



# TRADING LAW BULLETIN

## ISSUE NO. 48 MARCH 2006

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

**Territorial Application.** The Court of Appeal allowed an appeal from a decision that the connected lender liability under Section 75 did not generally apply where the card was used abroad. Although overseas transactions generally involved merchant acquirers which would recruit the suppliers, such four-party structures nevertheless constituted "arrangements" within Section 12(b) into which category the underlying regulated agreement fell. The basic elements of the regulated agreement were not affected by the fact that a transaction was carried out overseas, and as a matter of construction Section 75 did not apply only to transactions in the UK (*Office of Fair Trading v. Lloyds Bank Plc and others*, 22nd March 2006).

**Cancellable Agreements.** The applicants acquired immovable property financed by a loan from a bank. Much later they cancelled the agreement in accordance with the domestic law of Germany relating to the cancellation of doorstep transactions and a preliminary ruling was sought concerning the interpretation of Directive 85/577. The ECJ held that the Directive excluded contracts for the sale of immovable property. This was even though the sale was part of an investment scheme financed by the loan. Further, the Directive did not preclude a requirement for the consumer to make repayment of the amount of the loan on cancellation together with interest at the market rate. However, when a creditor had failed to comply with an obligation to inform the consumer of cancellation rights there was a requirement to ensure that domestic legislation protected consumers so that the creditor could not avoid bearing the consequences of the risks which materialised because of that failure (*Schulte v. Deutsche Bausparkasse Badenia* [2006] All ER (EC) 420).

**Option to Repurchase.** In a claim for specific performance for the sale of property pursuant to an option to repurchase in the event of any payment under a credit provision being in arrears, it was claimed that the option was unenforceable as a clog on the equity of redemption and that the option was in the nature of a penalty or, alternatively, that there should be relief from forfeiture. It was held that the transaction was not a mortgage and therefore the rules concerning clogs on the equity of redemption did not apply. The option agreement was not one within the jurisdiction to give relief from forfeiture nor were the provisions concerning the option a penalty (*Warnborough Limited v. Garmite Limited*, 12th January 2006).

**Value Added Tax.** The appellant marketed credit cards and had an agreement with a retailer to produce a single

credit and loyalty card. The appellant made payments to the retailer for services in the processing of applications and also a proportion of each spend on the card. The Tribunal held that the purpose of the card was to provide credit and without the introductory services there would be no card and no credit. All payments were therefore for a single supply of exempt intermediary services. The Tribunal rejected the argument by Customs that the payment was for a right to participate (*Prudential Assurance Co Limited v. Revenue and Customs Commissioners*, 5th December 2005).

**Value Added Tax.** A sports and leisure club appealed from a decision that no part of the membership fee paid on a monthly basis was in respect of the supply of credit and therefore exempt. The annual membership was £230 but the fee could be paid by monthly instalments at a total annual cost of £300. The Tribunal held that there was no clear contractual document containing all the terms and conditions. On the balance of probabilities the evidence was that membership could be had on a monthly basis as well as annually and therefore no part of the fees was exempt as a supply of financial services (*Taylor and Taylor v. Revenue and Customs Commissioners*, 28th November 2005).

**Contract for Loan.** A finance company provided a letter of offer which stated that it was to be subject to the formal terms and conditions set out in a second letter. The first letter was signed and returned by the customer. The finance company did not provide the finance and the Claimant issued proceedings for breach of contract and misrepresentation. The Court of Appeal held that the Judge had been correct in holding that the contract was enforceable. The terms of the first letter were binding on the customer and the first letter when signed was a contract within Section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 (*Courtney v. Corp Limited*, 1st March 2006).

### FOOD

**Food Hygiene.** The Food Hygiene (England) Regulations 2006 came into force on 11th January 2006. They revoked the Food Hygiene (England) Regulations 2005 which had come into force on 1st January 2006 and which themselves revoked previous Food Hygiene Regulations.

**Improvement Notices.** An appeal to the Magistrates' Court against improvement notices relating to matters such as the cleaning system and the use in certain circumstances of unpasteurised eggs was dismissed by the

Magistrates (*Savoy Hotel Group v. Westminster City Council*, 31st March 2006).

## CONSUMER PROTECTION

**Fireworks.** An acquittal on the basis of the due diligence defence in Section 39 of the Consumer Protection Act 1987 was upheld by the Divisional Court. Trading Standards had seized some toy pistol caps which had been imported and some of which did not conform to BS 7114. However, the Magistrates held that the method of testing both in-house and externally were to a comparable standard and that the defence under Section 39 was made out. The Divisional Court held that it was a matter of fact and degree and the Magistrates had been entitled to come to the conclusion which they did (*Powys County Council v. David Halsall International Limited*, 6th March 2006).

## DATA PROTECTION

**Processing.** The Medical Defence Union processed personal data for the purpose of conducting a risk assessment. A consultant surgeon brought an action under the Data Protection Act 1998 for compensation on the basis that the processing was unfair. The High Court held that there had been consent and the processing had not been unfair within Council Directive 95/46. Even if liability had been established the most the claimant could recover was compensation for pecuniary loss (*Johnson v. Medical Defence Union Limited*, 3rd March 2006).

## LETTING AGENCIES

**Winding Up.** A company claimed to have run a property rental agency which collected rents and deposits but granted tenancies in its own name. The DTI claimed that the company failed to pay deposits to tenants and there was a record of County Court judgments. Information was provided by a Trading Standards Department and the DTI sought to wind the company up. The Court held that a winding up could be expedient in the public interest not only where the company was involved in unlawful activity but where it was trading in an unsatisfactory but not necessarily unlawful manner (*Secretary of State for Trade and Industry v. Atlantic Property Limited*, 13th March 2006).

## PACKAGE HOLIDAYS

**Inclusive Price.** A trade association for travel agents and tour operators applied for judicial review to quash a guidance note issued by the Civil Aviation Authority concerning the interpretation of the Civil Aviation (Air Travel Organisers' Licensing) Regulations 1995. The Court held that there was a pure point of law and the public interest was in quashing the guidance if it was wrong. The definition of "package" in the Regulations contemplated that an agent could sell or offer component parts outside of a package and that to amount to a package the component parts had to be sold at an inclusive price. "Inclusive" connoted more than a mere mathematical total. The guidance was wrong and it was quashed (*R (Association of British Travel Agents Limited) v. Civil Aviation Authority*, 16th January 2006).

## ENTERPRISE ACT

**Cross-border Enforcement.** The Brussels Court of Appeal upheld an earlier order preventing a Belgian company from distributing deceptive prize notifications to consumers in the UK. The mailings could lead people to think that they had won a substantial cash prize and implied that it could only be claimed by placing an order from a catalogue. The action had been brought at the behest of the UK Office of Fair Trading and was the first cross-border action under the Injunctions Directive (*OFT v. Duchesne SA*, 8th December 2005).

**Contempt.** The Office of Fair Trading took action in respect of a second-hand car dealer who had failed to comply with a County Court order under Part III of the Fair Trading Act 1973. He was sentenced to 18 months' imprisonment for contempt of Court and an application to purge the contempt was dismissed (*OFT v. Fulke Grevill*, 9th February 2006).

## JURISDICTION

**Consumer Contracts.** A farmer in Austria purchased tiles for re-roofing his property from a supplier in Germany. The property was a farm-house which was partly a private dwelling and partly used for farming purposes. The claim was brought in Austria relying on the rules in the Brussels Convention concerning consumer contracts. The defendant objected to the proceedings being in the Austrian Courts and the ECJ was asked for a ruling as to whether there was a consumer contract. It was held that persons could only rely on special rules of jurisdiction if the trade or professional purpose involved in the contract was so limited as to be negligible in the overall context of the supply. Even then the special rules would not apply if the person acted so as to lead the supplier reasonably to believe that he was acting for business purposes. In determining the matter the Court had to take account of the content, nature and purpose of the contract (*Gruber v. Bay Wa AG* [2006] QB 204).

## UNDER-AGE SALES

**Evidence.** The applicant was convicted of an offence under Section 169A of the Licensing Act 1964. The prosecution served a witness statement from the young person and the defence did not request the attendance of that person within the time provided for. Only shortly before the trial did the defence say that the girl should attend and the local authority declined to make her available saying it was a matter of policy that they did not call under-age witnesses. The Magistrates refused to make an order that she should attend and the case proceeded on the basis of her written statement. The High Court held that there was nothing wrong in law with the decision of the Court. The application had been made late in that 14 months had passed since the sale and there was photographic evidence relating to the girl at that time. Different considerations may have applied if the request had been made near or at the time of the commencement of the proceedings (*R (Verma) v. Stratford Magistrates' Court*, 15th March 2006).