



TRADING LAW BULLETIN

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CONSUMER CREDIT

Default Notices. Consequent upon the implementation of the relevant part of the Consumer Credit Act 2006, the Consumer Credit (Enforcement, Default and Termination) (Amendment) Regulations 2006 came into force on 19th December 2006 extending the 7 day period for such notices to 14 days.

Title. A company acquired a vehicle on hire purchase from the Defendant. A director subsequently purported to sell the vehicle to the Claimant. Upon discovering the sale the Defendant contacted the Claimant requesting return of the vehicle. The Claimant issued proceedings seeking a declaration that the Claimant had acquired good title to the vehicle under subsection 27(2) of the Hire Purchase Act 1964 by virtue of the fact he was a private purchaser acting in good faith without notice of the hire-purchase agreement. At trial the judge found that, notwithstanding the fact that the Claimant intended to re-sell the vehicle, the Claimant was a private purchaser. However, as the Judge did not accept the Claimant's evidence about the source of the money which the Claimant used to purchase the vehicle, the Judge was not satisfied that the Claimant was acting in good faith. The Claimant therefore did not acquire good title. The Claimant appealed on the basis that "good faith" related only to the disposition of the motor vehicle and not to the origin of the purchase money. The Defendant requested the judgment be upheld on the additional ground that the Claimant was not a private purchaser. In the High Court Gloster J found that in the circumstances of the case the judge was entitled to find that the Claimant had not acted in good faith. Gloster J had regard to the fact that the burden to prove he was acting in good faith was on the Claimant. Gloster J did not uphold the additional ground on the basis that a selling on of a single vehicle did not necessarily make the Claimant a trade purchaser (*GE Capital Bank v. Ruston* [2005] EWCA Civ 1556; [2006] All ER 865 distinguished) (*Wilson v. Toyota Financial Services (UK) Plc*, 24th November 2006).

Cold calling. The Financial Services Authority has imposed a fine under its mortgage regulation provisions in respect of the cold calling of customers. The fine was also for failings when dealing with ASU policies (Daily Telegraph, 22nd November 2006).

Hire-Purchase Termination. A County Court has ruled that Section 100(1) of the 1974 Act only applies if there is a termination under Section 99 (*First Response Finance Limited v. Donnelly*, 16th October 2006).

UNFAIR TERMS

Implied Terms

In a case involving a dispute about contractual rights to occupy sites on a static caravan park, the issue arose as to whether implied terms could be unfair under the 1999 Regulations. The Chancery Division held that the Regulations apply only to express terms (*Baybut v. Eccle Rigs Country Park Limited*, The Times, 13th November 2006).

Employment. The Court of Appeal held that the provisions relating to the payment of a discretionary bonus did not fall within the scope of the Unfair Contracts Terms Act 1977 (*Commerzbank AG v. Keen*, The Independent, 23rd November 2006).

ENTERPRISE ACT

Costs. Following the hearing of proceedings under Part 8 of the Enterprise Act an issue arose as to whether the internal costs of the Trading Standards Department were recoverable. The County Court Judge said that an analogy with costs in criminal cases was unhelpful. Such costs were, however, payable by the Defendant under the Civil Procedure Rules (*Wakefield MDC v. Nazir*, 18th July 2006).

Enforcement Powers. The Enterprise Act 2002 (Amendment) Regulations 2006 implement Regulation (EC) 2006/2004 and make provision for the entry of premises and other enforcement procedures.

Cross-border Enforcement. A Dutch court has ruled against the UK OFT in an application for an injunction in respect of allegedly misleading advertisements relating to prize competitions and the sale of goods. The OFT has lodged an appeal (*OFT v. Best Sales BV*, 10th October 2006).

ADVERTISING

Costs. Following a conviction in respect of a large advertising hoarding, the maximum fine of £1,000 was imposed together with costs of approximately £7,500. The High Court held that costs should not ordinarily be greatly at variance with the fine and they were reduced to £2,250 (*BPS Advertising Limited v. Barnet LBC*, 5th December 2006).

Comparative Advertising. Direct mail advertising compared prices for supermarket goods. Proceedings were brought in Belgium in respect of claims that the advertisements were misleading. Under a reference by the Belgian courts, the ECJ held that Directive 97/55/EC did not prevent such advertising relating collectively to selections of goods nor did it require that all products in the "basket" be expressly listed. General guidance as to comparative advertising was also given (*Lidl Belgium GmbH & Co KG v. Etablissements Franz Colruyt NV* [2006] All ER (D) 92 (Sep)).

POLLUTION

Terms of Permit. A company was prosecuted for breaching the terms of a permit which provided that no odours should be emitted at levels which were likely to cause pollution as perceived by an authorised officer of the Agency. The Magistrates' Court dismissed the informations but the High Court upheld the prosecution appeal. It was held that the relevant words were to be construed as an evidential requirement and did not oust the jurisdiction of the Court to determine whether in fact the levels offended against the standards (*Environment Agency v. Biffa Waste Services Limited*, The Times, 20th December 2006).

NOISE

Abatement Notice. The High Court dismissed an appeal in respect of a conviction for breach of an abatement notice relating to noise from quad bikes. The expert instructed by the Defendant said he could not assist because no noise measurements or recordings had been made by the enforcement authority. The High Court held that the Defendant company had received a fair trial and they could themselves have obtained expert witnesses as to the noise level (*Gillbard v. Caradon District Council*, 23rd November 2006).

REGULATORY REFORM

Legislation. The Legislative and Regulatory Reform Act 2006 was enacted on 8th November 2006 and comes into force on 8th January 2007.

SALE OF GOODS

Title. Following the insolvency of the customer of a bank there was a dispute about the ownership of an industrial machine. Finance for acquiring goods was provided by a creditor and the issue arose as to whether the customer was a mercantile agent so as to pass title. The High Court held that there was an express provision not to sell the machine in the ordinary course of business and an implied term could not contradict the express term. In addition the buyer had been put on enquiry about the authority to sell (*Fairfax Gerrard Holdings Limited v. Capital Bank Plc*, 28th November 2006).

DOORSTEP SELLING

National Prohibitions. Austrian Regulations prohibited the doorstep selling of a large number of goods including silver jewellery. This included the organising of jewellery parties at private residences. A business based in Germany carried out such activities and proceedings were brought by a competitor in Austria. After reference by the National Court in Austria to the European Court of Justice, the ECJ held that Article 28 EC did not preclude such a provision where it applied to all relevant traders. The fact that the sale of jewellery of low value in private homes might be more appropriate and efficient than sale in a fixed commercial structure, was not a sufficient reason for holding that the national provision was caught by Article 28 EC (*A-Punkt v. Schmidt* [2006] All ER (EC) 1118).

PACKAGE TRAVEL

Inclusive Price. The Court of Appeal upheld the decision of the High Court that the definition of "package" in the Civil Aviation (Air Travel Organisers' Licence) Regulations 1995 contemplated that an agent could sell or offer component parts outside the package and that to amount to a package, component parts had to be sold at an inclusive price. Guidance to the contrary by the Civil Aviation Authority was wrong. The appropriate direction was that the guidance should be withdrawn (*Association of British Travel Agents Limited v. Civil Aviation Authority*, 17th October 2006).

VAT and Supply. In the Tribunal dealing with a VAT issue it was said that the Package Travel Etc. Regulations 1992 required that agents comply with certain consumer protection responsibilities under those Regulations. The Tribunal held that the existence of such statutory consumer protection could not change the identity of the person making the supply for VAT purposes (*International Life Leisure Limited v. HMR & C*, 12th July 2006).

PRODUCT LIABILITY

Medical Equipment. A civil claim was brought in respect of a total hip replacement operation. The Judge found that the prosthesis left the factory without any defects so that the statutory defence under Section 4 of the Consumer Protection Act 1987 was established. The Court of Appeal upheld the decision (*Piper v. JRI (Manufacturing) Limited*, 17th October 2006).

HEALTH AND SAFETY

Sentence. A hospital trust was fined £100,000 following the fatal infection of a patient. The Court of Appeal held that by adopting a starting point of £150,000 the Judge was in error and, having regard to the presence of strong mitigating features and no aggravating features, the fine should be reduced to £40,000 (*R v. NHS Southampton Trust*, 14th November 2006).

Sentence. The Court of Appeal upheld an Attorney-General's Reference against an unduly lenient suspended sentence where the Defendant had committed gross negligence in not protecting the health and safety of employees. The case involved the operation of a large stone cutting machine which resulted in catastrophic injuries to the head of the employee. An immediate custodial sentence of 15 months' imprisonment was substituted (*R v. Shaw*, 4th October 2006).

Work Equipment. In a civil action the House of Lords have considered the ambit of the Provision and Use of Work Equipment Regulations 1998 (*Robb v. Salamis (M & I) Ltd*, 13th December 2006).

PRICING

Price Promise. A retailer was convicted of failing to honour a price promise in respect of white goods. On appeal the High Court quashed the conviction. The case stated showed that there was doubt as to whether the two products in question were the same. The Court also gave guidance as to the case stated procedure (*DSG Retail Ltd v. Stockton On Tees BC*, 15th November 2006).

UNDER-AGE SALES

Persistent Selling. The Violent Crime Reduction Act 2006 (when in force) will include amendments to the Licensing Act 2003 in respect of the persistent selling of alcohol to children.

Knives. The Violent Crime Reduction Act 2006 (when in force) will include amendments to the Criminal Justice Act 1988 in respect of the sale of knives including raising the age limit to 18.

BUSINESS NAMES

Legislation. The Companies Act 2006 (when in force) will replace (in Sections 1200 to 1206) the provisions relating to business names in the Business Names Act 1985.

TRADE MARKS

Confiscation. A Defendant appealed against confiscation orders made following guilty pleas including counts relating to Section 92 of the Trademarks Act 1994. The case involved a large scale industrial tablet press along with packaging machinery used to produce various types of counterfeit tablets. Substantial sums were ordered by way of confiscation with four years' imprisonment in default. The Court of Appeal upheld the decision (*R v. Balentine*, 10th November 2006).