



# TRADING LAW BULLETIN

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## CONSUMER CREDIT

**Litigation funding.** A lender claimed against a firm of solicitors in respect of credit granted to litigants. The High Court held that the solicitors were liable having regard to the wording of the agreement between them and the lender even if, which was assumed for the preliminary issue, the regulated consumer credit agreements were unenforceable. An appeal to the Court of Appeal has been heard (*Conister Trust Plc v. John Hardman & Co*, 11<sup>th</sup> April 2008).

**Debt collection.** The OFT has issued warnings to 13 companies including debt collection agencies about the steps they need to take to improve in respect of their debt-collection practices.

**Legislative reform.** A draft Order has been laid before Parliament being the Legislative Reform (Consumer Credit) Order 2008 relating to an exemption for investment properties and replacing Section 77A in respect of statements in relation to fixed-sum credit agreements.

**Hire.** The Court of Appeal has upheld the decision of the High Court in respect of preliminary issues concerning photocopiers installed in shops or sub-post offices. The dispute arose between two competitor photocopier suppliers and the issue was whether the agreement was a consumer hire agreement within Section 15 of the 1974 Act. No hire payments were made for the photocopiers and the obligation on the retailer was to collect monies in respect of copies made and remit them to the supplier less the retailer's commission. The Court of Appeal noted that it had not been argued that a gratuitous bailment under which no consideration was provided could itself amount to a consumer hire agreement. The Court of Appeal therefore concluded that to be a regulated hire agreement there must be terms for payment or the provision of other reward by the bailee. In the present case there were none (*TRM Copy Centres (UK) Limited v. Landwall Services Limited*, 17<sup>th</sup> April 2008).

**Cancellable agreements.** A credit card holder brought claims against five credit card issuers alleging matters such as unenforceability. The High Court dismissed the claims holding that there had been no breaches of the copy agreement provisions under Section 78 of the 1974 Act nor were there any defects in respect of the cancellable agreements or in the default notices (*Rankine v. American Express Services Europe Limited and Others*, 16<sup>th</sup> May 2008).

## FOOD

**Premises.** The Administrative Court dismissed the claimant's renewed application for permission to judicially review the refusal of a District Judge to state a case on the grounds of frivolity following the conviction of the claimant in respect of 5 food hygiene offences at his public house. The claimant sought to argue that the District Judge's finding that the kitchen at the premises was open for business at material times was unreasonable and that he was not able to make such a finding on the basis of a document signed by the claimant's then pub manager, who died before the trial, which stated in terms "I agree to close the kitchen and associated areas for the service of foodstuffs." In dismissing the renewed application the court said that the document evidenced agreement to close a kitchen that was not already closed. Had it been closed it was improbable

that such a document would have been signed. It was reasonably open for the District Judge to make the finding that he did (*R (Matthew Castle) v. Basingstoke and Deane Borough Council*, 27<sup>th</sup> June 2008).

## DUE DILIGENCE

**Knives.** The defendant company was prosecuted for selling a knife to a person under 16 years in a test purchase. The Magistrates concluded that the defendant company had a clear system in place to avoid sales of knives to under-age people by way of, for example, till prompts and staff training. The Court considered that which occurred at the till and not what occurred between the till and the handing over of the goods. The prosecution appealed and the High Court held that the allegations by the prosecution had focused on the transaction at the till and therefore the Magistrates were entitled to see what happened then. Further, it was clear that the defendant company had taken all reasonable precautions and exercised all due diligence. The Magistrates' Court had reached a decision which was open to it (*Enfield LBC v. Argos Limited*, 27<sup>th</sup> June 2008).

## COPYRIGHT

**Modchips.** The appellant was convicted of 28 offences under the Copyright, Designs and Patents Act 1988 after a trial in the Crown Court. The prosecution related to a business which sold modchips which were fitted to computer games consoles which enabled the console to play pirate games. The Court of Appeal (Criminal Division) allowed the appeal and held that the modchips were designed to circumvent measures which were not themselves a device designed to prevent or restrict infringement. The fact that the technological measure was a discouragement to copyright infringement was not enough (*R v. Higgs*, 24<sup>th</sup> June 2008).

## PROCEDURE

**Trees.** The High Court considered a situation where the Crown Court had refused to allow the defendant to change his plea of guilty in respect of breaching a tree preservation order. The defendant had submitted to the Crown Court that his pleas of guilty were not unequivocal and that the trees in question were outside of the protection of the order. The Crown Court held that the dates on a letter from a tree surgeon were determinative. The High Court allowed the appeal and said that the Crown Court had been in error in focusing solely on the dates referred to in the letter rather than the entirety of the appellant's case (*Louder v. Bromsgrove District Council*, 25<sup>th</sup> June 2008).

## DOORSTEP SELLING

**Draft Regulations.** The Cancellation of Contracts Made in a Consumer's Home or Place of Work Etc. Regulations 2008 have been laid in draft before Parliament. They will replace the 1987 Regulations changing, in particular, the application of the regulations to a visit so that solicited visits will be included.

## PYRAMID SELLING

**Multi-level selling.** The Secretary of State petitioned to wind up a company which had been in business in the United Kingdom for about 30 years and had a turnover of about £10 million per annum in the UK. There was a significant element of recruitment of additional sellers and a bonus structure. The Chancery Division held that it would

have been just and equitable to wind up the company on the basis of misrepresentations made by existing sellers to potential recruits but a new business model had rectified matters. Further, the revised business model did not constitute a lottery and the company was not in breach of the Fair Trading Act 1973 Part XI because there was no inducement to make a payment (*Secretary of State for Business, Enterprise and Regulatory Reform v. Amway (UK) Limited*, 14<sup>th</sup> May 2008).

#### UNFAIR TERMS

**Charges.** In a preliminary issue the High Court has held that bank charges imposed when a customer exceeds an overdraft limit are core terms within the Unfair Terms in Consumer Contracts Regulations 1999 (*OFT v. Abbey National PLC and Others*, 24<sup>th</sup> April 2008).

**Storage agreements.** A sculpture was stored with the defendant but it became lost. A claim for £600,000 was made and the defendant said that the liability was limited to £587.13 in accordance with its terms and conditions. The question arose as to whether the term was fair. The High Court held that it was fair and reasonable for a company engaged in the business of fine art storage and transport to limit its liability to a fixed sum per weight or volume because the goods entrusted to them could vary so much in value. However, the defendant had taken no steps to bring the limit to the attention of the claimant and judgment was given for £132,000 together with consequential damages.

**Office accommodation.** The appellant provided serviced office accommodation. A company which was relocated between two buildings complained about the air conditioning in the new building. The standard terms provided that there would be no liability for loss of business, loss of profits, loss of anticipated savings, loss of or damage to data and that any liability would be capped at 125% of the fees or £50,000 whichever was the higher. The Judge held that the total exclusion of any remedy was unreasonable and unenforceable under the Unfair Contract Terms Act 1977. The Court of Appeal held that the Judge had been wrong to conclude that the relevant clause was unreasonable as the obvious and primary measure of loss was a diminution in the value of the services provided. The Court of Appeal said that it was entirely reasonable in principle to restrict damages for loss of profits etc. There had been no inequality of bargaining power and customers were advised to protect themselves by insurance from such losses. The relevant clause met the requirement of reasonableness (*Regus (UK) Limited v. Epcot Solutions Limited*, 15<sup>th</sup> April 2008).

#### ESTATE AGENTS

**2007 Act.** Commencement Order No.3 was made on 6<sup>th</sup> May 2008 and brings into force Section 5 dealing with the forward work programmes.

#### CONTROLLED WASTE

**Sentence.** The Court of Appeal upheld a fine of £25,000 for knowingly permitting controlled waste to be deposited. The fine was not manifestly excessive as the appellant was entirely dishonest and had the means to pay. The defendant was the sole director and shareholder of a skip hire company and the offence related to more than 1,000 tonnes of waste (*R v. Dbaliwal*, 20<sup>th</sup> May 2008).

#### ENTERPRISE ACT

**Penalty.** A kitchen supplier was again found in contempt of court in respect of breaches of court orders resulting from actions taken by the OFT under the Stop Now Order provisions. Manchester County Court imposed a fine of £90,000 (*OFT v. Miller*, 30<sup>th</sup> May 2008).

#### HEALTH & SAFETY

**Risk of accidents.** A headmaster of a school appealed to the Court of Appeal Criminal Division from a conviction in the Crown Court. The Court of Appeal allowed the appeal. It was said that it was unnecessary to provide any paraphrase of the statutory concept of risk but it was important the prosecution should prove a real as opposed to fanciful or hypothetical risk. There is no objective standard or test applicable to every case. Relevant factors would include the absence of any previous accident in circumstances which occurred day after day. The Judge should have withdrawn the case from the jury (*R v. Porter* [2008] All ER(D) 249).

#### CONSUMER PROTECTION

**Sale and buy back.** The OFT have announced a proposal to regulate sale and buy back schemes as these can target vulnerable persons.

#### TRADE DESCRIPTIONS

**Confiscation.** A confiscation order in the sum of £1.5 million has made following convictions in relation to a tarmac and block paving business (*R v. Connors*, 28<sup>th</sup> March 2007).

**Confiscation.** A confiscation order of £416,000 was made against a defendant who had earlier been convicted of 15 offences under the Trade Descriptions Act 1968 in relation to the sale of motor vehicles in the course of his business. In effect insurance wrecks were sold to the public with significant false trade descriptions applied to them. The offences triggered the criminal lifestyle provisions of The Proceeds of Crime Act 2002. The court was therefore obliged to make the assumptions provided for under section 10 of the Act and treat all transfers of property to him stretching back 6 years from commencement of the criminal proceedings as being his benefit from general criminal conduct. A financial examination demonstrated that over £3,000,000 had passed through various accounts. The Crown Court found the benefit in the sum of £3.3 million and a confiscation order was made in the sum of his available assets (*Nottingham City Council v. Singh*, 1<sup>st</sup> July 2008).

#### GAMBLING

**Unmet demand.** In an application under the previous legislation, the Gaming Act 1968, the Court of Appeal considered what was unmet demand for gaming. It was held that there was no question of an element of public interest being involved and that the absence of unmet demand was a reason in itself for refusing a licence. If that was shown then the licensing authority had to apply a discretion as to whether to refuse (*RTC Projects Limited v. Newcastle Licensing Justices* [2008] All ER (D) 412).

#### MACHINERY SAFETY

**Regulations.** The Supply of Machinery (Safety) Regulations 2008 were made on 19<sup>th</sup> June 2008 and come into force on 29<sup>th</sup> December 2008.

#### FINANCIAL SERVICES

**Ombudsman.** Independent financial advisers applied for judicial review. The Court of Appeal held that there was no breach of convention rights in the ombudsman system. Furthermore, the ombudsman was not required to determine a complaint in accordance with common law because the statute required him to do so by reference to what was, in his opinion, fair and reasonable in all the circumstances of the case (*R (Heather Moor and Edgecomb Limited) v. Financial Ombudsman Service*, 11<sup>th</sup> June 2008).

**FOS fees.** The ombudsman appealed against a District Judge's decision whereby the standard case fee was payable irrespective of the outcome of the complaint. The Court of Appeal held this was not unlawful (*Financial Ombudsman Service v. Heather Moor and Edgecomb Limited*, 11<sup>th</sup> June 2008).