



TRADING LAW BULLETIN

ISSUE NO. 59
DECEMBER 2008

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CONSUMER CREDIT

Carrying on a business. The Claimant was a banker who lent his own money to the Defendant for gambling purposes. The sums involved were very substantial and were lent and substantially repaid over a number of years. Two of the loans were beneath the monetary limit and it was alleged they were unenforceable because of the absence of a licence. The High Court held that regularity was not the only indicium to take into consideration as to whether the lender was carrying on a business or not. Blair, J held that the case was long way from consumer lending and the Claimant was not carrying on a moneylending business (*Khodari v. Tamimi*, 18th December 2008).

Unfair Terms. A bank applied for summary judgment on a guarantee. The Defendant alleged that a provision in the guarantee to the effect that the guarantee would not be affected by the bank's dealings with the customer was unfair under the 1999 Regulations. Field, J held that for a guarantee to be covered by the Regulations both the guarantee and the principal contract to which it was ancillary must be executed by a consumer and that was not so in this case (*Barclays Bank plc v. Kufner*, 10th October 2008).

Investment Properties. The Legislative Reform (Consumer Credit) Order 2008 came into force on 21st October 2008 and introduced a new Section 16C to the Act relating to investment properties. It also dealt with amendments in respect of fixed-sum credit agreement statements and notices in arrears.

OFT Approval. The OFT has approved the Debt Managers Standards Association's Code of Practice under the Enterprise Act 2002.

Limitations. Sixteen years after judgment under a guarantee of a loan the guarantor sought to set aside the judgment and the charging order. The Court of Appeal dismissed the argument that enforcing the judgment or charging order would be barred by the Limitation Act 1980 (*Yorkshire Bank Finance Limited v. Mulhall*, 24th October 2008).

Possession Order. The Appellant appealed against the refusal of an application to adjourn possession proceedings. The loan had been a bridging facility over nine months granted by the Claimant to other Defendants who had attempted to assist the borrower. The Court of Appeal dismissed the appeal because the possibility of discharging the mortgage debt within a reasonable period

was remote. However, there was an undertaking not to exercise the possession warrant for a specified period (*Cheval Bridging Finance Limited v. Hastings*, 12th December 2008).

Card Payments. A merchant claimed against the bank in respect of card payments which it said were due. The scheme rules had prohibited aggregation and the Claimant diversified into e-commerce, in particular in relation to the sale of prescription medicines by third parties to cardholders. The High Court held there was no agreement to vary the conditions and the claim was dismissed. (*Lancore Services Limited v. Barclays Bank plc*, 25th June 2008).

FOOD

Spirit Drinks. The Spirit Drinks Regulations 2008 come into force on 16th January 2009 and provide for the enforcement of Regulation EC (No.110/2208) in respect of the description, labelling etc of spirit drinks.

UNFAIR TERMS

Charges. The High Court gave a further judgment in the bank charges matter relating to whether terms imposing the charges were penalties (*OFT v. Abbey National plc*, 8th October 2008).

ADVERTISING

Comparative Advertising. The Appellant produced a beer using a champagne method and an application was made in the Belgium court seeking a prohibition on the use of certain wording such as "the first BRUT beer in the world". The Belgium courts referred to the ECJ questions such as whether a reference to a type of product could be comparative advertising. The Court held that it could and a literal interpretation of the Directive requiring that a single competitor be identified would be incompatible with the broad definition of comparative advertising. It was also held that advertising which referred to a type of product but did not identify a competitor would not be permissible under the Directive (*De Landtsbeer Emmanuel SA v. Comité Interprofessionnel* [2008] All ER (EC) 1068).

HEALTH AND SAFETY

Proof of Breach. An employee suffered fatal injuries when a dumper truck he was driving fell on its side and he was buried under its load. The Appellants appealed from the Court of Appeal in respect of convictions under the 1974 Act. One question was whether it was sufficient for the prosecution merely to prove a risk of injury resulting from a state of affairs or whether it was necessary to prove specific breaches of duty. The House of Lords dismissed

the appeal and said that Sections 2 and 3 of the Act described a result which had to be achieved by the employer and they did not prescribe a particular means of achieving such a result. The prosecution only had to prove that the result had not been achieved or prevented and the onus then passed to the defence to make good grounds of reasonable practicability (*R v. Charget Limited, 10th December 2008*).

Sentence. The Health and Safety Act 2008 was passed on 16th October 2008 and will increase the maximum fines for certain breaches and increase the range of imprisonment terms for Health and Safety offences.

Sentence. A prison term of 3 ½ years was passed upon a conviction for manslaughter following the rebuilding of a chimney which resulted in blocking the flue and fatal carbon monoxide poisoning. The Defendant was of previous good character but had taken shortcuts and had not inspected the boiler. Despite the gravity of the offence, there were positive qualities and the sentence was reduced to 2 ½ years (*R v. Johnson, 19th November 2008*).

Sentence. An employee of the Defendant company had lost parts of three fingers in machinery. Fines totalling £265,000 were imposed but the Court of Appeal said they were too high and the total was reduced to £180,000 (*Health & Safety Executive v. Tulip Limited, 20th November 2008*).

Manual Handling. In a civil case the Judge held that a failure to carry out a risk assessment was not causative of an injury. The Court of Appeal allowed the appeal saying that it was important to focus on whether steps were taken to reduce the risk of injury (*Egan v. Central Manchester Trust, 15th December 2008*).

PROCEDURE

Instigation of Proceedings. In a prosecution for insider dealing the question arose as to whether the FSA needed the consent of the Secretary of State or the DPP to institute proceedings. The Magistrates' Court held that the FSA's primary role was as the regulator and it was implicit that it should have unfettered powers to begin proceedings. This was upheld by the Divisional Court (*R (Uberoi) v. Westminster Magistrates' Court, 2nd December 2008*).

REGULATORY REFORM

LBRO Plan. The Local Better Regulation Office has outlined a three year plan which was published in October 2008.

Commencement Order. Certain parts of the Regulatory Enforcement and Sanctions Act 2008 came into force on 1st October 2008. These included provisions relating to LBRO, civil sanctions and regulatory burdens.

NOISE

Practical Means. A Magistrates' Court upheld a statutory defence against the contravention of a noise abatement notice in respect of a pub. The local authority's appeal was

dismissed. The High Court held that the Magistrates were fully aware of the contentions and that it was plain that the Magistrates agreed with the evidence as to the financial effects of employing other measures so that they were not practicable (*St Albans District Council v. Patel, 23rd October 2008*).

MEDICINES

Sentence. An error on the part of a technician resulted in the death of a baby in hospital. In a prosecution under the Medicines Act 1968 a fine of £75,000 was imposed. The Court of Appeal substituted a fine of £15,000. The imposition of a financial penalty on a not-for-profit organisation should not punish such a body in a way which would materially impact on its ability to discharge its public duty. The Judge had not given adequate recognition of the fact that the case was one of pure vicarious liability for the act of two employees who had been properly designated and trained (*R v. Guy's & St. Thomas NHS Trust [2008] 4 All ER 1174*).

PRODUCT LIABILITY

Producer. In a case involving liability in respect of vaccines the House of Lords referred to the ECJ the question of limitations in the context of substituting a party by the inclusion of a French parent company of the UK distributor (*O'Byrne v. Aventis Pasteur SA [2008] 4 All ER 881*).

UNFAIR COMMERCIAL PRACTICES

Established Means. In December 2008 the OFT issued a consultation on the development of the use of established means to encourage control of unfair commercial practices under Regulation 19(4) of the Consumer Protection from Unfair Trading Regulations 2008 and Regulation 13(4) of the Business Protection from Misleading Marketing Regulations 2008.

TRADEMARKS

Confiscation Orders. The Appellant had been convicted of possession and distribution of games and discs with false trademarks and appealed against the extent of a confiscation order. The Court of Appeal allowed the appeal in respect of the calculation of relevant value of certain property (*R v. Roach, 15th October 2008*).

Infringement. A Defendant was prosecuted in respect of CDs and DVDs bearing logos of producers. The defence was that the material bearing the trademarks was of such poor quality no-one would think that it was that of the trademark owner. The Court of Appeal dismissed an application for permission to appeal holding the goods in the case did not involve the use of a trademark for a descriptive purpose but was pure counterfeiting (*R v. Boulter, 7th October 2008*).

CONSUMER PROTECTION

Proposal for Directive. The Commission has issued a proposal for a Directive of the Parliament and of the Council on Consumer Rights (*COM(2008)614/3*).