of Schedule 6 the Agreement had to contain as a prescribed term for the purposes of s61 (1) a) and s127 (3) of the Act, "A term stating the amount of credit."

35. It is common ground that a failure to provide prescribed information in the document means that the Agreement is enforceable only by order of the Court, whereas a failure to set out a prescribed term (or set it out correctly) would render the Agreement irremediably unenforceable, with the essential consequence that the creditor cannot enforce the agreement by means of a Court judgment. If this consequence applied here, the present claim brought by the Bank must fail.

36. s20 of the Act provides as follows:

> 20 **Total charge for credit**
>
> (1) The Secretary of State shall make provisions containing such regulations as appear to him to be appropriate for determining the true cost to the debtor of the credit provided or to be provided under an actual or prospective consumer credit agreement (the 'total charge for credit'), and regulations so made shall prescribe
> (a) what items are to be treated as entering into the total charge for credit, and how their amount is to be ascertained;
> (b) the method of calculating the rate of the total charge for credit."

37. The Consumer Credit (Total Charge for Credit Regulations) 1980 ("the TCC Regulations") made pursuant to s20 state as follows:

> "**3 Total Charge for Credit**
>
> For the purposes of the Act, the total charge for the credit which may be provided under an actual or prospective agreement shall be the total of the amounts determined as at the date of the making of the agreement of such of the charges specified in regulation 4 below as apply in relation to the agreement but excluding the amount of the charges specified in regulation 5 below."

38. Regulation 4 of the TCC Regulations is headed "Items included in total charge for credit" and provides (as amended on 14 April 2000) as follows:

> "**4 Items to be included in the total charge for credit**
>
> Except as provided by regulation 5 below, the amounts of the following charges are included in the total charge for credit in relation to an agreement:
> (a) the total of the interest on the credit which may be provided under the agreement;
> (b) other charges at any time payable under the transaction by or on behalf of the debtor or a relative of his whether to the creditor or any other person;
> (c) a premium under a contract of insurance, payable under the transaction by the debtor..where the making or maintenance of the contract of insurance is required by the creditor:
> (i) as a condition of making the agreement, and
> (ii) for the sole purpose of ensuring complete or partial repayment of the credit, and complete or partial payment to the creditor of such of those charges included in the total charge for credit as are payable to him under the transaction in the event of the death invalidity illness or unemployment of the debtor."

39. Finally, s9 of the Act provides as follows:

> "9 **Meaning of Credit**
> (1) In this Act 'credit' includes a cash loan, and any other form of financial accommodation.....
> (4) For the purposes of this Act, an item entering into the total charge for credit shall not be treated as credit even though time is allowed for its payment."

Analysis

40. The Defendants contend that Ms O'Halloran stated that PPI had to be taken out otherwise the loan would not be granted. If so, Regulation 4 (c) (i) was clearly engaged. It is not suggested that sub-paragraph (ii) does not apply here, so the cost of the PPI policy here should have been included in the TCC and it was not. However, the Defendants have failed in the required factual contention because of my findings of fact set out above. Accordingly, the PPI was not "required" here. That is an end of the unenforceability claim here but in deference to some associated arguments made to me in this respect I make the following further observations.

41. First the Bank contended that even if Ms O'Halloran had stated that PPI had to be taken out in order to have the loan, there was still no breach of Reg. 4 (c) because "objectively" the loan was still optional despite what she had said: see, for example the descriptions of it as optional in the Agreement itself. There is nothing in this point. Reg. 4 (c) (i) stipulates that the PPI must be "required by the creditor"... "as a condition of making the agreement". This contemplates some conduct by the creditor imposing that requirement. The relevant conduct is that which occurs before the making of the agreement. The creditor here is represented by Ms O'Halloran. The form of the requirement is not stipulated – so it could be made orally for example. If a bank manager tells the customer that he must take out PPI before a loan is granted, he is obviously requiring that as a condition of [the bank] making the [loan] agreement. Once that happens the PPI in that particular case is no longer optional. And the fact that the document contains boxes to be ticked if PPI is to be taken out and that PPI is said to be optional makes no difference. The debtor now must tick the box and agree to take out PPI. There is as a matter of law no separate documentary existence of some optional PPI as distinct from what the representative of the bank has said about it. Even if the bank's firm policy is not to make the PPI mandatory, that is irrelevant if its agent chooses to ignore that policy in a particular case. Accordingly, had I found the facts in the Defendants' favour, the Bank would not have escaped a breach of Reg. 4 (c) on this ground.

42. Second, the Bank argued that even if Ms O'Halloran had stated that PPI had to be taken out in order to have the loan, there was still no breach of Reg. 4 (c) because it could have been cancelled within 30 days. There is nothing in that point either. What has to be shown is a requirement that the policy be taken out. This refers to the position before it is, obviously. The fact that subsequently it may be cancelled is irrelevant. A commitment to make the contract in respect of the PPI is and always was a commitment whatever happens later. Moreover what has to be required by the creditor is the *making* or *maintaining* of the PPI policy. These are disjunctive conditions. While it might be said that a PPI policy which can be so easily cancelled is not much use to the Bank (either in terms of affording some protection or perhaps enabling it to earn or keep a commission) that is not the point. And of course in many cases once a customer has decided to take the PPI (especially if told he had to) he may not consider the question of cancellation or inertia may set in.

43. In this regard the Bank relies upon the decision of HHJ Ibbotson in the Huddersfield County Court in *Beardsley v HSBC Bank* on 20 November 2008. There he rejected an unenforceability claim on the basis that he was not satisfied that the bank's representative had said that it was compulsory. That was in fact the end of the case but the Judge added that his conclusion was

supported by the documents and also that if there was the option to cancel without paying anything "that cannot be said to be a charge for credit." An application for permission to appeal was refused by Openshaw J on 9 February 2009. It is clear that the cancellation position was not the Judge's primary reason for finding that it was not a charge for credit. But to the extent that it was, I respectfully disagree for the reasons given above. Moreover it is not clear to me whether the Judge was addressing specifically the words of Reg. 4 (c) (i).

44. I now turn to an additional argument raised by the Defendants to the effect that there can be a breach of Reg. 4 (c) (i) even if Ms O'Halloran had <u>not</u> expressly stated that they had to take PPI as a condition of the loan. The argument is that simply to offer the loan package inclusive of PPI at the reduced rate of 10.9% amounts to a "requirement" to take PPI. It is based essentially on an OFT guidance note on "Discounted APR's and PPI" dated February 2000. This was before the TCC Regulations were amended to include Reg. 4 (c). However, paragraph 1.7 of the note anticipates that change. Paragraph 1.11 states that "where a lender offers loans with or without PPI and with an interest rate discount where PPI is taken out" there are in the OFT's view two separate agreements each of which must be considered separately for the purpose of the TCC Regulations. "The borrower remains free to decide whether or not to take out a loan with PPI – but the interest rate discount is available only if he does so. There is a clear link between the offer of PPI and the offer of credit on alternative terms and conditions (namely a lower rate of interest), and the fact that the terms and conditions of the credit are different in each case means that there are two different credit agreements. Under the agreement with the lower rate of interest therefore, the PPI is in effect mandatory, and its cost therefore falls to be included in the total charge for credit."

45. I quite follow that if the loan at the lower rate can be taken only if PPI is also purchased, the PPI is indeed a requirement of <u>that loan</u> and if it is taken, Reg. 4 (c) applies. It is no answer for the creditor to say that PPI was not in fact required because it was always open to the debtor to take the higher-rate loan without PPI – because that is not the loan he took out. That potential answer is what seems to be contemplated by the last two sentences of paragraph 1.4 of the note. But to my mind it still needs to be shown that PPI was mandatory for the lower-rate loan. I have been referred to paragraph 29.161B of *"Goode: Consumer Credit Law and Practice"* which refers to the OFT note. But what it says there seems to be the same as the view which I have just expressed.

46. Paragraphs 1.12 and 1.13 of the note deal with where the creditor's comparisons of APR are potentially misleading because one is for a loan with PPI and the other is not. But that is dealing with advertisements (the actual subject of the note). The context in our case is where Mr Speak has already opted for PPI and having been given the figures at the offered rate and not being happy with that, he is offered the same package at a lower rate. Had he then wanted to change his mind and not take PPI, Ms O'Halloran would not have been able to insist on it, or revert to the higher rate, as her own internal instructions made clear.

47. It follows that there was no "requirement" for PPI here and Reg. 4 (c) does not apply. There was therefore no obligation to state the cost of the PPI as part of the TCC.

48. However, at this point I should deal with an argument raised by the Bank had I found that there was a requirement to take PPI. This was to the effect that while there would then have been a breach of the TCC Regulations because the cost was not stated as part of the TCC, there was no breach of s9(4). The argument is that where the agreement has split up the "amount of credit" as

here, s9 (4) is satisfied because the cost of the PPI is not treated as "credit", the operative "credit" being the loan itself ie £5,000. It is accepted that if the agreement had shown only one amount of credit, ie the total amount of £7,012.39 there would have been a breach of s9 (4). But here the debtor can see that the loan is indeed for £5,000 only and the remaining credit was for the PPI.

49. There is a superficial attractiveness to the argument because all the individual features of the Agreement are clearly set out and the debtor knows what is being charged for what, in addition to being given at the bottom of the Agreement document the total monthly instalment payable. It could be said that the concept of "truth in lending" has been applied here. Nonetheless I would have rejected the argument for the following reasons:

(1) This is a single regulated agreement; it is not suggested that it is some form of multiple agreement under s18 of the Act. That being so, one cannot limit the "credit" under the agreement to the amount of the loan and ignore that stated for the PPI. The total credit is not £5,000 but indeed £7,012.39. s9 (4) requires alteration of that figure and here the removal of £2,012.39 from the second "Amount of credit";

(2) Since the PPI credit has not been removed, part of the "Amount of Credit" has been mis-stated and this means that there is not the required prescribed term in relation thereto;

(3) That the cost of the PPI simply cannot be regarded as "credit" at all is supported by Rosenthal's *Consumer Credit Law and Practice – Guide 3rd Edition* at p68;

(4) The Bank relies upon the statement of Mr Recorder Douglas QC in *Hurstanger v Wilson* [2007] 1 WLR 2351 as approved by Tuckey LJ at para. 11 of the judgment of the Court of Appeal:

> "In my judgment the objective of Schedule 6 is to ensure that, as an inflexible condition of enforceability, certain basic minimum terms are included which the parties (with the benefit of legal advice if necessary) and/or the court can identify within the four corners of the agreement. Those minimum provisions combined with the requirement under section 61 that all the terms should be in a single document, and backed up by the provisions of section 127 (3), ensure that these core terms are expressly set out in the agreement itself: they cannot be orally agreed; they cannot be found in another document; they cannot be implied; and above all they cannot be in the slightest mis-stated. As a matter of policy, the lender is denied any room for manoeuvre in respect of them. On the other hand, they are basic provisions, and the only question for the court is whether they are, on a true construction, included in the agreement. More detailed requirements, which are designed to ensure that the debtor is made aware, so far as possible, of specified information (including information contained in the minimum terms) are to be found in Schedule 1."

This emphasises the important difference between prescribed terms (such as Amount of Credit) and required information (such as TCC), but I do not see that it entails the conclusion sought by the Bank here. Indeed it was said in this passage that the prescribed terms "cannot be in the slightest mis-stated". Although it is a question for the Court whether on a true construction the prescribed term was included in the agreement, once it is accepted that Amount of Credit includes both the loan and the PPI elements it inevitably follows that it was not (correctly) included.

(5) I was also referred to paragraph 25 of the judgment of the Supreme Court in *Southern Pacific v Walker* [2010] UKSC 32, given by Lord Clarke. Having found that a broker administration fee had been correctly included as part of the TCC and therefore correctly

excluded from the Amount of Credit, which stated simply the amount of the loan, he went on the say that there was no infringement of the principle of truth in lending and no confusion for the debtor. But I do not see how that assists on the key question which is whether s9 (4) was observed in the first place. On the Bank's case, the upshot would be that the cost of the PPI comes in twice, once as part of the TCC and again as the Amount of Credit. But in respect of a single agreement such as this, the statutory scheme is that an item is either part of the TCC or part of the credit – but not both.

Misrepresentation

50. On my findings of fact no question of misrepresentation arises. This is because the Bank never represented to the Defendants that the PPI was mandatory. Indeed it was accepted that misrepresentation could only arise if (a) Ms O'Halloran said that it was mandatory but yet (b) the Bank succeeded in arguing that it was still in truth optional and therefore not required, either for the reasons given in paragraph 41 above or because of the 30 day cancellation clause referred to in paragraph 42 above. But I would have rejected both of those arguments anyway. Moreover I am far from certain that misrepresentation could have arisen even on that scenario. That is because it assumes that to say that the PPI was mandatory was false because in truth it was optional. But what does that mean? If Ms O'Halloran insisted on PPI then the Bank was insisting on it. It was not optional in that particular case. Perhaps it could be said that if the Bank's underlying policy was never to insist on PPI, to say that the Bank required it in a given case was to suggest that it had no such policy when it did. But this more subtle form of representation was not pleaded, argued or put to Ms O'Halloran. See paragraphs 5 and 15 of the Re-Amended Defence and Counterclaim. Had misrepresentation been a live issue the Defendants would have relied upon the decision of Mr Recorder Hinchcliffe QC in *Jenner & Ellis v Black Horse* 1 February 2010. Unenforceability was not alleged in that case but misrepresentation was on the footing that although the written documents described PPI as optional, the debtor was told that it was compulsory. In paragraph 22 the Judge said this:

> "One of Mr Ross's points was that it did not matter what misrepresentations were made during negotiations because the written policy documents state that PPI was optional. It seems to me that Mr Ross misunderstands what Mrs Ellis was saying. The misrepresentation was that unless you agree to the optional payment protection you will not get the loan. Accordingly ..the policy documents cannot cure the misrepresentation.."

51. But with respect I do not see how imposing such a requirement is a representation at all. It is the imposition of a condition or the making of a conditional promise.

52. These points illustrate what to my mind are the difficulties in alleging this kind of misrepresentation when a debtor fails in the principal allegation that the PPI was in fact mandatory.

Breach of ICOB

53. The Bank accepts that at the material time it was an insurance intermediary and therefore bound by ICOB. Any breach by it of ICOB is a breach of statutory duty actionable at the instance of the Defendants by reason of s150 of the Financial Services and Markets Act 2000.

Breach of Rule 2.2.3 (1)

54. Rule 2.2.3.1 states that

> "When a firm communicates information to a customer it must take reasonable steps to communicate in a way that is clear, fair and not misleading."

55. In argument Mr Berkley QC made it clear that primarily, a breach of this rule is only invoked if the misrepresentation argument were to succeed along the lines that PPI was stated to be compulsory when it is not. But the former argument does not arise for the reasons given above. Equally there is no breach of ICOB here.

56. Mr Berkley QC did however advance a secondary argument. This was to the effect that Ms O'Halloran was nonetheless in breach of this rule because she did not make it clear when giving the financial information about the lower rate that it was also available without PPI. However, I have already found that she did make it clear that PPI was optional and while the quotation for the lower rate was inclusive of PPI that was because by then Mr Speak had agreed that he wanted it. I see no reason why Ms O'Halloran needed to go back over that question again in the absence of any further query or comment from Mr Speak. So there was no breach on this basis either.

Breach of Rule 4.3.1

57. This states that an insurance intermediary

> "..must take reasonable steps to ensure that , if in the course of insurance mediation activities it makes any personal recommendation to a customer to buy ..a non-investment contract, the personal recommendation is suitable for the customer's demands and needs at the time the personal recommendation is made."

58. In relation to Mr Speak the breach is said to have been caused by the failure of Ms O'Halloran to go though the D.A.N Questionnaire with him to assess his need for a PPI policy. But I have found that he was taken through it in detail, and question by question, by Ms O'Halloran. Accordingly there is no breach as far as he is concerned.

59. But it is also said that there was a breach in any event in relation to Mrs Speak, it being common ground that Ms O'Halloran did not go through the questions in the D.A.N Questionnaire with her and that had she done so, the existence of the bipolar condition would have been revealed. It was argued that in any case of joint borrowers and certainly with husband and wife (or cohabiting partners) the Bank should go through a process like that set out in the D.A.N Questionnaire not merely with the husband but with the wife also.

60. I do not accept that there is any such hard and fast rule. It depends on the circumstances of each case. Here I have found that (a) Mrs Speak gave full authority to Mr Speak to deal with all aspects of the loan with the Bank (b) Ms O'Halloran sought express confirmation of this from Mr Speak when she started (c) when she asked him the questions she asked them in relation to both of them and (d) when Mrs Speak arrived she explained what the D.A.N Questionnaire was all about. I do not accept that Mrs Speak was simply asked to sign the D.A.N Questionnaire without being told what it was. In those circumstances I do not consider that Ms O'Halloran also had a duty to go through the questions again with Mrs Speak. It was said that such a duty is entailed or at least supported by the fact that banks and customers now operate in a post-*Etridge* era. I do not accept that - where there is no allegation of undue influence or matters of that kind, or circumstances which could be said to put the bank on notice (and none were alleged here) I do not see that the Bank is unable to proceed on the basis of taking the relevant information from the husband where he was authorised to give it.

61. Moreover it is very difficult to see what loss in real terms was suffered by Mrs Speak. On the facts as I have found them, Mr Speak wanted the PPI and if Mrs Speak had been asked separately and had disclosed her bipolar condition, this would simply have meant that any inability to pay the loan due to that condition on her part would not be covered. But the rest of the cover would have applied. Moreover as between them, the significant earner was Mr Speak whose monthly income was £1,667 as opposed to £375 for Mrs Speak. Even if disclosure of the bipolar condition meant that she could not have PPI at all (as to which there is no evidence and which seems highly unlikely) the loss suffered by the fact that she took it has to be based on some proportion of the premium actually charged. There is no evidence about what the premium would have been for Mr Speak alone - Ms O'Halloran was not asked about this – and I rather suspect that it would not have been significantly less. Mr Berkley QC accepted that in looking at this question one would have to look at their respective earnings. Mrs Speak's income was about 18% of their total joint earnings. At best her loss might be £360 therefore, plus a proportion of the interest element. But in truth there is no proper evidence of loss at all.

A Further Point

62. It should be clear from the above that in analysing the question of breach I have focused on the actions of Ms O'Halloran as the representative of the Bank and whether <u>she</u> took the relevant reasonable steps. In so doing I rejected a general argument made by the Bank that it is enough to see whether it, as an <u>organisation</u>, had taken reasonable steps, for example by the giving of adequate training to staff so that a disobedient representative's actions would not necessarily place the Bank in breach. I do not think that this is the correct approach.

Conclusion

63. I therefore dismiss all the claims made under ICOB.

Unfair relationship

64. As was made clear by Mr Berkley QC in opening, this final claim is made only in the absence of success on the unenforceability argument and where misrepresentation and/or a breach of ICOB in relation to the D.A.N Questionnaire would succeed. Given what I have concluded thus far, it does not therefore arise. It was not submitted that if PPI <u>had</u> been made a requirement of the loan this would of itself have given rise to an unfair relationship. And this is not one of those cases where the PPI was said to have been intrinsically unsuitable by reference to its terms or cost.

65. I was referred to the case of *Wollarton v Black Horse Ltd* in the Northampton County Court 29 March 2010 where an unfair relationship would have been found had the agreement not already been found to be wholly unenforceable because PPI was required as a condition of the loan. The case was cited simply to show that mis-selling of PPI is capable of giving rise to an unfair relationship; it was not suggested that the facts were similar and indeed they were not. There the bank was found to have inserted an agreement to PPI in the loan agreement document sent out to the debtor for signature when PPI had not even been discussed at the meeting so that the debtor did not even have the chance to accept or reject the premium. I was also referred to *Roch v Black Horse Limited* in the Basildon County Court on 23 February 2010. An unfair relationship was found there but this was where the debtor had been told that the loan application would not succeed unless he took out PPI, where there was no discussion as to his need for such a policy or the fact that it could be cancelled. That is not this case.

66. Accordingly there was no unfair relationship here.

Conclusion

67. It follows that the Bank's claim succeeds and the Defendants' counterclaim fails. There must be judgment for the Bank which according to Mr Lynch's agreed statement is in the sum of £7,496.88 as at 17 August 2009, plus interest since then.