



TRADING LAW BULLETIN

ISSUE NO. 50 SEPTEMBER 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

Waiver. The Defendant lender entered into a regulated loan agreement with the Claimant secured on the Claimant's house, and charged a mandatory "mortgage indemnity fee" which guaranteed that the Claimant would not be pursued for any shortfall in the event of a sale to enforce the security. The High Court held that this fee was for a contractual waiver and not payable under a contract of insurance; the lender had therefore complied with the Consumer Credit Agreements Regulations 1983 in stating the fee as part of the total charge for credit and not part of the amount of credit (*Griffiths v. Welcome Financial Services*, 26th July 2006).

Damages. The Claimant pawned a number of items in return for seven loans from the Defendant, renewing each loan on the expiry of each period set by the initial loan agreements. The agreements were later found to be unenforceable, and the Defendant returned items under six of the loans. The Court of Appeal held that in respect of these six loans the Claimant was not entitled to further damages arising from each loan renewal. As for the seventh loan, the Defendant had already sold the pawn, and the Court held that the Claimant was not barred by Section 170(1) of the Consumer Credit Act 1974 from claiming damages in conversion for the cost of replacing the item (*Wilson v. Robertsons (London) Limited*, 27th July 2006).

Limitation. The House of Lords held that a letter from a mortgagor to his mortgagee explaining he could not afford to pay "the outstanding balance" contained an admission of debt, so that time began to run afresh from the date of the letter, and the letter – raising no issue in dispute – was not covered by the without prejudice rule (*Bradford & Bingley Plc v. Rashid*, *The Times*, 14th July 2006).

Pledges. The sole director of a jewellery company pawned a necklace belonging to a third party in return for a loan advanced by the Appellant, without informing the Appellant that he did not have the requisite authority. The Court held that non-disclosure of want of title created a false representation, and entered summary judgment against the sole director (*Advanced Industrial Technology Corporation Limited v. (1) Bond Street Jewellers Limited, (2) Condrup*, 4th July 2006).

Guarantees. The Claimant bank encouraged the Defendant to sign a guarantee for a replacement loan by indicating that, unless he did so, his account would be transferred to new personnel with whom the Defendant did not have a relationship. The Defendant gave the guarantee, but by then the Appellant had decided to refer the account for transfer. The Chancery Division found that the Appellant had made a negligent misrepresentation, and the guarantee had to be set aside (*National Westminster Bank Plc v. Kotonou*, 22nd May 2006).

Security. The Defendant bank called on the First Claimant's guarantee following the collapse of a group of companies. The Claimants had executed a legal mortgage of the matrimonial home as security for the due fulfilment of the First Claimant's obligations under the guarantee. The Chancery Division held that a demand served upon the First Claimant under the guarantee

was not a demand under the mortgage, and so interest did not begin to run from that date. Furthermore, the costs and expenses incurred in the guarantee proceedings were not secured by the mortgage ((1) *Kotonou*, (2) *Kotonou v. National Westminster Bank Plc*, 12th April 2006).

VAT. The Respondent company ran the "Nectar" scheme, which allowed consumers to redeem points acquired by their dealings with certain retailers for "rewards" in the form of further goods or services. The Respondent would pay "service charges" to the retailers reflecting the points redeemed. The Appellant Customs successfully argued in the Chancery Division that the service charges were third party consideration for VAT purposes for a VAT supply by the retailers to the consumers, so that the Respondent could not treat the VAT element as part of its input tax (*Revenue & Customs Commissioners v. Loyalty Management UK Limited*, 22nd June 2006).

Voluntary Arrangements. The Appellant debtors entered into a voluntary arrangement with the Respondent bank, which had a charge over the Appellants' home. That arrangement contained a clause precluding all creditors from commencing or continuing proceedings in respect of the Appellants' personal liability. However, the Chancery Division found that the clause had no effect on a secured creditor's right to enforce its security, even where that required recourse to the court, and refused permission to appeal against summary judgment entered in the Respondent's favour ((1) *Rey*, (2) *Rey v. FNCB Limited*, 13th June 2006).

2006 Act. The first commencement order has been made in respect of the Consumer Credit Act 2006. A number of technical and power making sections were brought into force on 16th June 2006 and, on 1st October 2006, the provisions substituting 14 for 7 days in respect of default notices was brought into force.

VAT. The High Court has considered the VAT impact on securitisation by way of assignment (*MBNA Europe Bank Limited v. Revenue & Customs*, 29th September 2006).

Financial Services. An amendment to the Regulated Activities Order 2001 brings home reversion plans and home purchase plans within the regulated activities under Financial Services and Markets Act 2000.

FOOD

Fisheries. Convictions were upheld for breach of fishing licences by exceeding monthly fishing catch quotas for cod. The Court of Appeal held that the imposition of quotas was proportionate and compatible with the EU exemption of sub 10-metre vessels from logbook and landing declaration obligations. The licence restriction did not infringe the principle of legal certainty (*R v. (1) Bossom, (2) Joy*, 29th June 2006).

Labelling. An Advocate-General's Opinion has said that the responsibility for food labelling lies with all persons in the production and distribution process albeit on condition that those persons are actually in a position to verify the particulars (*Lidl Italia, Srl*, 12th September 2006).

Condemnation. As part of an ongoing and complex case, a magistrates' court ordered the Respondents to destroy 254 pallets of meat intended for human consumption, and to pay the costs of destruction (*Food Standards Agency Northern Ireland v. (1) McCabe, (2) Euro Freeze (Ireland) Limited*, 21st August 2006).

HOME SELLING

Cancellation. The Government has proposed to legislate to provide cooling off periods on door-to-door selling even if an invitation to visit has been given.

HEALTH & SAFETY

Sentence. The Court of Appeal has reduced the fine on a track maintenance contractor which was prosecuted from a railway accident (*R v Balfour Beatty*, *The Times*, 18th July 2006).

Sentence. Where the employee of one company had been made available to another company on the same site and was killed the Court of Appeal held that the sentencing Judge had been correct to impose fines on the basis of equal blameworthiness (*R v. Environmental Tyre Disposal Limited* [2006] 1 Cr.App.R.(S) 675).

Sentence. The Court of Appeal reduced a fine and held it was impossible to lay down any tariff or to say that a fine should bear any specific relationship to the turnover or profit of the defendant company. There is no principle that it was necessary for the Court to have detailed particulars of the financial position of the company where it was made plain that the means of the company were substantial (*R v. Transco Plc*, 28th March 2006).

ANIMALS

Fairs. The Defendant local authority licensed a bird fair at a showground. The Administrative Court declared that the word "market" in Section 2 of the Pet Animals Act 1951 (which made it an offence to carry on the business of selling pets at a stall in a "market" etc.) could include showground markets. It was also declared that the organiser of the bird fair, in merely providing facilities, was not necessarily the keeper of a pet shop for licensing purposes, but that traders at the fair could be caught by the requirements. The "general licence" for gatherings of birds, issued by the Secretary of State under the Avian Influenza (Preventive Measures) (No 2) Regulations 2005, was valid (*R (Haynes) v. Stafford BC and Interested Parties*, 14th June 2006).

ADVERTISING

"Let By" Signs. The Divisional Court held that magistrates had been entitled to conclude that a "Let By" sign was prima facie evidence of a tenancy having been granted, and dismissed an appeal against conviction for an offence of unlawfully displaying the signs for more than 14 days after the granting of a tenancy, contrary to the Town and Country Planning (Control of Advertisements) Regulations 1992 (*Barbara Rees Limited v. Cardiff CC*, 3rd July 2006).

Protest. The Divisional Court held that a banner with words relating to the opposition to a road scheme was an advertisement for the purposes of planning legislation (*Butler v. Derby City Council* [2006] 1 WLR 1346).

ENVIRONMENTAL PROTECTION

Controlled Waste. Magistrates had dismissed summonses alleging offences of failing to take reasonable measures to prevent the escape of controlled waste, contrary to Section 34(1)(b) of the Environmental Protection Act 1990, on the basis that there had been no "escape". On appeal, the Divisional Court agreed with the prosecution that the offence was the failure to take reasonable measures, and that an "escape" did not have to be established.

However, the magistrates had correctly answered the case that had been presented to them, and the appeal would be dismissed (*Camden LBC v. Mortgage Times Group Limited*, 3rd July 2006).

DATA PROTECTION

Pre-Action Disclosure. Documents relating to the Applicant's banking transactions were obtained illegally by an enquiry agent, and seized during the execution of a search warrant. The Respondent had employed the enquiry agent but denied instructing him to conduct unlawful asset searches. The High Court granted an application for pre-action disclosure, since the Applicant clearly intended to sue the Respondent, and was arguably entitled to an order providing him with an explanation as to what had been done with his personal information (*Hughes v. Carratu International Plc*, 19th July 2006).

STREET TRADING

Motor Vehicles. The Divisional Court quashed a conviction for unlawful street trading, where the Appellant had parked his car on a public highway with a notice in the rear window advertising it for sale, because the Appellant had been in that particular street "for some purpose other than street trading": namely, to attend a doctor's appointment. Duality of purpose did not necessarily impugn the Appellant's defence. The Appellant's acquittal in a second case was also upheld in circumstances where he had lent the car to a third party who had parked it on a high street (*Onasanya v. Newham LBC* [2006] 4 All ER 459).

COSTS

Licensing. The Respondents had appealed to the magistrates' court against conditions imposed on their premises licence by the Appellant local authority, and while they were broadly successful, a number of conditions were nonetheless attached to the licence. On the issue of costs, the Divisional Court held that the magistrates had a very wide discretion, and had been entitled to award the Respondents the costs of the appeal (*Crawley BC v. Attenborough*, 9th May 2006). Similar issues were addressed in *Vehicle Agency v Greenfarms Ltd* [2006] RTR 250 and *Cambridge City Council v Alex Nestling Ltd*, *The Times*, 12th July 2006.

GAMING

Cheques. The Appellant had written two cheques in exchange for chips at the Respondent's casino. Both were dishonoured. The first had been for £35,000 when originally handed over, but it was subsequently increased to £55,000: the High Court held that under Section 16(2A) of the Gaming Act 1968 redemption of this cheque had been unlawful because there had not been one whole transaction, and so the Respondent's claim on the first cheque was dismissed. However, the second cheque, which had been altered from £30,000 to £50,000, had been returned to the Appellant and then re-offered by him to the Respondent at the end of a session. This cheque had been validly redeemed, and the Respondent was entitled to summary judgment on it (*Napoleons Leisure Limited v. Singh*, 9th June 2006).

WORK EQUIPMENT

Definitions. The Court of Appeal considered the definition of "work equipment" and "installation" as regards the place where the employee is working, the degree of control over the equipment and the territorial link with the employer's place of business (*P.R.P. Architects v. Reid*, 28th July 2006).

TRADEMARKS

Sentence. A 30 month sentence of imprisonment was reduced to 21 months in respect of large scale infringing acts over a prolonged period in respect of films, games, and music (*R v. Kirkwood* [2006] 2 Cr.App.R.(S) 263)