Neutral Citation Number: [2023] EWHC 668 (Ch)

Case No: BL-2019-000866; BL-2020-001989

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Rolls Building
Fetter Lane
London EC4A 1NL

Date: 22 March 2023

Before :

MR JUSTICE ZACAROLI
MASTER KAYE

- -

BETWEEN: **Claim No. BL-2019-000866**

(1) FAROL HOLDINGS LIMITED
(2) JANHILL LIMITED
(3) MR AND MRS TPW UGLOW (a firm)

Claimants

and

(1) CLYDESDALE BANK PLC
(2) NATIONAL AUSTRALIA BANK LIMITED

Defendants

AND BETWEEN: **Claim No. BL-2020-001989**

IVOR GASTON & SON (a firm)

Claimant

and

(1) CLYDESDALE BANK PLC
(2) NATIONAL AUSTRALIA BANK LIMITED

Defendants

- -

Andrew Onslow KC, Lisa Lacob and Liisa Lahti (instructed by Fladgate LLP) for the **Claimants**
Bankim Thanki KC, Ian Wilson KC and Richard Hanke (instructed by DLA Piper UK LLP) for the **First Defendant**
Patrick Goodall KC and Natasha Bennett (instructed by Herbert Smith Freehills LLP) for the **Second Defendant**

Hearing date: 22 March 2023

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JUDGMENT

Mr Justice Zacaroli and Master Kaye:

1. At the third CMC in this action, held on 22 March 2023, we refused the defendants' application to adduce expert evidence on a particular issue. These are our reasons for doing so.

2. The defendants sought an order permitting expert evidence on a point said to be relevant to the claim against them that their alleged conduct in adding basis points to the fixed rate element of the interest on fixed rate loans offered to the claimants, and not disclosing that fact to the claimants, was unfair within the meaning of s.140A of the Consumer Credit Act 1974 (the "1974 Act").

3. The pleaded issue to which the evidence is said to relate is as follows (taking the pleading of the claim by Mr and Mrs TPW Uglow under s.140A as an example):

   (1) At para 180 of the points of claim it is pleaded that "the relationship between Uglow and the Bank arising out of the Uglow FRLs is or was unfair under section 140A(1)(c) of [the 1974 Act] by reason of the non-disclosure of the additional basis points included in the fixed rate".

   (2) There are then provided ten paragraphs of particulars, of which only the last is relevant for present purposes. By sub-para 180.10, it is pleaded that:

   > "The practice of adding significant and hidden basis points to the Market Rate before quoting Uglow a Fixed Rate, in order to generate hidden treasury income (in addition to the income generated from the Margin) to meet internal targets, fell below the standard of commercial conduct reasonably to be expected of banks providing loans to SME customer."

   (3) In the first defendant's defence, at para 192.10, para 180.10 of the particulars of claim is denied, on the following basis:

   > "192.10.1. It is denied that the income element included within the Fixed Rate offered to Uglow was "hidden" income for the reasons set out above.
   >
   > 192.10.2. It is denied that that income was included "to meet internal targets".
   >
   > 192.10.3. Further, Treasury Partners and Business Partners were reviewed against a balanced scorecard that took into account a number of areas of performance, including income targets, of which annual treasury revenue was an element, amongst other factors. It is denied that it was commercially unacceptable for treasury revenue to have been an element in that review analysis.
   >
   > 192.10.4. Uglow is put to strict proof that, if so alleged, it could have entered into a fixed rate loan (or equivalent product) with another lender that did not include an additional income element in the pricing of that product.

> 192.10.5. In all the circumstances, the Bank's conduct did not fall below the standard of conduct reasonably to be expected of banks providing loans to SME customers."

4. For the claimants, Mr Onslow KC stressed the particular nature of the pleading in sub-para 180.10. The only conduct which it is said fell below "the standard" is the conduct asserted in that paragraph, and is only the *whole* of that conduct, namely adding hidden basis points to the fixed rate offered to customers for the purpose of meeting internal targets.

5. It is common ground that the nature of the enquiry under s.140A(1)(c) is a broad one. The question is whether anything done, or not done, by the bank is "unfair", having regard to all matters that the court thinks relevant. The question whether a bank's conduct falls below the standard of commercial conduct reasonably to be expected of banks is but one element in the broad enquiry. The phrase comes from the judgment of Lord Sumption in *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61, at §17:

> "The view which a court takes of the fairness or unfairness of a debtor-creditor relationship may legitimately be influenced by the standard of commercial conduct reasonably to be expected of the creditor. The ICOB Rules are some evidence of what that standard is. But they cannot be determinative of the question posed by section 140A, because they are doing different things. The fundamental difference is that the ICOB Rules impose obligations on insurers and insurance intermediaries. Section 140A, by comparison, does not impose any obligation and is not concerned with the question whether the creditor or anyone else is in breach of a duty. It is concerned with the question whether the creditor's relationship with the debtor was unfair. It may be unfair for a variety of reasons, which do not have to involve a breach of duty. There are other differences, which flow from this. The ICOB Rules impose a minimum standard of conduct applicable in a wide range of situations, enforceable by action and sounding in damages. Section 140A introduces a broader test of fairness applied to the particular debtor-creditor relationship, which may lead to the transaction being reopened as a matter of judicial discretion. The standard of conduct required of practitioners by the ICOB Rules is laid down in advance by the Financial Services Authority (now the Financial Conduct Authority), whereas the standard of fairness in a debtor-creditor relationship is a matter for the court, on which it must make its own assessment. Most of the ICOB Rules, including those relating to the disclosure of commission, impose hard-edged requirements, whereas the question of fairness involves a large element of forensic judgment. It follows that the question whether the debtor-creditor relationship is fair cannot be the same as the question whether the creditor has complied with the ICOB Rules, and the facts which may be relevant to answer it are manifestly different. An altogether wider range of considerations may be relevant to the fairness of the relationship, most of which would not be relevant to the application of the rules. They include the characteristics of the borrower, her

sophistication or vulnerability, the facts which she could reasonably be expected to know or assume, the range of choices available to her, and the degree to which the creditor was or should have been aware of these matters."

6. The defendants seek to adduce expert evidence of a financial markets expert on the following issues:

> "1. In the context of banks offering fixed rate loan products to SME customers in the period 2002-2010 inclusive, how was the fixed rate offered to customers usually determined by banks? In answering this question, please consider the following sub-questions:
>
> 1.1 Was it usual to incorporate an income element within the fixed rate by way of additional basis points? If so:
>
> (A) What level of additional basis points was commonly incorporated?
>
> (B) What was the rationale for incorporating the additional basis points and what costs/risks was it intended to cover?
>
> (C) What, if any, relationship was there between these additional basis points and the "credit margin" / "lending margin", which did not form part of the fixed rate, but was included as part of the overall interest rate?
>
> 1.2 When communicating the fixed rate on offer to customers, did banks usually break the fixed rate down into its constituent elements and/or disclose the inclusion of any income element or additional basis points?"

7. The first point taken in opposition by Mr Onslow is that it is not clear whether the pleaded allegation to which this evidence is said to be relevant is even in issue. The first defendant has denied generally sub-para 180.10, but the basis on which it has done so is set out in the sub-paras of para 192.10 of its defence. Within these sub-paras it denies that income was included "to meet internal targets", but does not go on to plead specifically to the allegation that *if* income was included for that purpose, it was conduct which fell below the requisite standard. Mr Goodall KC, who appeared for the second defendant and took on the burden of making submissions on this issue on behalf of the defendants, did not specifically answer that point, but we will assume for present purposes that the general denial of sub-para 180.10 is sufficient to amount to a denial of that proposition.

8. We note, however, given the specific nature of the pleading in para 180.10, that the expert evidence sought to be adduced would not actually assist in determining the issue. The fact, if it could be established by expert evidence, that it is usual for banks to incorporate an income element within the fixed rate by way of additional basis points and that this was not usually communicated to customers would not assist in determining whether doing so *for the purpose of meeting internal targets* fell below the requisite standard.

9. Mr Onslow's second, and more substantive, objection is that the proposed expert evidence does not meet the basic requirement for expert evidence, that there is a recognised body of expertise governed by recognised standards and rules of conduct relevant to the question which the Court has to decide. Unless that threshold is reached, the evidence is not admissible: *The RBS Rights Issue Litigation* [2015] EWHC 3433 (Ch), per Hildyard J at §13-14:

> "13. The admissibility of expert evidence (as an exception to the general rule that opinion evidence is inadmissible) was summarised by Evans-Lombe J in *Barings Plc v Coopers & Lybrand* [2001] PNLR 22, §45 as follows:
>
> > "In my judgment the authorities which I have cited above establish the following propositions: expert evidence is admissible under section 3 of the Civil Evidence Act 1972 in any case where the Court accepts that there exists a recognised expertise governed by recognised standards and rules of conduct capable of influencing the Court's decision on any of the issues which it has to decide and the witness to be called satisfies the Court that he has a sufficient familiarity with and knowledge of the expertise in question to render his opinion potentially of value in resolving any of those issues."
>
> 14. Thus, the first issue is whether there is a recognised body of expertise governed by recognised standards and rules of conduct relevant to the question which the Court has to decide. Unless there is, the Court should decline to admit evidence which ex hypothesi is not evidence of any body of expertise but rather the subjective opinion of the intended witness."

10. Mr Goodall submitted that expert evidence must be admissible, in a case where the claimants were asking the Court to find that the conduct of a bank fell below the requisite standard, because without that evidence the Court could not know what the requisite standard was. Mr Onslow accepted that expert evidence is theoretically admissible to assist in identifying what that standard is, but that such evidence must satisfy the basic requirement for expert evidence. Admissible evidence, for example, would include evidence as to published guidance or conduct rules, but it would *not* include evidence going only to what was usual among (some or even all) other banks at the time.

11. Mr Goodall countered by reference to the much quoted passage from Oliver J's judgment in *Midland Bank Trust Company v Hett Stubs & Kemp* [1979] 1 Ch 384, at p.402, concerned with expert evidence relevant to the scope of a solicitor's duty:

> "The extent of the legal duty in any given situation must, I think, be a question of law for the Court. Clearly if there is some practice in a particular profession, some accepted standard of conduct which is laid down by a professional institute or sanctioned by common usage, evidence of that can and ought to be received. But evidence which really amounts to no more than an expression of opinion by a particular practitioner of what he thinks he would have done had he been placed, hypothetically and without the benefit of hindsight, in the position of

> the Defendants, is of little assistance to the Court; whilst evidence of the witness' view of what, as a matter of law, the solicitor's duty was in the particular circumstances of the case is, I should have thought, inadmissible, for that is the very question which it is the Court's function to decide."

12. Mr Goodall pointed to the fact that Oliver J did not confine expert evidence to that which was directed at rules and practices of professional institutes but included (as Evans-Lombe J noted in *Barings Plc v Coopers & Lybrand* [2001] P.N.L.R. 22) "some accepted standard of conduct which is … sanctioned by common usage."

13. We agree with Mr Onslow, however, that this is referring to something significantly more than evidence as to what was usual practice among banks. What is required is such a level of common usage as would amount to sanctioning an accepted practice. As Hildyard J noted in the *RBS Rights Issue* case, at §29, evidence, even from an expert, as to what they knew, and what they understood other practitioners in the relevant market to know, is really evidence of fact. Similarly, evidence as to what the expert themselves did, and what they were aware, from their own experience or from speaking to others, other banks did is really evidence of fact.

14. In the context of a claim under s.140A of the 1974 Act, Mr Onslow's point has increased force. The question for the Court is not whether the first defendant breached any duty imposed on it, but whether its conduct in adding hidden basis points to the fixed rate so as to meet internal targets was – in all the circumstances – unfair. The fact, if it be the case, that other banks (even all other banks) were doing the same thing cannot, in our judgment, assist in showing that the conduct is not unfair.

15. Moreover, where the impugned conduct involves keeping secret additional income within a fixed rate offered to customers, from those customers, it is difficult to see, however widespread the practice among banks, that it could ever reach the threshold of a common usage that sanctioned that conduct as accepted practice.

16. Mr Goodall submitted that the experts may well, in the course of their evidence, rely on published guidance or standards of conduct, in order to justify their conclusion that the impugned conduct was usual among banks, and that the defendants should not be shut out from adducing such evidence. As we have already noted, if the application was one to adduce evidence of such accepted standards (as opposed to what other banks did), then it may be that we would have allowed it. That is not, however, the application, and we do not think it would be appropriate to allow this application, on the basis that the experts – in the course of providing evidence which we do not consider admissible – may introduce supporting evidence which in itself would be admissible.

17. Mr Goodall pointed to cases where the commonality of particular terms in contracts had been relied on as relevant to the evaluation under s.140A. We do not find those cases helpful, since such terms were openly included in contracts, and so would have been well known to those in the market on both sides of the transaction. That is not the case where the impugned conduct is not the inclusion of particular terms, but doing something which was (allegedly) deliberately hidden from customers.

18. He also submitted that the burden lies on the defendants in showing that the relevant conduct was *not* unfair, so they should not be shut out from adducing evidence that assists them in overcoming that burden. Wherever the burden lies in relation to an issue, however, expert evidence must satisfy the essential requirements for such evidence.

19. The fact, as Mr Goodall submitted, that there will be expert evidence from a financial markets expert on other pricing issues is in our view irrelevant. It is necessary to justify such experts being asked to opine on the additional issues sought to be introduced by the defendants.

20. Finally, Mr Goodall pointed to a paragraph in the particulars of claim in claim 4 (brought by Ivor Gaston & Son) to which he said such expert evidence was relevant. In that paragraph it is asserted that if the claimant had been told that the fixed rate included hidden additional profit then the claimant would have sought to negotiate a better rate with the first defendant "or another lender". We do not accept that the expert evidence sought to be introduced would assist in resolving that question. The premise of the pleading is that the "hidden" element was made known to the claimant. In those circumstances, the claimant would have been bound to interrogate the rate being offered by another lender. Any negotiation, whether with the first defendant or any other lender, would necessarily have included an interrogation of the elements that made up the fixed rate being offered. The fact – if it were the case – that other lenders also included a profit element within the fixed rate offered to customers would not provide any assistance to the Court in determining what the outcome of hypothetical negotiations between the claimant and such other lender or lenders would have been.

21. For these reasons we refused the application. That is not to say that there is no possibility that expert evidence could be prepared that would meet the criteria for admissibility in relation to the issue raised by para 180.10. If the defendants wished to apply to adduce such evidence, whether it would be appropriate to allow it to be adduced in this case would need to be addressed if and when such evidence was prepared.