



# TRADING LAW BULLETIN

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## FINANCIAL SERVICES

**Hire-Purchase.** The Court of Appeal ruled against a bankrupt who sought to say that the benefit of a hire-purchase agreement was to be treated as a tool of the trade (he was a photographer) for the purposes of the Insolvency Act (*Mikki v. Duncan* [2016] EWCA Civ 1312).

**Durable Medium.** On 25th January 2017 the ECJ ruled on the meaning of “durable medium” in respect of the Payment Services Directive. It was held that information was provided on a durable medium if it allowed the user to store the information and to access it and reproduce it unchanged for an adequate period without any unilateral modification by the service provider and also, if the service user is obliged to consult an internet website for transmission, the information must be accompanied by active behaviour aimed at drawing the attention of the user to the existence and availability of that information (*BAWAG PSK Bank v. Verein Für Consumente Information* Case C-375/15).

**Unfair Terms.** Security was granted by a mortgage on a borrower’s home. Issues of *res judicata* arose and the ECJ decided that Directive 93/13 did not preclude a rule of national law prohibiting national courts from examining of their own motion unfairness where a ruling had already been given. However, where one or more terms had not been examined the national court was required to assess the potential unfairness of the terms whether at the request of the parties or of its own motion where it is in possession of the legal and factual elements necessary for that purpose (*Banco Primus SA v. Garcia* Case C-421/14).

**Borrower Information.** The Court of Appeal held that there had been no breach of a facilities agreement when a bank marketed loans without the consent of the borrowers and there were explicit terms entitling the bank to provide information about the loans to potential assignees (*Irish Bank Resolution v. Camden Market Holdings* [2017] EWCA Civ 7).

**Costs.** Following decisions about interest rate swaps between an Italian local authority and a bank dealing with matters such as restitution the Court held that the correct order as to costs would be no order. The local authority had avoided a number of transactions for failure to comply with Italian Financial Services law but had lost on numerous other issues (*Dexia Crediop Spa v. Comune di Prato* [2017] EWHC 252 (Comm)).

**Compensatory Damages.** The Irish Supreme Court considered the correct approach to calculating compensatory damages where a bank had been deprived of its security when solicitors breached an undertaking to discharge an existing mortgage (*Allied Irish Bank Plc v. Maguire* [2016] IESC 57).

**Foreign Limitations.** The Court of Appeal dismissed an appeal by an English borrower who had used the money to purchase a residential property in Florida. The loan agreement and promissory note had been secured with a mortgage. Foreclosure proceedings were brought in the Florida Court. The Defendant did not pay the judgment and was sued in English proceedings. His assertion that the limitation period under Florida law prevented the bringing of English proceedings was dismissed and summary judgment upheld (*US Mortgage Finance v. Dew*, 1st March 2017).

**Financial Ombudsman.** A complaint was made regarding a discretionary investment service against an investment manager. The first complaint through FOS was upheld but it was quashed by consent in judicial review proceedings. A further decision, also adverse to the Claimant manager, was made and further judicial review proceedings were brought. The main ground of complaint was that a skilled person review had included the conclusion that the arguments put forward by the firm were accepted and the then FSA confirmed the findings of the review. However, the High Court held that this was not binding on FOS and the application for judicial review was refused (*Full Circle Asset Management Limited v. FOS* [2017] EWHC 323 (Admin)).

**Unfair Terms.** In cases involving mortgage loans and alleged unfair terms the ECJ held that Article 6(1) of Directive 93/13/EEC precluded national case law which temporally limits the restitutionary effects connected with a finding of unfairness to amounts overpaid under such a clause after delivery of the decision in which the finding of unfairness is made (*Naranjo v. Banco Popular Espanol* (Case – 308/15)).

**Undervaluation and Limitations.** The Court of Appeal upheld summary judgment in favour of a Defendant valuer in respect of a claim for allegedly undervaluing a property. The decision of the Judge below was upheld in that the damage had been sustained when the borrower failed to pay (*Bridging Loans Limited v. Kevin Toombs* [2017] EWCA Civ 205).

**Guarantees.** A bank sued to recover losses in relation to facilities provided to insolvent companies which were controlled by the Second Defendant. The Defendant asserted that the bank had agreed to release guarantees and that the fraudulent representations relied upon by the bank, if any, had been made by his solicitor. It was held that the pleaded case was not made out and there was judgment for the Claimant (*Clydesdale Bank Plc v. Stoke Place Hotel Limited* [2017] EWHC 181 (Ch)).

**Statutory Demand.** A guarantor for a company loan made by a bank appealed against a decision upholding the dismissal of an application to set aside a statutory demand. An earlier statutory

demand had been set aside on appeal. It was held that it was not open to the debtor to apply to set aside the second demand on the same grounds raised in opposition to the first as this amounted to an abuse of process (*Harvey v. Dunbar Assets Plc* [2017] EWCA Civ 60).

**Financial Advice.** A professional negligence claim was brought against a financial services company by a client. It was alleged that there was a breach of duty by not performing a detailed review of advice given by an unrelated financial adviser. As a result there was a transfer from a previous employer's final salary scheme. The High Court held that the duty to advise would only arise in obvious cases. The most important consideration of the scope of a professional's duty was the retainer. The company had therefore owed no tortious or contractual duty. The claim was struck out (*Denning v. Greenhalgh Financial Services Limited* [2017] EWHC 143 (QB)).

**Jurisdiction.** Loan agreements contained asymmetric jurisdiction clauses whereby the bank could bring proceedings in any jurisdiction but allowing the Defendants to bring proceedings in England only. The Court held that the natural meaning of the words "confers exclusive jurisdiction" in Regulation 1215/2012 included asymmetric jurisdiction clauses (*Commerzbank v. Pauline Shipping Limited* [2017] EWHC 161 (Comm)).

**Solicitor's Advice.** The Supreme Court dismissed an appeal concerning the drawing up of a loan agreement by solicitors. Although the firm had been negligent the client had suffered no loss because the solicitors were not responsible for the client's decision to enter into the loan agreement (*BPE Solicitors v. Hughes-Holland* [2017] UKSC 21).

**FCA Notices.** The Supreme Court allowed an appeal by the FCA against the decision of the Court of Appeal that notices given to a bank had identified the bank's International Chief Investment Officer (*FCA v. Macris* [2017] UKSC 19).

**Credit Record.** An individual appealed against a decision dismissing his claim against a bank. A settlement of a claim was made following a verbal offer to settle which was accepted by the bank including that the customer's credit record would be marked as settled. However, this was not included in the settlement order. The High Court held that there was a real prospect of arguing successfully that the condition as to the credit record survived the settlement order (*Adibe v. National Westminster Bank Plc*, 16th March 2017).

**PPI.** An individual entered into an individual voluntary arrangement and was subsequently granted a certificate of completion. After that PPI mis-selling claims resulted in a payment to the IVA supervisor. The Judge held that the monies were not subject to a trust for the purposes of the IVA but this was overturned by the Court of Appeal (*Green v. Wright* [2017] EWCA Civ 111).

**Secret Commissions.** The borrowers were experienced property investors who entered into secured commercial loans. Some of the loans were after the Hurstanger case. The High Court held that the broker who received the commission was not the agent of the borrowers let alone a fiduciary agent and therefore there was no entitlement to relief (*Commercial First Business Limited v. Pickup* [2017] CTL 1).

**Financial Ombudsman Service.** An insurance company applied for judicial review of a FOS decision upholding a complaint. The complaint revolved around the non-disclosure of a medical condition. The High Court held that the Claimant had followed the relevant law, guidance and practice. The decision was quashed and the complaint had to be re-determined. It was held that whilst an Ombudsman did not have strictly to consider the relevant law if there was a conclusion contrary to the law clear reasons should be given (*Aviva Life and Pensions v. FOS* [2017] EWHC 352 (Admin)).

**Rate of Interest.** The High Court gave judgment in favour of borrowers who switched their variable rate borrowing to a fixed rate very shortly before the sharp decline in interest rates generally. It was held that the bank had failed adequately to explain the financial consequences of changing to a fixed rate and how the redemption penalty worked. If this had been done it was likely that the borrowers would have asked for a fixed rate for just two years and not ten (*Thomas v. Triodos Bank NV* [2017] EWHC 314 (QB)).

**Indemnity Clause.** An insurance broking company was sold and the seller appealed to the Supreme Court against a decision by the Court of Appeal that an indemnity in respect of fines, compensation etc. imposed on or required to be made by the company following and arising out of claims or complaints registered with the Financial Services Authority did not apply to the buyer's losses as they arose from the company referring itself to the FSA and not because of any customer making a claim or complaint. The appeal was dismissed (*Wood v. Capita Insurance Services Limited* [2017] 2 WLR 1095).

## DATA PROTECTION

**Principles.** In appeals in respect of subject access request the Court of Appeal considered a number of issues including the scope of "personal data" particular in the context of personal and household processing (*Ittihadieh v. 5-11 Cheyne Gardens RTM* [2017] EWCA Civ 121).

## TOYS

**Due Diligence.** The High Court dismissed an appeal by a prosecuting local authority against the decision that there was no case to answer. Following the Magistrates' decision that a company was not guilty the Magistrates dismissed the case against a former director (*Haverling London Borough Council v. Masters*, 14th February 2017).

## ENVIRONMENTAL LAW

**Regulatory Functions.** In a criminal appeal the Court of Appeal considered the regulatory functions of the local authority and the Environment Agency. The issue related to building material and machines. The Court held that it was the agency which had the authority to exercise the regulatory function in that case and not the local authority (*R v. Recycled Material Supplies Limited* [2017] EWCA Crim 58).

## ESTATE AGENTS

**Commission.** In an appeal to the Court of Appeal concerning estate agent's commission and a golf course and cottage the Court interpreted the contract and held that commission was due having regard to the report and the terms of business (*Savills (UK) Limited v. Blacker* [2017] EWCA Civ 68).

## UNFAIR TERMS

**European Court Jurisdiction.** There was a reference to the Court in respect of proceedings concerning legal fees. It was held that proceedings which were administrative in nature could not be regarded as exercising a judicial function. Consequently there was no authority to make the reference and it was for the Court with jurisdiction to examine whether there was an unfair contractual term (*Panicello v. Martinez* (Case C-503/15)).

## UNFAIR COMMERCIAL PRACTICES

**Combined Offers.** The ECJ held that the sale of a computer already equipped with software did not result in an unfair commercial practice where the offer was not contrary to the requirements of professional diligence. Such an offer was not in itself a breach as the failure to indicate a price for each item did not prevent the consumer from making a transactional decision (*Deroo-Blanqueart v. Sony Europe* (2016) 1 WLR 4538).

**Basic Rates.** The ECJ considered the prohibition on applying a higher rate than the basic rate in respect of consumers contacting a trader by telephone. It was held that the relevant Directive means that call charges to a telephone help line operated by the trader may not exceed the cost of a call to a standard geographic land line. Whether the trader makes or does not make a profit through the telephone is irrelevant (*Zentrale Zur Bekämpfung v. Comtech GmbH* (Case C-568/15)).

## ANIMALS

**Dangerous Dogs.** The Divisional Court held that the Crown Court had been entitled to order the destruction of a dog which had attacked a child in the driveway of the owner. The offence could occur where the incident happened in a private home (*Blake v. CPS*, 26th January 2017).

## PACKAGE TRAVEL

**Food.** In an appeal to the Court of Appeal Civil Division it was held that where customers ordered a meal in a hotel etc the property passed to them and therefore if it was contaminated it was capable of amounting to a breach of the implied conditions that goods should be of a satisfactory quality. The Defendants had supplied an all-inclusive holiday in a hotel (*Wood v. Tui Travel Plc* [2017] EWCA Civ 11).

## PLANNING

**Service.** The local authority appealed against a decision that it had not validly served a notice. The Court of Appeal upheld the appeal. Where the requirement was to serve a notice relating to a particular property on the owner of that property and title was registered the obligation to make reasonable enquiries went no further than to search the proprietorship register for the address of the registered proprietor (*Oldham MBC v. Tanna* [2017] EWCA Civ 50).

## HEALTH & SAFETY

**Sentence.** In an appeal to the Court of Appeal Criminal Division the Court made observations regarding the citation of previous cases, that health and safety cases are ordinary criminal cases, on the length of the prosecution's skeleton argument and costs (*R v. TheWall* [2016] EWCA Crim 1755).