



TRADING LAW BULLETIN

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CONSUMER CREDIT

Meaning of Credit. In a case involving leases in a retirement village it was argued that the payment of a fee on assignment of the lease was the grant of credit. The High Court held that the lease contained no obligation to make the payment, there was no suggestion that the purchase price was being deferred and there was no obligation to assign the lease. Therefore there was no deferment of any obligation to pay (*Burrell v. Helical Limited* [2016] CTLC 1).

Unenforceability. The High Court struck out a claim which sought to enforce a regulated agreement. It had been entered into by an unlicensed lender and failed to comply with the provisions of the Agreements Regulations 1983. The Court relied upon a decision of the First Tier Tribunal in the Barons Court matter (*John-Phillip v. Moneylink Finance Limited*, 18th July 2016).

Economic Duress. A bank was granted summary judgment in a claim relating to the alleged misselling of interest-rate swaps. Any claim that there was had been compromised when a new loan was granted which included a settlement agreement. The allegations that there was no valid consideration for the compromise and that the Claimant's signature was procured by economic duress were not made out (*Marsden v. Barclays Bank Plc* [2016] EWHC 1601 (QB)).

Valuations. A creditor granted an advance secured over a development following a surveyor's valuation. There was a request for further funds and there was a second valuation. The second loan was by way of refinancing the facility. It was alleged that the second valuation was negligent. The Defendants applied for summary judgment which was granted by the County Court on the basis that the second valuation, if negligent, could not have caused a greater loss than the amount by which the debt was increased. The Court of Appeal held that the second loan stood apart from the first and, if the second valuation was negligent, the lender had suffered a loss. The issues raised were better determined at trial and summary judgment was set aside (*Tiuta International Limited v. De Villiers Chartered Surveyors* [2016] EWCA Civ 661).

Mortgage. A Court in Rhode Island declined jurisdiction in favour of England in respect of a mortgage. The mortgagor applied for an injunction to restrain an auction or other sale of commercial property in Rhode Island. This was refused by the High Court. It was held that there was an arguable case as to jurisdiction but, as to whether there was a serious issue and whether there was an absence of benefit resulting in a lack of consideration, this was not demonstrated and the application was refused (*MCH Realty LLC v. CFS 915 LLC*, 19th August 2016).

Penalties. The Court of Appeal dismissed an appeal giving judgment in respect of financing agreements relating to a group of buildings in Madrid. A bank had provided part of the finance to complete the purchase. The relevant provision had nothing to

do with damages for breach of contract and was payable on the happening of a specified event and did not fall foul of the rule against penalties (*Edgeworth Capital (Luxembourg) SARL v. Ramblas Investments BV* [2016] EWCA Civ 412).

Compound Interest. The Chancery Division assessed loss caused to a lender as a result of deceit by a valuer. The Court held that the burden was on the lender to show that alternative loans would have been made and the evidence indicated that the lender could satisfy whatever demand there was for mortgages. The lender was therefore only entitled to simple interest (*Mortgage Express v. Countrywide Surveyors Limited* [2016] EWHC 1830 (Ch)).

Property Loans. An application for summary judgment in respect of loans to a property developer was granted in part. However, some of the loans might be unenforceable under the 1974 Act and the 2000 Act notwithstanding that the Claimant's main business was not lending (*Newmafruit Farms Limited v. Pither* [2016] EWHC 2205 (QB)).

VAT. The First Tier Tribunal have held that, where intermediaries who assessed potential borrowers via the web and sold that information, they supplied the negotiation of credit and therefore made exempt supplies as they were doing more than advertising or being a mere conduit (*Dollar Financial UK Limited v. Revenue & Customs Commissioners* [2016] UKFTT 598 (TC)).

Plan Administration. The Upper Tribunal (Tax) has referred to the ECJ for further guidance issues relating to potential debt collection in respect of a dental plan administrator (*Revenue & Customs Commissioners v. DPAS Limited* [2016] UKUT 373 (TCC)).

Floor Clauses. A class action in Spain on behalf of 15,000 mortgagees related to clauses used by many Spanish banks imposing an interest rate floor. The Spanish Court held that consumers had not properly been informed about these contracts. The Spanish Court's ruling only dealt with mortgages since 2013. The case was referred to the ECJ and a major issue was the impact of requiring repayments earlier than that date in respect of the financial position of some Spanish banks. The Advocate General's opinion was that any claim did not go back earlier (*Francisco v. Cajasur Banco* Case C-307/15).

Valuation Report. A negligence claim was brought against a specialist property company in respect of valuation reports for the purposes of a loan. The valuation related to arcades in a seaside resort. The Defendant had used a turnover multiplier but it was held that it should have used earnings before interest, tax, depreciation and amortization. However, there was some contributory negligence on the part of the Bank as it had not responded to the borrower's mortgage history (*Barclays Bank Plc v. Christie Owen & Davies Limited* [2016] EWHC 2351 (Ch)).

Unfair Relationships. The Court of Appeal in Northern Ireland dismissed an appeal whereby judgment was granted in favour of a bank. The Court said that the argument that the unfair relationship provisions applied to an exempt agreement (for business purposes) was irrelevant because it was not a credit agreement as the credit was provided to a limited company albeit guaranteed by the Defendant. For the same reason Section 86E did not apply but, in any event, the case did not involve a default sum (*Bank of Ireland (UK) Plc v. McLaughlin* [2016] NICA 33).

Durable Medium. In a case concerning the Payment Services Directive an Advocate General proposes that information transmitted to the e-banking mailbox of the customer constitutes a durable medium provided that the e-banking mailbox enables the user to store information in a way which is accessible for future reference and it must allow the unchanged reproduction of the information stored and prevent the service provider from accessing, modifying or erasing that information (*Bawag v. Verein Fur Konsumenteninformation* Case C-375/15).

FINANCIAL SERVICES

Market Abuse. The High Court held that in a case of alleged market abuse there were two entirely separate procedures being an application to the Court under Section 129 of the 2000 Act and the exercise of the FCA's own power under Section 123 to impose a regulatory penalty (*FCA v. Da Vinci Invest Limited* [2016] 3 All ER 547).

Investment Advice. It was alleged that a financial adviser breached the duty to exercise reasonable skill and care when advising on making investments. The defence to the main claim was that the investment advice was sound, the investments were suitable and that the real complaints were poor performance informed by hindsight which is different from unsuitability. The defence was upheld and the claim rejected (*O'Hare v. Courtts & Co* [2016] EWHC 2224 (QB)).

Collective Investment Funds. A collective investment fund lent money to a company which lent on for the purchase of property. The fund relied on a certificate of title from solicitors. However, they had not been directly retained by the fund so their duty of care was limited and a negligence claim was dismissed (*Connaught Income Fund v. Hewetts Solicitors* [2016] EWHC 2286 (Ch)).

FOOD

Pre-packaged Food Stuff. The ECJ have given a ruling as to Article 1(3)(b) of Directive 2000/13/EC in respect of individual portions of honey presented in the form of portion-cups. These constitute pre-packaged food (*Breitsamer v. Munchen* Case-113/15).

UNFAIR COMMERCIAL PRACTICES

Home Selling. The Court of Appeal (Criminal Division) heard an appeal in respect of the sale of reclining armchairs. In upholding the conviction the Court said in relation to a confidentiality agreement that it cannot be seen that such a clause would be regarded as proper in a case of this kind. There were no inconsistent verdicts and it was clear that the Director of the company knew the material facts and his conviction was also upheld (*R v. Waters* [2016] EWCA Crim 1112).

LICENSING

Taxis. A taxi driver's licence was revoked following alleged aggressive behaviour. Despite the fact he had been diagnosed as autistic and had received anger management treatment there was no reason to doubt the finding of the Magistrates that he was not fit and proper (*AVIS v. Transport for London*, 5th August 2016).

COMMERCIAL AGENTS

The High Court awarded compensation in respect of an alleged unlawful termination of an agreement regarding the distribution of food. The Court held that the contract conferred an absolute right to terminate and the obligation of good faith did not constrain this right (*Monk v. Largo Foods Limited* [2016] EWHC 1837 (Comm)).

TRADING STANDARDS

Re-Structuring. A Trading Standards Officer brought proceedings against a local authority in connection with a previous undertaking to review the restructuring of its consumer protection services. The local authority agreed to appoint a new reviewer to conduct a further review (*R (On the Application of Hudson) v. Liverpool City Council*, 26th September 2016).

ENVIRONMENT

Confiscation. Directors had been convicted of consenting or conniving in a company's failure to comply with environmental permit conditions concerning control of waste but they were not personally liable under confiscation procedures in respect of the cleaning up of the company's site. It was not the sort of case where the benefit on the part of the company should be treated as benefit obtained by an individual defendant (*R v. Powell* [2016] EWCA Crim 1043).

COSMETICS

The ECJ interpreted Article 18(1)(b) of Regulation (EC) Number 1223/2009 as a prohibition on the placing on the market of cosmetic products containing some ingredients tested on animals in order to market the products in third countries if the resulting data was used to prove the safety of those products for the placing on the EU market (*European Federation for Cosmetic Ingredients v. Secretary of State for BIS* Case C-592/14).

UNFAIR TERMS

Proper Law. The ECJ considered the case involving injunctions for the protection of consumer interests in respect of alleged unfair terms. It was held that a contractual term in the course of electronic commerce which provided that the contract was to be governed by the law of the state in which the seller or supplier is established is unfair insofar as it leads a consumer into error by giving him the impression that only the law of that state applied without informing him of other protection (*Verin v. Amazon EU Sarl* Case C-191/15).

Damages. The European Court have held that a decision by a national court of last instance may constitute a sufficiently serious breach of EU law giving rise to liability only where that decision manifestly infringed the applicable law or is despite the existence of well-established case law (*Tomasova v. Slovakia Republic* Case C-168/15).

ANIMALS

Strict Liability. Appellant partners appealed by way of Case Stated in respect of preliminary issues in proceedings under the Animal Welfare Act 2006. The case involved a slaughter house. The Divisional Court held that the alleged offence was in time but it was not one of strict liability. It involved the question of taking such steps as were reasonable in all the circumstances to prevent suffering. Proceedings against two of the three partners were terminated (*Riley v. Crown Prosecution Service*, 18th October 2016).

Journey Times. The European Court interpreted Council Regulations concerning the protection of animals during transport in respect of the rest period (*Masterind v. Hauptzollamt* Case C-469/14).

SECURITY INDUSTRIES

Confiscation. The Defendant operated a security business but did not have a licence. The Court of Appeal held the question was whether the offence prohibited and criminalised the carrying out of unlicensed activity or whether it created an offence of simply failing to obtain a licence to carry out something that was otherwise lawful. It was held that the provision criminalised engagement in such conduct not merely the failure to obtain a licence and the prosecution appeal against the refusal to make a compensation order was allowed (*R v. Palmer* [2016] EWCA Crim 1049).