TRADING LAW BULLETIN

ISSUE NO. 71
DECEMBER 2011

Gough Square Chambers
6-7 Gough Square
London EC4A 3DE
Telephone: 020 7353 0924
Fax: 020 7353 2221
DX: 476 London
Email: gsc@goughsq.co.uk

CONSUMER CREDIT

Meaning of "debt collection". In a VAT case the Court of Appeal considered the exemption for "debt collection". The ECJ had previously held that there was a single supply of services in a payment plan scheme where money was collected from dental patients and passed to dentists less a commission. The Court of Appeal said that the ECJ decision concluded that the words "debt collection" in the carve out from the exemption had a meaning capable of being applied to "transactions concerning payments" (*Commissioners for Her Majesty's Revenue and Customs v. Axa UK plc* [2011] EWCA Civ 1607).

Credit hire. The Court of Appeal reaffirmed that the fact that the Claimant had been offered a replacement car but rejected it did not bar a claim for hire charges (*Carly Sayce v. TNT (UK) Limited* [2011] EWCA Civ 1583).

Credit hire. The Court of Appeal have considered the issue of the recovery of interest on credit hire charges (*Pattni v. First Leicester Buses Ltd* [2011] EWCA Civ 1384).

Costs in mortgage proceedings. The Court of Appeal held that where there was a dispute between a mortgagor and mortgagee as to what was owed by the one to the other, including legal costs, the proceedings should be conventional proceedings by way of an account of what was due under the mortgage and not against the mortgagee's solicitors under the Solicitors' Act 1974 except for very limited purposes (*Tim Martin Interiors Limited v. Akin Gump LLP* [2011] EWCA Civ 1574).

Litigation Funding. A solicitor obtained funding to pay disbursements and ATE premiums in CFA claims for clients in respect of regulated consumer credit agreements. The Claimant alleged a repudiation by a refusal to make advances. The High Court held that the Defendant had been entitled to refuse to make advances on the ground that conditions precedent had not been satisfied (*McKay v. Centurian Credit Resources LLC* [2011] EWHC 3198 (QB)).

Credit cards. The Competition Commission has given notice of intention to revoke the Credit Cards (Price Discrimination) Order 1990. This arose because of the Payment Services Regulations 2009.

Sale under a mortgage. The Claimant owned some land and buildings which were subject to charges. Receivers were appointed and in due course the Claimant vacated the property but left behind a number of cattle. The question arose of whether cattle were "goods" for the purposes of an order for sale. The Chancery Division held that cattle were chattels personal and therefore goods and had been in the possession of receivers as bailees (*National Westminster Bank Plc v. Hunter*, 23rd November 2011).

Claim against Solicitors. The Chancery Division held that solicitors were liable to pay monies to a lender where the mortgage advance had been paid to other solicitors who purported to be acting for the vendors and when that transaction was a fraud. The Court held there had been no contributory negligence (*Mortgage Express v. Iqbal Hafeez*, 10th October 2011).

Licensing. A licensee's licence was revoked by an Adjudicator of the OFT and it appealed to the First-Tier Tribunal. During the course of the hearing the OFT made an application that the appeal be struck out. The Appellants had admitted that there had been a separate company to send letters to customers on the apparent basis that that company was an independent firm of solicitors instructed to threaten legal action. The Tribunal dismissed submissions that there was no intent to cause consumer harm saying that the submission was somewhat disingenuous. The appeal was struck out (*Logbook Loans Limited v. Office of Fair Trading* (CCA/2009/0010 and 0011)).

Guarantees. In an application for summary judgment a guarantor asserted that the lender was estopped from enforcing the guarantee because of representations as to the refinancing transaction and because there had been a conflict of interest. The High Court held that there was no prospect of success and the representations contended for, to the effect that the lender would not enforce its rights simply because of an opportunity to have an exclusive period to attempt refinancing, was inconceivable (*Standard Bank Plc v. Jaber* [2011] EWHC 2866 (Comm)).

Disclosure. A finance company which had repossessed caravans and had allegedly suffered loss on reselling was refused disclosure about discussions as to potential loss which the borrowers said that they had with other companies (*GE Commercial Distribution Finance Europe Limited v. Stacey*, 15th November 2011).

Admissions. The Court of Appeal held that a Judge had not gone wrong in principle in refusing a litigant's application to withdraw an admission. Having made an admission of part of the debt, solicitors later said that there was a defence (*Kojina v. HSBC Bank Plc*, 9th November 2011).

Guarantees. The Appellant had provided a guarantee for a mortgage and the lender enforced the guarantee by a statutory demand instead of attempting to realise its security. It was argued that the guarantee was not a debt for a liquidated sum so that the creditor could not petition. It was said that the liability was in damages of an unliquidated kind. The Court of Appeal held that a guarantee could be in the form of a "see to it" obligation which created a liability in damages. However, the guarantee in this case resulted in the guarantor being a principal debtor and could be the basis for a petition (*McGuinness v. Norwich & Peterborough Building Society* [2011] EWCA 1286).

Payment protection insurance. A District Judge and High Court Judge rejected allegations of payment protection insurance misselling on the basis of an unfair relationship under Sections 140A and B of the 1974 Act. The Court of Appeal upheld the decision saying that, if what had been done or not done was in compliance with a statutory prescribed regulatory regime (namely ICOB), it was not easy to see where unfairness could be derived (*Harrison v. Black Horse Limited* [2011] EWCA Civ 1128).

Guarantees. In a commercial lease words regarding the limitation period during which guarantors would be liable had inadvertently been omitted. The Court of Appeal held that the substantive effect of the missing words was clear and there was liability for the full amount (*Company Developments (Finance) Limited v. Coffee Club Restaurants Limited*, 14th June 2011).

Payment plans. Company directors agreed a payment plan for the repayment of unpaid invoices. They relied on the Statute of Frauds Amendment Act 1828 but this argument was dismissed by the Court of Appeal as the debt already existed and, whilst an agreement which postponed payment resulted in the obtaining of further credit, that would not be the case if matters just drifted. There was no intention to obtain money or further goods (*Roder UK Limited v. West* [2011] EWCA Civ 1126).

Licensing. The Office of Fair Trading have issued a consultation on guidance as to misleading or otherwise undesirable names (OFT 1378).

ENTERPRISE ACT

Car Sales. The OFT have been given undertakings from a car supermarket about the sale of cars, finance and after-sale guarantees (OFT 121/11).

CONVERSION

Retention of Title. The Chancery Division considered a claim in conversion relating to two luxury cars. The Court held that the terms and conditions had not been effectively communicated to or accepted (*Lightning Bolt Limited v. Elite Performance Cars Limited*, 2nd November 2011).

UFAIR TERMS

Water charges. The Court of Appeal held that there was no unfairness within the 1999 Regulations where there had been a variation as to the payment of water charges (*Rochdale Borough Council v. Dixon* [2011] EWCA Civ 1173).

AGENCY

Commercial Agents. Issues concerning the Commercial Agents (Council Directive) Regulations 1993 were considered by the High Court. The agency in question related to the sale of leather upholstery in the UK. The Court held that whether a party was a commercial agent within the Directive was a straightforward matter. There was an implied term as to acting for a number of principals and the contract was within the Regulations implementing the Directive (*Rossetti Marketing Limited v. Diamond Sofa Co Ltd* [2011] EWHC 2482 (QB)).

Estate Agents. The High Court held that there was no serious scope for argument that a provision about payment of remuneration on exchange of unconditional contracts was unfair (*Foxtons Limited v. O'Riardon* [2011] EWHC 2946 (QB)).

Sole agency. The Court of Appeal held that a sole agency agreement had not complied with the Estate Agents Act 1979. The appeal by the estate agency was dismissed (*Great Estates Group Limited v. Digby* [2011] EWCA Civ 1120).

NOISE

Abatement notices. If an abatement notice is served at a property where the person to whom it is addressed no longer lived a failure to respond should be dealt with in any criminal proceedings. The Divisional Court granted judicial review of a conviction relating to a barking dog (*R (On the application of Khan) v. Isleworth Crown Court*, 12th October 2011).

FINANCIAL SERVICES

Extended warranties. The Court of Appeal held that extended warranties relating to repair or replacement of TV equipment were contracts of general insurance within the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (*In the matter of Digital Satellite Warranty Cover Limited* [2011] EWCA Civ 1413).

Cross-undertakings. The Court of Appeal held that where the Financial Services Authority obtain a freezing injunction it was not general practice to require a cross-undertaking (*Financial Services Authority v. Sinaloa Gold Plc* [2011] EWCA Civ 1158).

Code of Business Rules. The High Court held that there had been a breach of the relevant rules where a bank recommended the purchase of structured notes but it had not been shown that there was a loss for the purposes of Section 158 of the 2000 Act (*Zaki v. Credit Suisse (UK) Limited* [2011] EWHC 2422 (Comm)).

Spread betting. The Chancery Division held that a company offering spread betting had not breached the 2000 Act by providing unauthorised advice (*City Index Limited v. Valducci* [2011] EWHC 2562 (Ch)).

LICENSING

Private hire. The High Court held that the Magistrates should not have overturned a decision of a local authority sub-committee to refuse to renew a driver's licence by reason of hardship (*Cherwell District Council v. Anwar* [2011] EWHC 2943 (Admin)).

Consent orders. The High Court held that, where there had been an agreement between the holder of a premises licence and a local authority as to hours, that should have effect and an application for judicial review of a reduction by the Magistrates' Court was granted (*R (On the application of Festiva Limited) v. Highbury Magistrates' Court*, 4th November 2011).

TRAVEL

Passenger protection insurance. The High Court considered the construction of a policy and the effect on the cancellation of scheduled cruises (*All Leisure Holidays Limited v. Europaische* [2011] EWHC 2629 (Comm)).

Regulations. The Court of Appeal considered the Package Travel, Package Holidays and Package Tours Regulations 1992 in the context of a personal injury claim. It was held that the Judge had been wrong to find that the Claimant was purchasing two services at the same time but separately. They were sold as a component part of the combination or package (*Titshall v. Querty Travel Limited* [2011] EWCA Civ 1569).

HEALTH AND SAFETY

Code of Practice. The Supreme Court upheld the Judge's conclusion that a Code of Practice gave official and clear guidance setting an appropriate standard in respect of a personal injury claim relating to excessive noise (*Baker v. Quantum Clothing Group Ltd* [2011] 4 All ER 223).

Sentence. The Court of Appeal (Criminal Division) reduced total fines of £100,000 in respect of offences arising from a fatality payable over two years to one of £50,000 payable over five years to take account of a difficult financial situation (*R v. Deeside Metals Ltd* [2011] EWCA Crim 3020).

Electricity. The Court of Appeal held that the Electricity at Work Regulations 1989 required, so far as was reasonable, work to be carried out in a manner which did not give rise to danger and brought in considerations comparable to common law negligence (*Berry v. Ashtead Plant Hire Co* [2011] EWCA Civ 1304).