



# TRADING LAW BULLETIN

ISSUE NO. 62  
SEPTEMBER 2009

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

**Credit cards.** The Court of Appeal dismissed an appeal following a trial in a claim by a merchant against a bank was dismissed. The action was to recover monies said to be due under a merchant acquirer agreement. The bank said that the merchant had been engaged in unauthorised third party transactions, in particular, processing payments for third parties for the sale of pharmaceutical products and pornographic downloads. The claim that the merchant was entitled to payment of monies retained was mistaken. The only obligation was to make card payments and there was no obligation in respect of unauthorised payments (*Lancore Services Limited v. Barclays Bank Plc*, 23rd July 2009).

**High Cost Credit.** On 2nd July 2009 the OFT launched a review into the supply of high cost credit. This was part of the ongoing financial services strategy. The sector being examined is said to be characterised by loans which are often small amounts, repayable over short periods and with high APRs.

**Harassment.** An award of £7,000 damages was made as a result of harassment by the director of a company seeking to recover a debt. The High Court held that the company was vicariously liable for the harassment as it was in the scope of the director's actual authority (*S & D Property Investments Limited v. Nisbet*, 13th July 2009).

**Unlicensed lending.** A five year term of imprisonment was passed on a loan shark who was engaged in unlicensed moneylending. When he was arrested it was estimated that there were 900 clients owing him in the order of £800,000 (*R v. Kiely*, 5th August 2009).

**Irresponsible lending guidance.** On 30th July 2009 the OFT issued a consultation on draft guidance. The draft sets out the practices which the OFT propose to say constitute irresponsible lending. The draft also sets out procedures and policies which lenders would be expected to put into practice including obtaining key information from prospective borrowers, assessing a prospective borrower's ability to meet repayments and dealing with borrowers in default or arrears.

**Charging Orders.** A final charging order was obtained by a judgment creditor before the debtor had a bankruptcy order made against him. As a result of a credit card debt an interim charging order was made

before the presentation of the petition and the final order was made after the presentation of the petition but before the final bankruptcy order. The County Court held that, as a matter of discretion, it was right to discharge the charging order but this was reversed by the Court of Appeal. The Insolvency Act 1986 was intended to alter the position in respect of charging orders and bankruptcies. There was nothing to justify a departure from the principle that a judgment creditor who had obtained a final order before the making of a bankruptcy order was not to be deprived of the benefit of the security (*Nationwide Building Society v. Wright*, 29th July 2009).

**Copy Agreements.** The Scottish Government has made a statutory instrument which, from 1st December 2009, will require any action commenced in the Scottish Courts relating to a regulated agreement to include an averment that such an agreement exists and a copy of the regulated agreement must be attached to the initial writ.

**Licensing Appeals.** On 1st September 2009 the functions of the Consumer Credit Appeals Tribunal were transferred to the First-Tier Tribunal and the CCAT was abolished. On the same date the Tribunal Procedure (First-Tier Tribunal) (General Regulatory Chamber) Rules 2009 came into force and will govern consumer credit appeals.

**Debt Management.** The Consumer Credit Appeal Tribunal upheld an adjudicator's decision to refuse a credit licence to a debt management company because of insufficient skills, knowledge and experience in the running of a consumer credit business.

**Hire Agreement.** A printing company claimed damages for defects in a printing press hired from one of the Defendants but designed and manufactured by the other Defendant. The Technology and Construction Court held that the owning company was liable to the hiring company for defects and the press was not of satisfactory quality contrary to the Supply of Goods and Services Act 1982 but the damages were limited to the rectification costs (*Lobster Group Limited v. Heidelberg Graphic Equipment Limited and Close Asset Finance Limited*, 30th July 2009).

**Second Charge Lending.** In July 2009 the OFT issued guidance for lenders and brokers in respect of second

charge lending. The guidance says that the OFT will consider taking enforcement action where it becomes aware of evidence that lenders or brokers are acting in breach of the guidance. The guidance states that second charge lending is considered a high-risk credit activity. The guidance begins with general principles such as transparency, fair contract terms, no high-pressure selling, no irresponsible lending, forbearance with customer in difficulty and proportionate action. On 14th September 2009 the European Commission published an address given by a Commissioner at a public hearing on responsible lending held on 3rd September 2009.

**Annual Percentage Rate.** The European Commission has published a report on the calculation of APRs for consumer credit agreements on 10th September 2009.

**Guarantees.** The High Court upheld a County Court decision giving judgment under a guarantee. Issues arose as to the signing of the guarantee and the statute of frauds. The County Court concluded that the presence of an email address on the copy of an email constituted a sufficient signature for the statute of frauds. The High Court said that if a party creates and sends an electronically created document then he will be treated as having signed it to the same extent that he would in law be treated as having signed a hard copy of the same document. However, the issue was whether the automatic insertion of a person's email address was sufficient for Section 4 of the Statute. In principle, any email could be a Section 4 note or memorandum but there was no signature and the appeal against summary judgment was allowed (*Mehta v. Fernandes*, 7th April 2006).

## **DISTANCE CONTRACTS**

**Advance payment.** Belgian law prohibited a deposit or payment from a consumer before the end of the second day withdrawal period in respect of distance contracts. A company sold goods, including sales to customers in other countries where payment could only be made by credit card. The ECJ held that Article 29 did not prevent national rules prohibiting advance payments but it did preclude prohibitions on requesting, before the expiry of the withdrawal period, the number of the consumer's payment cards (*Criminal Proceedings against Gysbrechts* [2009] All ER (EC) 711).

## **SALE OF GOODS**

**Title.** The Defendant bought bulk quantities of returned stocks and sold them to wholesalers (the Claimant). The Defendant went into administration and the Claimant claimed to be the owner of some of the goods which had been disposed of following the administration. The Court of Appeal said that the correspondence relied on

merely recorded discussions about future sales and the Judge had been wrong to hold that title had passed (*Trade Electronix Limited v. Best Buy Today (Wholesale) Limited*, 29th July 2009).

## **CONSUMER PROTECTION**

**White Paper.** The Government has issued a White Paper entitled "A Better Deal For Consumers; Delivering Real Help Now and Change for the Future". It proposes a modernisation of consumer law and the implementation of the Draft Directive on Consumer Rights.

## **UNFAIR TERMS**

**Mobile Phones.** A mobile phone agreement provided that the supplier's principal place of business governed jurisdiction of any dispute. The ECJ held that the Directive must be interpreted as meaning that an unfair contract term is not binding on the consumer and it is not necessary for that consumer to have successfully contested the validity of such a term beforehand (*Pannon GSM Zrt v. Gyorfi*, 4th June 2009).

**Estate Agents.** The High Court has ruled that terms in a letting agreement for renewal commission and for the payment of commission if the landlord sold to the tenant were unfair under the 1999 Regulations (*Office of Fair Trading v. Foxtons Limited*, 10th July 2009).

## **NOISE**

**Abatement Notices.** Notices required a company to take steps necessary to prevent noise but did not specify what the steps were. That was not complied with in a case which dealt with motor sports noise and the notices were held to be invalid (*Elvington Park Limited v. York City Council*, 20th July 2009).

## **WASTE**

**Enforcement.** The Claimant alleged that the Defendants acted unlawfully in failing to take enforcement action against other parties. The High Court dismissed the claim holding that the enforcing party was entitled to reach the conclusion that a process of monitoring and warning was a proportionate response to problems relating to over and under collection of the waste (*R (Repic Limited) v. Secretary of State*, 31st July 2009).

**Controlled Waste.** A Magistrates Court terminated a prosecution for abuse of process. The Divisional Court held that an amendment should have been allowed and it was not an abuse of process having regard to the Council's enforcement policy (*LB Wandsworth v. Rashid*, 10th June 2009).