



TRADING LAW BULLETIN

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CONSUMER CREDIT

Litigation funding. A firm of solicitors appealed against a decision of the High Court that they were liable to the lenders under a litigation funding agreement. The point appealed against was a preliminary issue on the assumption that the individual regulated credit agreements with the consumers were unenforceable. The provision was that the solicitors would pay the “indebtedness under the Consumer Credit Agreement” and also the provision for payment in respect of the “remaining liability”. The Court of Appeal upheld the appeal holding that the word “liability” does not necessarily import the notion of enforceability. The natural and ordinary meaning of “liability” in the way that it was used is something which is enforceable (*Conister Trust Limited v. John Hardman & Co*, 21st July 2008).

Modifying Agreements. In March 2008 the Treasury and BERR issued a summary of responses to the consultation in respect of the regulation of modified credit agreements.

Payment Protection Insurance. On 30th September 2008 the Financial Services Authority issued a statement that it is to escalate regulatory intervention in the sale of PPI.

FOOD

Costs. In a prosecution of an abattoir the Judge accepted that it would be an abuse of process to rely upon visual observation only of the animal carcasses dealt with. However, he declined to make a defence costs order because of certain alleged failures on the part of the Defendant. The Divisional Court overturned the decision holding that it was incumbent upon the Judge to consider costs solely on the basis that the Defendant was not guilty (*R (On the Application of R E Williams & Sons (Wholesale) Limited) v. Hereford Magistrates' Court*, 2nd July 2008).

REGULATORY ENFORCEMENT

The Regulatory Enforcement and Sanctions Act 2008 received Royal Assent on 21st July 2008. It creates a new body, The Local Better Regulation Office, and introduces new powers for regulators such as fixed penalties and acceptance of enforcement undertakings.

HEALTH & SAFETY AT WORK

Sentence. A warehousing and distribution company was fined £325,000 following an employee's death when he was crushed by a trailer which rolled back towards him. A non-employee driver had failed to apply the hand-brake. The driver had been fined £1,000 and the Court of Appeal

held that the fine on the company was not proportionate and reduced it to a total of £275,000 (*R v. TDG (UK) Limited*, 29th July 2008).

Work Equipment. The House of Lords considered whether a door closer on an off-shore oil platform door was work equipment within the Provision and Use of Work Equipment Regulations 1998. The Scottish Court had dismissed the Appellant's claim for breach of statutory duty. The House of Lords held that the door closer was apparatus for use at work. Under the Directive the duty on the employer was in respect of work equipment made available to workers by the employer (*Spencer-Franks v. Kellogg Brown*, 2nd July 2008).

CONSUMER PROTECTION

National Consumer Council. Many provisions of the Consumers, Estate Agents and Redress Act 2007 came into force on 1st October 2008. These include general powers of investigation, of complaints made by vulnerable designated consumers and the provision of information to the Council.

ENTERPRISE ACT

Cross Border Enforcement. In July 2008 a Dutch Court granted the Office of Fair Trading an injunction against a mail order company from sending out misleading prize draw mailings to United Kingdom consumers. It was held that the mailings appeared to notify consumers that they had won a large prize when they had not (*OFT v. Best Sales BV*, 9th July 2009).

UNFAIR TERMS

Relief Claimed. The Office of Fair Trading brought proceedings under the 1999 Regulations in the High Court against a firm of estate agents in respect of some of the terms in their contracts with domestic landlords who wished to let their property. The Defendant company made applications to strike out some of the relief claimed by the OFT. Upholding some of the applications, the High Court referred to the difference between an action between a consumer and trader in the County Court in respect of an alleged unfair term and a “collective challenge” by the OFT. The Judge held that there could be a term which was considered to be unfair as part of a collective challenge but could nevertheless be fair on an individual challenge and vice versa (*Office of Fair Trading v. Foxtons Limited*, 17th July 2008).

Arbitration Clauses. A building company obtained an arbitration award against a consumer as a result of building an extension to her bungalow. She had refused to submit

to arbitration on the basis that the arbitration clause was unfair. The High Court held that the clause was unfair because it caused a significant imbalance in the parties' rights and obligations. The clause prevented the consumer from having access to the Courts (*Mylcryst Builders Limited v. G Buck*, 19th September 2008).

Guidance. The OFT issued a new edition of its guidance on unfair terms in September 2008.

FORESTRY

Licensing. The appellant was convicted of felling trees in an area of land without a licence. The High Court upheld the appeal saying that the Crown Court had been wrong to hold that a defendant could not rely on the defence under the Forestry Act 1967 Section 9 because it had to give weight to the history of the land and the genuineness of the individual's intention to reinstate the land as a garden (*Rockall v. Department of Environment, Food and Rural Affairs*, 3rd July 2008).

FINANCIAL SERVICES

Penalty. The Financial Services Authority have imposed a fine of £1.2 million on a sub-prime mortgage provider because of systems failures in particular with regard to retentions for repair work.

SALE OF GOODS

Bills of Sale. The owner of some motor cycles entered into a security bill of sale which was duly registered with the Supreme Court. He defaulted on the terms of the bill and "sold" some of the motor cycles to a dealership. The High Court upheld a claim for summary judgment by the creditor. The defendant could not rely on estoppel even though no HPI check had been carried out and nothing was shown against the vehicle (*Industrial & Corporate Finance Limited v. Wyder Group Limited*, 8th August 2008).

GAMING

Credit. Even though a client had been allowed to continue gaming when he owed money to the club for previous losses, an agreement to that did not constitute credit. However, when there was a specific request to allow him 12 months to pay his debt of £2 million, that amounted to the grant of credit contrary to Section 16 of the Gaming Act 1968 so that that amount was irrecoverable (*Aspinalls Club Limited v. Fouad Al-Zayat*, 3rd September 2008).

TIMESHARE

Winding Up. A winding up order was granted in the Companies Court where a company involved in timeshare had used marketing statements which misled the public into taking out membership in respect of unused timeshare accommodation. A winding up order in respect of an associated company which had not used such methods was not ordered (*In the Matter of TAG World Services Limited*, 30th July 2008).

SECURITY INDUSTRY

Prosecutions. The Private Security Industry Act 2001 gave no express power to the Security Industry Authority to institute or continue a prosecution. However, the Divisional Court held that it was clear that there was such power to prosecute and the prosecution of offences was calculated to facilitate, or was incidental or conducive to, the carrying out of the authority's functions. The prosecutions were in respect of allegations that the company had employed unlicensed security operatives (*R (On the application of Securiplan Plc and Others) v. Security Industry Authority*, 25th July 2008).

TRADE MARKS

Sentence. The Defendant had approximately 20,000 counterfeit DVDs and CDs in his possession together with ancillary equipment. If they had not been counterfeit they would have been worth about £600,000. Following a plea of guilty he was sentenced to concurrent sentences of 18 months imprisonment. The Court of Appeal held that, despite the personal circumstances, the offending was of a serious and sustained nature and it was necessary to include a deterrent element (*R v. Hatton* [2008] 1 Cr.App.R.(S)429).

NOISE

Costs. The High Court considered the question of costs where there had been an appeal against an abatement notice to the Magistrates' Court. The appeal failed but the time for compliance was extended by the Court. The Magistrates' Court ordered that the local authority pay £1,000 towards the appellant's costs because they had not offered the appellant a chance to discuss the time limit for compliance. The High Court held that the authority had successfully contested the appeal so that it was entitled to its costs and the order was set aside (*R (On the Application of Chiltern District Council) v. Wren Davis Limited*, 24th July 2008).

DOORSTEP SELLING

Regulations. The Cancellation of Contracts Made in a Consumer's Home or Place of Work Etc Regulations 2008 were made on 8th July 2008 and come into force on 1st October 2008.

UNINCORPORATED ASSOCIATIONS

Criminal Liability. An underground pipe taking heating oil from its storage tank to the boiler of a golf club was fractured when independent building contractors carried out work on the ground above. This resulted in the pollution of a watercourse. The golf club was an unincorporated association with approximately 900 members. The Court of Appeal noted that the offence was one of effective strict liability and, if it had not been, different considerations may have arisen. In the case of a strict liability offence, a prosecution may be brought, on the facts of the case in question, against either the club in its own name or individual members (*R v. RL*, 22nd April 2008).