



TRADING LAW BULLETIN

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CONSUMER CREDIT

Amount of credit and commissions. The Court of Appeal upheld the decision of the County Court Judge in respect of alleged non-compliance with the Consumer Credit (Agreements) Regulations. Schedule 6 of the Agreements Regulations imposed a basic requirement that the agreement contain the prescribed terms as a matter of construction and not as imposing any standard of clarity for the statement of those terms. Clarity was a matter addressed by Schedule 1. The agreement did contain the term prescribed in Schedule 6 for stating how the borrowers were to repay the legal fees and interest as such a term could be construed from the wording of the agreement. The Court of Appeal also upheld the decision that the agreement did not contain a statement of the amount or the amounts of the repayment of the legal fees and interest as required by Paragraph 13 of Schedule 1. The Court of Appeal agreed with the Judge that the commission paid to the broker by the lender was not secret. The Claimant had procured the broker's breach of fiduciary duty by paying the commission without informing the borrowers that the commission of a specified amount was to be paid and without making it clear that they were being asked to consent to the payment. The Court of Appeal said it would not exercise its discretion to order rescission of the agreement but would order the lender to pay equitable commission in the amount equal to the sum of £240 paid as commission (*Hurstanger Ltd v. Wilson* [2007] CTLC 59).

Agency. A car dealer promised the defendant that it would discharge the balance outstanding from the defendant to the claimant under a hire-purchase agreement in respect of the car the defendant agreed to trade in as part of the transaction to acquire a new car. The dealer ceased trading without paying off the balance. The finance was arranged for the defendant via a credit broker who obtained the finance company's approval to a hire-purchase agreement with the defendant. The new car was sold by the dealer to the broker and by the broker to the finance company to enable it to let the vehicle on hire-purchase to the defendant. The defendant sought to rely on Section 56(1)(b) and (2) of the Consumer Credit Act 1974. The County Court Judge upheld that argument but the High Court allowed an appeal on the basis that the new car had not been sold by the dealer to the finance company and therefore the statutory provisions did not apply. Furthermore, there was no evidence that the dealer was the finance company's agent at common law (*Black Horse Ltd v. Langford* [2007] CTLC 74).

Bank charges. The claimants had sued the defendant bank for the repayment of fees and charges resulting from the operation of their bank account. It was argued that the charges exceeded the bank's losses caused by breaches of the terms of the account and the terms permitting the recovery of such charges were unenforceable under the Unfair Terms in Consumer Contracts Regulations 1999, under the Unfair Contract Terms Act 1997 and at common law. The District Judge found that the charges had not been imposed for any breach of contract so that the law relating to penalties had no application. Furthermore, the charges were part of the price for the services of providing a bank account which could not be challenged under the 1999 Regulations (*Berwick v. Lloyds TSB Plc* [2007] CTLC 107).

Bank charges. A District Judge gave judgment for the defendant bank holding that there was a contract for banking services and the terms had been notified to the claimant. The charges were imposed for the provision of services and were not a penalty. Charges were not therefore imposed by a term which was subject to the 1999 Regulations (*Gillin v. Lloyds TSB Plc*, 26th June 2007).

Hire terms. Damages were awarded for early termination of plant hire contracts. The hirer had sold the business to a third party who thereafter was invoiced and paid the charges under the agreements. However, there was no agreement to a full novation. The Court of Appeal agreed that there was no novation. The buyer of the business had agreed to be liable only for charges arising under the agreements from the date of sale (*Finning UK Ltd v. Inveresk Plc*, 16th May 2007).

Directive. The Council of the European Union reached, by a qualified majority, a political agreement on the Commission's modified proposal for a Directive on credit agreements for consumers on 21st May 2007.

Mortgages. Having regard to the then Land Registration Act 1925 Section 29, priority was governed by the order of entry in the Charges Register and not by the order of creation of the charges. However, the Judge held that by virtue of estoppel by convention or proprietary estoppel, the appellant lender was prevented from denying that their legal charge ranked behind the respondent lender's charge. The Court of Appeal upheld the Judge saying that there was no contravention of the general principle that estoppel cannot be used to circumvent a statute (*Scottish & Newcastle Plc v. Lancashire Mortgage Corporation Ltd*, 5th July 2007).

Information, licences and charges. The Consumer Credit (Information Requirements and Duration of Licences and Charges) Regulations 2007 were made on 31st March 2007 and come into force on 1st October 2008 with certain exceptions.

Hire agreements. The claimant claimed future hire instalments on default termination of a hire agreement for a car. It was a regulated hire agreement. The full amount of unpaid rentals was claimed with a rebate of 4% per year as provided for in the agreement. The District Judge held that the clause was not a penalty. On appeal the County Court Judge held that the clause could not represent a genuine pre-estimate of the claimant's loss as no account had been taken of the increased value of receiving the vehicle back at an earlier point than expected and the contractual term therefore constituted a penalty (*Volkswagen Financial Services (UK) Ltd v. Ramage* [2007] CTLC 120).

MONEY TRANSFERS

Hawala system. The claimant submitted that money he had placed with the operator of a Hawala money transfer facility was held on trust because there was an obligation to apply the money to a specific purpose. The High Court held that the operator of the facility was a trader using his customers' money for trade and he was not a trustee. It was inherent in the system that the money paid was not kept in separate accounts (*Re I*, 4th July 2007).

ESTATE AGENTS

Negative licensing. The Office of Fair Trading has made a prohibition order in respect of an estate agent who had been sentenced to a total of 30 months' imprisonment for theft and perverting the course of justice (OFT press release 19th April 2007).

HEALTH AND SAFETY

Sentence. The defendant company appealed against a fine of £150,000 in respect of the collapse of a stack of coil which resulted in a fatal injury. The Court of Appeal substituted a fine of £100,000 (*R v. Clifton Steel Ltd*, 13th June 2007).

Reasonably practicable. The European Court of Justice has upheld the advice of the Advocate General that the United Kingdom was not in breach of Council Directive 89/391/EEC by providing that certain obligations under the Health and Safety at Work Act 1974 were to be carried out so far as is reasonably practicable (*Commission of the European Communities v. United Kingdom*, 14th June 2007).

ADVERTISEMENTS

Hoardings. A District Judge in a Magistrates' Court held that the defendant was not guilty of offences relating to advertisement control. The advertisements were a scrolling illuminated hoarding. The wall on which the hoarding had been placed had been painted with an advertisement for many years. The High Court agreed that

the painting was an advertisement at the relevant date and that the hoarding used by the defendant did not amount to a substantial alteration in the manner of the use of the site (*Wandsworth Borough Council v. South Western Magistrates' Court*, 2nd May 2007).

CONSUMER PROTECTION

Inspections. The Office of Fair Trading has issued guidance for the use of on-site inspection powers under the Consumer Protection Cooperation Regulations.

PACKAGE TOURS

Guidance. The Department for Business, Enterprise and Regulatory Reform has issued a consultation on draft guidance on the application of the Package Travel etc. Regulations 1992.

UNFAIR TERMS

Guidance. The Office of Fair Trading issued a consultation on revised guidance for the Unfair Terms in Consumer Contract Regulations 1999 in April 2007.

Reasonableness. The High Court has held that it was unreasonable for a company which let out serviced office accommodation to exclude liability for matters such as loss of business and loss of profits by those to whom the offices were let out (*Regus (UK) Ltd v. Epcot Solutions Ltd*, 4th May 2007).

ANIMALS

Abuse of process. The High Court quashed convictions under the Protection of Animals Act 1911 on the basis that the relevant sheep carcasses had not been retained and the defendant's veterinary surgeon did not have an opportunity to examine the sheep at any point. The High Court examined the duty to retain material under the Code of Practice under the Criminal Investigation and Procedure Act 1996 and held that, if the Magistrates had addressed the issue of whether the Trading Standards Officers could have discharged their duty by retaining relevant evidence, they would have come to the conclusion that a representative selection could and should have been retained. The failure to do so amounted to wholly exceptional circumstances and the case should have been stayed (*Leatherland v. Powys County Council*, 8th February 2007).

TOYS

The defendants were convicted under the Toys (Safety) Regulations 1995 in respect of a painted toy hammer bench which contained excessive lead and chromium. The prosecution had alleged a breach of the essential safety requirements contrary to Regulation 4. The High Court quashed the convictions as the Magistrates had failed to consider Regulation 13 and whether the toy jeopardised the safety or health of users or third parties when used as intended or in a foreseeable way, bearing in mind the normal behaviour of children (*Kenworthy v. North Tyneside MBC* [2007] CTLC 98).