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equitable set-off claim
against bank for mis-sold
business PPI against sums
due under secured
commercial loan**

Mr Ishaq v. Lloyds TSB Bank PLC
B2/2016/2883

Article by David Bowden

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Mr Ishaq v. Lloyds TSB Bank PLC - B2/2016/2883

Executive speed read summary

Mr Ishaq had loans from a bank to buy 2 properties. He was also sold business loan repayment insurance ('BLRI') a type of PPI that banks sold to commercial customers. The bank agreed to a repayment plan and then demanded higher monthly payments which were not paid. Receivers were appointed and the property was sold at public auction. A claim was brought against the bank for breach of contract, conversion and for breach of duty of care in mis-selling the BLRI. The bank conceded it had mis-sold the BLRI and gave a full refund. Following a trial in Central London County Court, the claim was dismissed. Mr Ishaq sought permission to appeal and Lord Justice Lewison adjourned this for a hearing in open court ordering the bank to respond to the proposed grounds of appeal. Permission to appeal was sought on the basis that Mr Ishaq had a right of equitable set off, that if the mis-sold BLRI had been credited to his mortgage account there would have been no arrears and no right to appoint receivers and sell the property. Lewison LJ rejected this submission ruling that on the facts of this case, there never was a claim for the repayment of the BLRI before the bank appointed LPA receivers adding that the existence of a future claim cannot give rise to an equitable set-off. Permission to appeal alleging that the judge below was wrong to conclude that the property was sold at an undervalue was also refused. Lewison LJ ruled that this had been a matter of evaluation for the trial judge and the Court of Appeal will rarely, if ever, interfere with an evidential conclusion reached by an experienced circuit judge. The lender's costs of the permission hearing were summarily assessed at £8000.

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13 October 2017

Court of Appeal, Civil Division (Lord Justice Lewison)

What are the facts?

Mr Ishaq owned 2 properties - one in London and the other in Nottingham. He had secured loans over both properties. Each mortgage had an 'all monies' charge in favour of the bank. For the London property Mr Ishaq had 'Business Loan Repayment Insurance' (BLRI). It was common ground that the BLRI was unsuitable for him and that it had been mis-sold to Mr Ishaq. In 2009 the bank demanded repayment. It came to an agreement where it would accept £1000 a month. In October 2010 the bank increased the amount it wanted to £2058 per month. Mr Ishaq continued to pay £1000 a month. In January 2011 the bank issued a final demand. On 1 February 2012 receivers sold the London property for £204,000. On 25 June 2012 Mr Ishaq brought a claim against the bank for breach of contract, conversion, and for a breach of duty of care in mis-selling the BLRI. The bank conceded mis-selling of BLRI. It gave Mr Ishaq a refund which Mr Ishaq accepted.

What is Business Loan Repayment Insurance?

Business Loan Repayment Insurance (BLRI) is a type of insurance policy sold alongside commercial loans including fixed or variable rate loans and treasury Loans. BLRI was used to cover a named account holder for accident or sickness. Many BLRI products were added without the consent or knowledge of the customers or banks led customers to believe that in order to take out a commercial or business loan, BLRI was a requirement and not optional. BLRI has been sold by these lenders:

- Barclays
- HSBC
- Lloyds TSB Bank
- Royal Bank of Scotland/National Westminster Bank
- Santander

How does this BLRI product compare to PPI?

There is little to distinguish the 2 products save that PPI has had a higher public profile. The rules in relation to the selling of general insurance made by the FCA's predecessor (the Insurance Conduct of Business Rules) apply to BLRI.

What happened in Central London County Court?

The matter was tried by HHJ Faber in Central London County Court on 29 February 2016. She dismissed the claim.

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Are there any other prior authorities of relevance?

These 3 authorities are referred to in the judgment of Lord Justice Lewison:

Fuller v. Happy Shopper Markets Limited [2001] EWHC Ch 702 (High Court, Chancery Division, Lord Justice Lightman)

A declaration was granted in favour of a tenant that whilst legal set off was confined to judicial proceedings, nevertheless the tenant was entitled to rely on the principle of equitable set off in view of the close link between the tenant's claim for repairs and the landlord's cross claim for rent arrears. A landlord intending to levy distress should ensure that a tenant had no claims which could be offset against the outstanding rent by way of equitable set off.

Fearn v. Anglo-Dutch Paint & Chemical Company Limited [2010] EWHC 1708 (Ch) (High Court, Chancery division, Intellectual Property – Deputy Judge George Leggatt QC)

Where one party had a claim against another party who had a cross-claim, the 2 claims could not be netted off so as to extinguish each liability to the extent of the other except by either agreement or by a judgment of a court. Once both liabilities had been established by agreement or judgment, that where the 2 claims were made reasonably and in good faith and were so closely connected that it would be manifestly unjust to allow one party to enforce payment without taking into account the cross-claim, an equitable set-off arose before agreement or judgment the effect of which was not to extinguish or reduce either claim but rather that neither party might exercise any rights contingent on the validity of its claim except in so far as it exceeded the other party's claim. The court also had a discretion to order any judgment sum to be netted off against any other such sum as from the date on which the existence and amount of the two liabilities were established.

Equitas Limited v. Walsham Brothers & Company Limited [2013] EWHC 3264 (Comm) (High Court, QBD, Commercial Court – Mr Justice Males)

Damages were in principle recoverable (subject to ordinary principles of remoteness and mitigation) for breach of an obligation to remit money where that failure to remit caused a loss. Unless there was some positive reason to do otherwise, the law would proceed on the basis that a claimant kept out of its money had suffered a loss as a result. Specific evidence to that effect was not required. The defendant owed a duty to the syndicates and to the 1st claimant to remit funds reasonably promptly after receipt. The duties were owed in contract, tort & restitution and those duties were continuing ones. The defendant was not entitled to rely upon any cross-claim by way of defence to those claims.

On what basis did Mr Ishaq seek permission to appeal?

Mr Ishaq sought permission to appeal the judgment of Judge Faber on these 2 grounds:

- The mis-selling of BLRI by the bank gave him a right of equitable set-off, and
- The valuation evidence showed the property was sold at an under value.

What submissions did Mr Ishaq make at the oral permission hearing?

Although the filed Grounds of Appeal filed were said to be 'quite discursive' by Lord Justice Lewison, the oral submissions emphasised these 2 points:

- but for the mis-selling of the BLRI and the refund Mr Ishaq received, he would not have been in arrears at all and there would have been no event of default, and
- by reason of a breach of equitable duty the receiver sold the London property at an undervalue.

Did Lord Justice Lewison grant permission to appeal? Why did he do this?

Permission to appeal was refused. Lewison LJ said there was no realistic prospect of success on this appeal and that there was no other reason for the Court of Appeal to hear it. He also ruled that the 1st ground was 'legally incorrect'.

What reasons did Lewison LJ give for refusing permission to appeal on equitable set-off?

Lord Justice Lewison started his judgement by making the prescient observation that whilst the Particulars of Claim alleged mis-selling of BLRI, they did 'not allege a failure to follow the FCA provisions as to procedure'. He also noted that this had not been 'raised in the skeleton argument for trial by Mr Ishaq' so that the trial judge could not be 'at fault for not making a finding on this'.

Lewison LJ set out Mr Ishaq's submission that his claim for repayment of BLRI premium wrongly debited to his account meant that the principle of equitable set-off would extinguish the bank's claim in consequence there never was a default situation. On this Lewison LJ started by referring to *Fearn* in which the judge held that a cross-claim did not extinguish a claim except to a limited extent. Lewison LJ observed that Mr Ishaq did 'not argue that the *Fearn* decision is wrong' but instead he relied on *Happy Shopper Markets*. Lewison LJ observed that this had been 'a case of self-help concerning distress for

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rent' where the tenant had written to the landlord on 14 February 1999 complaining about the state of repair of his roof and requiring re-imbusement of his rent. It was 2 years later until the landlord distrained for rent.

He noted how Mr Justice Males in *Equitas* dealt with *Fearn's* where he had said that the 'context in which the issue arose is important. The tenant had asserted a right of set off, but the landlord had sent in the bailiffs to levy a distress for the arrears without taking account of the earlier overpayments' with Lightman LJ ruling that 'the two claims were sufficiently closely connected to give rise to a right of equitable set off'. Because of this Lewison LJ ruled that in his 'judgment there is no real conflict between the decision in *Happy Shopper* and the decision of Mr Leggatt in *Fearn's*' adding that he 'respectfully agreed' with the decision in *Fearn's*.

Concluding on this issue, Lewison LJ ruled that this was to his mind 'a convincing explanation as to how to reconcile *Happy Shopper* and *Fearn's*' adding that 'on the facts of this case, there never was a claim for the repayment of the BLRI before the bank appointed LPA receivers'. Lewison LJ said he agreed with the bank's counsel that 'the existence of a future claim cannot give rise to an equitable set-off' adding that Mr Ishaq 'cannot re-write history'.

What reasons did Lewison LJ give for refusing permission to appeal on sale at an undervalue?

Mr Ishaq claimed that the London property was sold at an undervalue following its sale at public auction. Lewison LJ started by noting that the trial judge 'heard evidence from 2 valuers' but that she had 'preferred the bank's evidence' because 'the bank's values were more realistic'. As to Mr Ishaq's contention about a prospective development value for the site, Lewison LJ dismissed this shortly saying 'this was so speculative' that the trial judge 'could not attribute more than the market value where the bank's valuer gave the present valuation'. He observed that this had been 'a matter of evaluation for the trial judge' adding that the Court of Appeal 'will rarely, if ever, interfere with an evidential conclusion reached by an experienced circuit judge'.

What will happen next?

Lord Justice Lewison summarily assessed the bank's costs in resisting the application for permission to appeal at £8,000. It seems that the other property has since been sold too.

What should those advising clients with an insurance mis-selling claim do?

Here although Mr Ishaq had claimed he had been mis-sold the BLRI, his particulars of claim in his original county court action did not specify how and nor did they set out the particular breaches of the ICOP rules he relied on. Where a lender concedes mis-selling of PPI, it has to pay the sum to the customer including any statutory interest less any withholding tax. This is the default position even where a customer is in arrears. Where a customer wants a PPI refund to be used to clear loan arrears, or reduce the loan amount, then it has to tell the lender that is what he wants. Here Mr Ishaq left it too late having accepted the BLRI refund when he should have used that to clear any arrears instead.

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David Bowden is a solicitor-advocate and runs [David Bowden Law](http://DavidBowdenLaw.com) which is authorised and regulated by the Bar Standards Board to provide legal services and conduct litigation. If you need advice or assistance in relation to consumer credit, financial services or litigation he can be contacted at info@DavidBowdenLaw.com or by telephone on (01462) 431444.