



TRADING LAW BULLETIN

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FINANCIAL SERVICES

Concept of “Product”. The ECJ has held that the legal relationship between a debt-collection agency and the debtor who has defaulted under a consumer credit agreement falls within the material scope of the Unfair Commercial Practices Directive (“*Gelvora*” *UAB v. Valstybine Case C-357/16*).

Hedging Products Review. The Court of Appeal have upheld a High Court decision that the reviews conducted pursuant to an agreement between banks and the statutory regulator which considered that there had been serious failings in the way the bank sold interest rate hedging products did not give rise to a duty of care to carry out those reviews with reasonable skill and care. The imposition of a duty of care in respect of a complaints system could have far-reaching consequences and it would not be fair, just and reasonable in the circumstances (*CGL Group Limited v. Royal Bank of Scotland* [2017] EWCA Civ 1073).

Unlawful Lending. The Court of Appeal (Criminal Division) considered sentences passed on two Defendants who had engaged in unlawful moneylending contrary to the 1974 Act and FSMA 2000. There was no evidence of violence, threats or undue pressure to repay but it was a substantial business carried on illegally. Sentences of imprisonment were reduced to two years (*R v. Dowse* [2017] 2 Cr.App.R.(S) 26).

Land Registration. Homeowners appealed from a decision that the Land Register in respect of their property should be altered to re-register a charge in favour of a bank. Many years after a consolidation it was pointed out that the charge against the property related to a mortgage which had been redeemed. The bank therefore applied to discharge the charge being unaware of the consolidated loan. The Court of Appeal upheld the decision of the High Court. It was said that what was done was not a “mistake” within the Act but the Court had power to make an order to bring the Register up-to-date (*NRAM Plc v. Evans* [2017] EWCA Civ 1013).

Debentures. The Court of Appeal considered a debenture granted by a company to a building society. It was held that it had created an enforceable qualified floating charge even though there had been crystallisation of an earlier charge over the property. The Court upheld the appointment of administrators (*Saw v. Wilson* [2017] EWCA Civ 1001).

Appointed Representatives. The Upper Tribunal have upheld a decision of the FCA that a director of companies responsible for a network of financial advisers had failed to exercise due skill, care and diligence imposing a penalty of £86,691 and prohibiting the director from performing any significant influence function. The Tribunal said that the applicant had not regarded it as his responsibility to pay close attention to how the appointed representatives discharged their responsibility (*Palmer v. Financial Conduct Authority* [2017] UKUT 313 (TCC)).

Unfair Relationships. A bank appointed receivers in respect of property owned by the borrower who ran a farming business. A Deputy High Court Judge in the Chancery Division dismissed the borrower’s defence that the appointment was inconsistent with an agreement that he would have an opportunity to reduce indebtedness by selling assets. A guarantee given by the borrower’s wife fell within Section 140C(4)(c) of the 1974 Act but the wife had not pleaded that the relationship was unfair and in any event it was not. There was no evidence of any impropriety in appointing receivers and no unfair relationship was created (*Clydesdale Bank Plc v. Gough* [2017] EWHC 2230 (Ch)).

Unfair Terms. A Romanian couple borrowed money in Swiss Francs. They brought proceedings alleging the unfair nature of the terms of the repayment in a foreign currency. Subsequently they reached an amicable settlement with the bank but the referring Court wished to maintain its questions and refer two additional questions to the Court. Whether the Court had jurisdiction has been dealt with in an Opinion of the Advocate General (*Gavrilescu v. SC Banca Transylvania SA Case – 627/15*).

Investments. Investors claimed damages from the defendant bank for breach of contract, misrepresentation, breach of trust, dishonest assistance and restitution. They had paid money to an investment company run by fraudsters which held an account at the bank. The Commercial Court held that there had been no concluded contract as to the terms of the development scheme between the investment company and the bank. The investors had not seen the letter of introduction relating to the investment scheme and had failed to prove any loss. There was no necessary proximity between the bank and the investors to justify the imposition of a duty of care, there was no intention on the part of the investors to create a trust and in any event the bank would have been a stranger to any trust (*Chudley v. Clydesdale Bank Plc* [2017] EWHC 2177 (Comm)).

Jurisdiction. The ECJ have held that a recourse claim between jointly and severally liable debtors under a credit agreement constitutes a “matter relating to a contract” within Regulation 1215/2012 and, under that Regulation, the credit agreement must be classified as a “contract for the provision of services”. The place of the services which were provided within the meaning of that provision is, unless otherwise agreed, the place where the credit institution has its registered office and that also applies in determining the territorial jurisdiction to hear an action for recourse between joint debtors (*Kareda v. Benco Case C-249/16*).

Amount of Judgment. A widow contested possession proceedings in respect of a loan of £200,000 to her husband. At the trial the lender claimed a debt of £355,475.54 but the Judge only awarded £200,000. The High Court held that the Judge fell into error relating to evidence concerning cheque book stubs. In

the absence of evidence as to the ability to pay the sum possession was granted (*Landmark Mortgages Limited v. Bamrah* [2017] EWHC 2041 (QB)).

Complaints. On 13th September 2017 the FSA published a letter identifying issues in respect of complaints' handling processes by consumer credit businesses.

Registered Charge. The First Tier Tribunal dismissed an appeal against the refusal of the Land Registry to remove a registered charge in favour of the respondent bank. The Tribunal accepted the evidence of a document examiner that there was very strong support for the fact that the charge had been signed. Further, the plea of *non est factum*, fraud, misrepresentation and undue influence were dismissed (*Conte v. National Westminster Bank Plc*, 2016/0283).

CONTRACT OF SALE

Goods. The ECJ considered a case where a contractor was asked to renovate a domestic swimming pool. The Court held that, although the contractor did sell various goods, it was clear that the provision of services was the principal subject of that contract. The contract of work therefore did not constitute a contract of sale within Directive 1999/44 (*Schottelius v. Seifert* Case C-247/16).

AIR TRANSPORT

Cancellation or Delays. The ECJ considered the interpretation of Regulation (EC) 261/2004 on compensation. It was held that Article 7(1) should be interpreted as meaning that the concept of "distance" in the case of connecting flights relates only to the distance between the point of departure and final destination on the basis of the "great circle" method, regardless of the distance actually flown (*Bossen v. Brussels Airline* Case C-559/16).

Travel Agents. The ECJ said that under the Regulation it was the duty of the air carrier to show that it had informed passengers of the cancellation within the requisite period and if it did not do so then it had to pay compensation. Such an interpretation applied not only when the contract was directly entered into with the air carrier but also when the contract was entered into by a travel agency (*Krijgsman v. Surinaamse*, 11th May 2017).

Extraordinary Circumstances. During a landing an aircraft collided with a bird causing delay. The European Court held that extraordinary circumstances were events which were not inherent in the normal exercise of the activity of the aircraft carrier and outside its actual control. A breakdown remains intrinsically linked to the operation of the aircraft. However, a bird strike was not intrinsically linked and was an extraordinary circumstance (*Peskova v. Travel Services*, 4th May 2017).

LETTING AGENTS

Information. The Upper Tribunal dismissed an appeal from the First Tier Tribunal (subject to adjusting the penalty) in respect of the publication of relevant fees. The issue turned on the description of "administration fee" and "variety of works". The First Tier Tribunal had been wrong to find that the revised wording was in compliance. Only if the further services under the heading "other fees" had said they would never result in an increase in the administration fee would the wording have been compliant (*London Borough of Camden v. Foxtons Limited* ([2017] UKUT 349 (AAC)).

REGULATORY ENFORCEMENT

Primary Authority. On 1st October 2017 the Coordination of Regulatory Enforcement Regulations 2017 come into force. These provide a framework under the Primary Authority Scheme.

TRADING SCHEMES

VAT. An Advocate General's opinion has dealt with the question of derogation relating to turnover taxes and there was no necessity for the United Kingdom to inform the Commission about unregistered re-sellers and VAT on purchases of goods used for the purpose of their economic activities (*Avon Cosmetics Limited v. HMRC* Case C-305/16).

WAREHOUSED GOODS

Registration. The Upper Tribunal upheld an appeal by HMRC and ordered a fresh hearing following a First Tier Tribunal decision reversing an HMRC decision revoking the registration of a trader under the Warehouse Keepers' and Owners of Warehoused Goods Regulations 1999 (*HMRC v. Ahmed* [2017] UKUT 359 (TCC)).

TRADEMARKS

Unauthorised Use of Trademarks. The Supreme Court dismissed an appeal by traders who were engaged in the bulk importation and subsequent sale of goods such as clothes and shoes. Even though the goods had originally been authorised by the registered trademark holder the sales had not been authorised and, *prima facie*, an offence is made out (*R v. C* [2017] 1 WLR 3006).

CONSUMER PROTECTION

Cancellation Rights. The Court of Appeal Civil Division considered the expression "excursion organised by the trader away from his business premises" within the 2008 Regulations. The appeal concerned conditional fee agreements and costs. It was said that the Regulations had been breached when the agreements were entered into with solicitors at a community centre. The Court said the meeting could not have been said to be an excursion (*Kupeli v. Atlasgaet* [2017] EWCA Civ 1037).

PLANNING

Breach of Enforcement Notices. The Court of Appeal Criminal Division dismissed an appeal from a jury conviction for breaching an enforcement notice in respect of residential property. It had been alleged there was a material change of use by the property being divided into four self-contained flats. The Defendant owned the property but said that her husband took full responsibility for managing it. Nevertheless, the Court held that there was justification for the conclusion that she was aware of the notice and the Judge was right to direct the jury to focus on what the Appellant did or did not do (*R v. Mirza* [2017] EWCA Crim 924).

Notices. The Divisional Court allowed an appeal against a preliminary ruling by a District Judge that a notice was not a nullity. The notice had required the removal of a two-storey extension of the property and a single rear extension. In fact the house had a single-storey side extension and both a single and two-storey rear extension. The notice was hopelessly unclear and a nullity (*Sarodia v. Redbridge LBC*, [2017] EWHC 2347 (Admin)).

GUARANTEES

Leases. The Court of Appeal Civil Division allowed an appeal against the dismissal of a landlord's claim for payment of outstanding rent arrears against the tenant. There had been an agreement between a debt-collection agency and a guarantor but this did not affect the liability of the tenant (*Christiana Properties Limited v. Annauth* [2017] EWCA Civ 1060).

UNFAIR TERMS

Entire Agreement Clause. In a case involving the sale of two houseboats it was said that there had been a misrepresentation. This concerned the availability of mooring rights. The seller said these had not been promised and there was an entire agreement clause. The Court held that the entire agreement clause did not avail the seller because the contract was clearly not the entirety of their agreement but if it did apply it was unfair and unreasonable (*Djurberg v. Small*, 1st September 2017).

LICENSING

Fees. Following a ruling from the ECJ the Supreme Court reconvened in connection with the payment of fees for sex-shop licences. The local authority had been entitled to require payment of a fee including enforcement as well as processing costs. The matter was remitted to the Administrative Court which could consider, amongst other things, the reasonableness of the enforcement element of the fee (*R (on the application of Hemming) v. Westminster City Council* [2017] UKSC 50).