



# TRADING LAW BULLETIN

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### CONSUMER CREDIT

**The Consumer Credit Bill.** On 16th December 2004 the Consumer Credit Bill was given a First Reading in the House of Commons. The main features of the Bill are the introduction of a concept of unfair credit relationships to replace the extortionate credit bargain provisions, new requirements to provide customers with information about the state of their accounts and on default, indefinite consumer credit licences with a periodic charge, OFT power to impose requirements on licensees and to impose financial penalties on default, a general power on the part of the OFT to require information, a Consumer Credit Appeals Tribunal to be established, the monetary limits under the Act are to be removed, special provisions are made as to giving information to customers in respect of interest payable on judgment debts, the provision relating to irredeemable unenforceability would be removed and the Financial Services Ombudsman Scheme would apply to consumer credit business.

**Credits Cards - Connected Lender Liability.** The dispute between the OFT and some credit card issuers as to the extent of Section 75 liability in respect of credit card transactions carried out overseas has been decided in the Commercial Court. It was held that, whilst four-party transactions (where the merchant acquirer is not the card issuer) nevertheless constituted arrangements for the purposes of the Act, the majority of credit card transactions carried out overseas would not attract Section 75 liability. Permission to appeal to the Court of Appeal was granted and a Notice of Appeal has been lodged (*Office of Fair Trading v. Lloyds TSB Bank Plc and Others*, Gloster, J, 12th November 2004).

**Unenforceability.** Where a condition was imposed that arrears under a first mortgage would have to be paid off as part of a home improvement loan, a County Court has held that the agreement was irredeemably unenforceable for failing to state the amount of credit accurately. The same conclusion was reached in respect of an insurance premium which resulted in the broker getting commission on the policy. It was also held that charging the contractual rate on arrears and on costs and charges resulted in the agreement being an extortionate credit bargain (*London North Securities v. Meadows*, 24th October 2004).

**Section 75 Disclosure.** A company (by then in administration) had insured against potential liability under extended warranties provided in respect of consumer goods the acquisition of which had been financed under regulated agreements. The finance company which had the Section 75 liability sought to obtain details of the insurance but the administrators refused to provide it. The Court of Appeal upheld an order that such details be given (*Re O T Computers Limited* [2004] Ch 317).

**Replacement Loans.** The Court of Appeal considered the

situation whereby an original loan which was in some way ineffective had been replaced by one which was not directly tainted. It was said that it would be natural to expect that if an obligation incurred is legally ineffective in any way, any new obligation arising out of the release of the earlier obligation would be legally ineffective in a similar way. The decision was in the context of undue influence and the Court held that if a mortgage is voidable for undue influence, a replacement mortgage, even if undue influence is not operative at the time of such replacement, will itself be avoidable at any rate if the replacement mortgage is taken out as a condition of discharging an earlier avoidable mortgage (*Yorkshire Bank Plc v. Tinsley*, 25th June 2004).

**Electronic Communications.** The Consumer Credit Act 1974 has been amended by the Consumer Credit Act 1974 (Electronic Communications) Order 2004 which came into force on 31st December 2004. The Order modifies both the Act and Regulations for the purpose of enabling electronic communications to be used for concluding regulated consumer credit agreements and for the purposes of sending notices and other documents such as copies under Sections 63 and 64. A new Section 176A is introduced to provide for electronic transmission of documents. If a transmission is made in accordance with that provision it becomes an "appropriate method". The Consumer Credit (Enforcement, Default and Termination Notices) (Amendment) Regulations 2004 provide that notices to be given under those Regulations must be in paper form.

### FOOD

**Labelling.** A prosecution was brought in respect of a food drink which had a label stating that the drink was 100% fruit juice. The label also had the word "burst" after the food name and there was a list of ingredients on the back of the bottle. The Magistrates held that the descriptions were not false or misleading within Section 23 of the Trade Descriptions Act 1968 and a consumer would be able to read the whole of the label. They also held that if there had been a false description a reasonable consumer would not be misled. The prosecution appealed by way of case stated to the Divisional Court who held that the Magistrates had been entitled to reach the conclusions which they did on the evidence apart from the conclusion that the word "burst" qualified the other wording. The Magistrates had used the correct test and the appeal was dismissed (*Lewin v. Purity Soft Drinks*, 14th December 2004).

**Amendment of the 1990 Act.** The Food Safety Act 1990 (Amendment) Regulations 2004 implement EU Regulation 178/2002 and replace the existing definition of "food" by reference to the Regulations. The Regulations came into force on 7th December 2004.

**Code of Practice.** The Food Standards Agency has issued a Code of Practice which updates, consolidates and replaces the previous 20 separate Codes of Practice issued under the 1990 Act.

**Food Regulations.** The General Food Regulations 2004 provide for the enforcement of certain provisions of Regulation (EC) No. 178/2002 relating to the general principles and requirements of food law. They come into force on 1st January 2005.

**Due Diligence.** The owners of a hotel were convicted of offences under the Food Safety legislation and sought to reply upon the defence of due diligence in Section 21 of the 1990 Act. The due diligence notice referred to two employees who, it was said, had failed to carry out the necessary clean up. During the trial the District Judge raised the possibility that the Head of Health and Safety of the company was also responsible but no application was made to name him in the due diligence notice. The company was convicted because it could not rely on the act or default of the Head of Health and Safety because he had not been named. The Defendants' appeal to the High Court succeeded. Whilst the Judge had been right to convict in the circumstances and in the absence of the requisite notice, the Administrative Court had power to remedy that defect under Section 28A(3)(b) of the Supreme Court Act 1981. But for the technical omission it was clear that the Defendants would not have been convicted (*Kilday Court Hotels Limited v. Wigan MBC*, (2005), 169 JP 1).

#### HEALTH AND SAFETY

**Sentence.** The Defendants had operated a freight service using heavy lifting trucks for containers. An employee had been killed when a truck reversed over him. The Court of Appeal held that fines of £250,000 and £50,000 for contraventions of the 1974 Act and the Docks Regulations 1988 were manifestly excessive as there was no significant aggravating factor apart from the fatality and there was much mitigation. The fines were reduced to £200,000 and £25,000 (*R v. P & O Ferries (Irish Sea) Limited*, 24th November 2004).

**Sentence.** A trainee diver died when attending the Defendants' basic training course. There were breaches of the Diving At Work Regulations but the Judge held that the death had not been caused by or contributed to by any failures by the Defendants. Each Defendant was fined £3,000 with costs of £7,500. The Court of Appeal reduced the fines to £1,500 and costs of £4,000. Once it had been accepted that there was no link between the Defendants' breaches and the death, the Court had to focus on how the breaches affected the general safety aspects (*R v. Wilson*, 2nd July 2004).

#### PROPERTY MISDESCRIPTIONS

**Informations.** The Defendant appealed following convictions in the Magistrates' Court in respect of offences under the Property Misdescriptions Act 1991. The offences related to a purported absence of damp in the property in question. The Defendant argued in the High Court that the informations had not been sufficiently particularised. The Court dismissed the appeal and held that the Magistrates had been entitled to look at extraneous material in deciding if the informations were adequate. There had been clear, strong evidence against the Defendants in respect of strict liability and there was no due diligence defence (*Dacre Son & Hartley Limited v. North Yorkshire CC*, (2005) 169 JP 59).

#### TRADE DESCRIPTIONS

**Abuse of Process.** A husband and wife were charged under Section 1 of the Trade Descriptions Act 1968 in respect of a conservatory. It was said that when the conservatory was built

certain things did not conform to the contract. In the Crown Court the wife was acquitted of all counts and costs were awarded against the prosecution. The husband was convicted of certain counts and appealed to the Court of Appeal. The Crown Court Judge had been asked to stay the case as it was an abuse of process in that there was no evidence of any fraudulent activity nor persistent breaches. The local authority's enforcement policy was considered. The Judge refused to stay the proceedings. The Court of Appeal quashed the convictions and said that although the Judge was exercising a discretion when refusing a stay there was evidence that the enforcement criteria had not been satisfied and that the proceedings were oppressive. The Court of Appeal said that local authorities should consider with care the terms of their policies and ensure that the criteria are satisfied (*R v. Adaway* (2004) 168 JP 645).

#### SALE OF GOODS

**Supply of Fuel.** There was a standard form of agreement between a service station licensee and an oil company. It provided for adjustment of the amounts payable to take account of changes in commercial circumstances generally. The contracts provided for the volume of fuel to be measured at the terminal even though it was loaded at above ambient temperature. The licensees appealed against the decision that adjustments made were not in breach of contract and that the oil company could measure the fuel as it had done. The Court of Appeal held that there had been no breach of contract, the measuring of fuel was established by industry practice and there was no requirement to re-measure it on delivery by reason of the Weights and Measures (Liquid Fuel Carried By Road Tanker) Order 1985 (*Esso Petroleum Co Ltd v. Addison*, 12th November 2004).

#### UNDER-AGE SALES

**Evidence.** Following a test purchase of alcohol a prosecution was brought against the Defendants that they had sold wine to a 15 year old girl. The label said that it was 7.5% proof. Following the prosecution evidence there was a submission that there was no certificate of analysis of the contents of the bottle and the Magistrates dismissed the case. The prosecution's appeal to the High Court was allowed. Under Section 24(1) of the Criminal Justice Act 1988 the Court could draw such inferences as it thought proper from documents and the Magistrates should have done so in respect of the label which stated 7.5% proof. The matter was remitted to the Magistrates' Court (*City of Sunderland Council v. Dawson*, 12th November 2004).

#### TRADE DESCRIPTIONS

**Summonses.** A prosecuting authority applied to quash a decision by a Magistrates' Court which refused to issue summonses. The case involved clocking and informations were laid under the Theft Act 1968 and under the Trade Descriptions Act 1968. The Court considered that the informations were bad for duplicity and the level of criminality could be met by proceeding on only the Trade Descriptions' allegations. The High Court granted the applications saying that the Magistrates' Court had been wrong to refuse to issue the summonses. This could only be done if there was an abuse of process or impropriety. There had been no duplicity as there was a clear distinction between the two Acts (*R v. London Borough of Newham Magistrates' Court* (2004) 168 JP 658).