



TRADING LAW BULLETIN

ISSUE NO. 45 JUNE 2005

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

Overdrafts. The Claimant Bank offered the Defendant an overdraft facility stating the interest rate and that it was variable. The offer was accepted and the account went into overdraft but soon went beyond the agreed limit. The Bank wrote to the Defendant informing him that he was incurring interest at the rate of 26% a year. There was no mention of any other charges. Resisting the claim the Defendant said that the exemption in Section 74 of the Consumer Credit Act 1974 did not apply because the Bank had failed to comply with the conditions of the OFT's Determination made under Section 74(1)(b) which included a requirement to notify the customer of the rate of interest and other charges. Judgment was given for the Bank and the Defendant appealed to the Court of Appeal which dismissed the appeal. It was held that "charges" meant charges relating to the grant of credit and not charges payable in the absence of any agreement for credit. The requirement that specified information should be given after the expiration of three months from when the account exceeds any credit limit only imposes a final deadline. Section 82(2)(a) did not affect the situation because the agreed overdraft was subject to the exemption (*Coutts & Co v. Sebestyen* [2005] CCLR 4).

Pending Appeal. The County Court decision on unenforceability and extortionate credit bargains in *London North Securities v. Meadows* was subject to an appeal to the Court of Appeal heard on 13th and 14th June 2005. The judgment has been reserved.

Consumer Credit Bill. The Bill introduced in December 2004 fell at the General Election and has been reintroduced into the House of Commons.

Connected Lender Liability. A firm of Solicitors accepted credit card payments in respect of the purchase of motor vehicles from overseas. The High Court held that the firm processed the payments as agents for the company which arranged the purchase of the cars. The firm were not the agents of the cardholders. Following settlement with customers who did not receive their cars under Section 75 of the Consumer Credit Act 1974, the bank obtained judgment under the merchant services agreement entered into by the firm (*Bank of Scotland v. Alfred Truman*, 17th March 2005).

FOOD

Labelling. The House of Lords have refused leave to appeal to the prosecution in respect of the food labelling case of *Lewin v. Purity Soft Drinks*.

Sentence. As a result of pleas of guilty to selling food unfit for human consumption because of salmonella contamination and breaches of the Food Hygiene Regulations, the owner of a kebab shop in Bradford was imprisoned for twelve months (Daily Telegraph, 3rd June 2005).

MISLEADING PRICES

Previous Prices. The Office of Fair Trading sought an order restraining a retailer and a director from breaching the Control of Misleading Advertisements Regulations 1988 in respect of pricing. The Office of Fair Trading also relied on the Enterprise Act 2002. In a very limited number of stores goods were marked at a "Red Star" price for 28 days and then sold throughout all or most of the company's stores at a 70% discount off the "Red Star" prices. The case for the Office of Fair Trading was that the inevitable inference would be that the discounts were genuine and any disclaimer would not remove or diminish that. The company relied upon the Code of Practice, the Human Rights Act and the history of the legislation. Having examined the legislation, including that from other jurisdictions, the High Court held that the whole purpose of the strategy was to influence consumers' economic behaviour by conveying the impression to consumers that they were getting a tremendous bargain. The Court concluded that the claim was made out (*The Office of Fair Trading v. The Officers Club Limited*, 26th May 2005).

TRADEMARKS

Sentence. The Appellant was a wholesale seller of mobile phone accessories including covers which bore registered trademarks of famous brands and were counterfeit. He pleaded guilty and was sentenced to 12 months imprisonment with a confiscation order. His appeal to the Court of Appeal was allowed only to the extent of allowing further time to pay the confiscation order but the sentence of imprisonment was upheld (*R v. Junaid Sheikh*, 27th April 2005).

HEALTH AND SAFETY

Manslaughter. A young boy died having fallen into a septic tank. There were convictions for manslaughter by gross negligence and failure to discharge a duty under the Health and Safety At Work Act 1974. The Court of Appeal allowed the appeals. The septic tank was in a field adjacent to a caravan site and the boy had been jumping on heavy stones which had been placed on the manhole covers to stop them moving. The prosecution case was that the Defendants had failed to ensure that the manhole covers were securely fitted. The Court of Appeal held that there was a paucity of evidence as to the actual condition of the relevant manhole and its cover and as to the knowledge of it, actual or reasonably imputable, to either of the Defendants. Their convictions could not be held to be safe (*R v. Kelly*, 5th May 2005).

NOISE POLLUTION

Shop Window. The Defendant company was prosecuted under the Control of Pollution Act 1974. Audio suckers had been attached to the shop window which looked down onto a street. Music was played which was audible to the public. The Magistrates held that the loudspeakers had not been operated "in a street" within Section 62(1). The appeal by the prosecution was allowed with a direction returning the case to the Magistrates to convict. The High Court held that although the plate glass was part of the property its outer-face was in the street. It had been found that this amounted to a loudspeaker so that the speaker was being operated in the street (*Westminster City Council v. French Connection Retail Limited* (2005) 169 JP 321).

ENTERPRISE ACT

Contempt. A nine months sentence of imprisonment was imposed by Edmonton County Court on a trader who was involved in the doorstep selling of block paving services. The Defendant had failed to comply with orders under the Enterprise Act restraining him from breaching the Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987, the Supply of Goods and Services Act 1982, the Business Names Act 1985 and other consumer protection legislation (*London Borough of Enfield v. Connors*, 8th June 2005).

VIDEO RECORDINGS

Mail Order. The Video Recordings Act 1984 prohibits the supply of videos classified as R18 at any place other than a licensed sex shop. The Appellant companies operated licensed sex shops but responded to orders by post, telephone and online by sending such items through the post. Their appeals against conviction were dismissed by the High Court. The provisions gave

heightened protection in respect of persons under 18. The purpose was not limited to ensuring that such material was only supplied "by" persons licensed. The word "supply" had a wide meaning. The purpose of the legislation was to ensure that the restricted material was applied only in a place which was licensed so as to ensure that the customer came face-to-face with the supplier, so the supplier could assess the age of the customer. The meaning of Section 12(1)(b) was that it was an offence to offer to make the supply, not to make the offer, other than in a licensed sex shop. As far as the costs were concerned, it had not been demonstrated that there was a failure in the exercise of discretion in making costs orders significantly greater than the fines. (*Interfact Limited v. Liverpool City Council*, 23rd May 2005).

TRADE DESCRIPTIONS

Sentence. The Defendant supplied celebrity photographs bearing false signatures. He sold some at a stall at the National Exhibition Centre and it was discovered that some of the signatures were false. Test purchases were carried out and 27 photographs out of a stock of over 1,000 contained forgeries. The Defendant maintained he was unaware that they were forgeries. A suspended prison sentence was passed together with costs of £10,000. The Court of Appeal allowed the appeal. Taking into account the fact that only 27 signatures were forged and other mitigating factors, the Court of Appeal was not convinced that the custody threshold had been crossed. A conditional discharge was imposed and the order for costs was reduced to £100 (*R v. Bore* (2005) 169 JP 245).

PRODUCT SAFETY

Toys. The Defendants were convicted in respect of a stationery set which contained brightly coloured items of "office equipment" but which were smaller than normal size. One of the items was a craft knife with blades. The Magistrates held that the items were toys and convicted. The High Court dismissed the appeal. It was said that the question of whether a product was a toy depended upon at whom it was targeted and any other logical indication. Here the price, colour and physical position within the shop were relevant considerations. With regard to the craft knife, the more dangerous an article the more difficult it would be to prove that it was a toy. Whilst the finding by the Magistrates that the "CE" mark was indicative of the set being a toy was incorrect, they would have arrived at the same conclusion irrespective of that finding. The Magistrates had given appropriate weight to the evidence and the conviction was upheld (*PMS International Group Plc v. North East Lincolnshire Council*, 13th May 2005).