



TRADING LAW BULLETIN

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FINANCIAL SERVICE

Disclosure. The Claimant had been tricked into making a payment to a bank. The High Court granted an Order obliging the Bank to provide information about the person who had committed the fraud as this could not be obtained from any other source (*Nicholas Ho v. Lloyds Bank Plc*, 29th January 2018).

Negligent Payments. The Court of Appeal held that a bank which made payments to third parties was liable in negligence after the company went into liquidation. There was a duty on the part of the bank to protect funds held in the company's account from fraudulent disposition (*Singularis Holdings Limited v. Daiwa Markets Europe* [2018] EWCA Civ 84).

Interest. The Court of Appeal upheld a Judge's decision to award statutory interest at 3% in respect of a loan between private individuals (*Carrasco v. Johnson* [2018] EWCA Civ 87).

Identification. The Court of Appeal allowed an appeal by the FCA against a ruling of the Upper Tribunal that an exchange trader had been identified in a decision notice and was entitled to a copy of the notice (*FCA v. Grout* [2018] EWCA Civ 71).

Credit Cards. The Court of Justice of the European Union has held that a co-branding partner or agent scheme with a three-party system was subject to the interchange fee cap (*R (On the Application of American Express Company) v. HM Treasury* Cases C-304/16 and C-643/16).

Hedging Products. The High Court refused to allow an amendment of particulars of claim to include declaratory relief to the effect that the Claimants had suffered consequential loss from a bank's alleged breach of sales standards and COB Rules. One factor was a previous FCA review (*Day v. Barclays Bank plc* [2018] EWHC 394 (QB)).

Litigation Funding. In an appeal by an insurance company from a decision that it was liable to pay a little under £1.2 million to a firm of solicitors an application was made to allow an amendment of the pleadings. This was refused. The case involved a funding scheme for personal injury and a number of other agreements about the terms on which monies were to be advanced. This was known as an irrecoverable costs loan agreement. A guarantee indemnity was given and was underwritten by the insurance company. Later there was a refinancing. At the trial reliance was placed on an argument which had not been pleaded that an exclusion clause applied to the refinancing agreement. The Court of Appeal held that the exclusion clause did not cover breaches of the refinancing agreement. It was a completely new agreement. Therefore the issue of the amendment did not arise but it would have been refused (*Nesbit Law Group Limited v. Acasta European Insurance Co Limited* [2018] EWCA Civ 268).

Injunctions. An injunction had been granted to prevent the sale of business premises by the Applicant who had borrowed from the Respondent. He said that he had repaid the indebtedness of something in excess of £250,000 and the lender was not entitled to appoint a receiver. The High Court held that there had been no good arguable case shown that the indebtedness had been paid off and the power to appoint was validly exercised and the injunction discharged (*Sinha v. Saluja* [2018] EWHC 707 (Ch)).

Agency. A son appealed against a decision that he was liable on a loan on the basis that his father had authority to enter into the loan agreement on his behalf. The Court of Appeal held that the Judge was entitled to find that there was actual authority as he did not believe the son's evidence (*Auckland v. Khan*, 15th February 2018).

Moneylending. The Court of Appeal allowed an out-of-time appeal against a refusal to set aside a possession order. There had been a borrowing of £5,000 secured against domestic property. The Applicant clearly had a reasonable prospect of success and the lender's reliance on what was Section 16C of the 1974 Act was difficult to make good. The loan agreement itself was defective. The possession order was set aside (*Lukan v. Ghana Commercial Finance* [2018] EWHC 418 (QB)).

Privilege. The Claimant alleged that the Defendant bank and a subsidiary wilfully shut their eyes to what was an obvious fraud in respect of a missing trader intra-community fraud. They sought documentation generated during the course of the investigation by solicitors on behalf of the bank. In particular there were interviews with key RBS employees. The application for disclosure was dismissed on the basis of privilege (*Bilta (UK) Limited (In Liquidation) v. Royal Bank of Scotland* [2017] EWHC 3535 (Ch)).

Fractional Interests. The Upper Tribunal allowed an appeal against the decision of the First Tier Tribunal in respect of fractional interests in a property in London. HMRC claimed that VAT at the standard rate was payable. The Upper Tribunal said that the supply was an ongoing right which comprised more than something in the nature of short-term accommodation in the hotel sector. The decision of the FTT was set aside and it was held that the supplies in question were exempt supplies of land (*47 Park Street Limited v. HMRC* [2018] UKUT 41 (TCC)).

Solicitors' Liability. In an appeal from the Inner House the Supreme Court considered the liability of solicitors who made a careless misrepresentation when acting for a client seeking to discharge security over property. The Court held that a commercial lender about to implement an agreement with its borrower referable to its security does not act reasonably if it proceeds upon no more than a description of its terms put forward by or on behalf of the borrower. The lender knows the

terms of the agreement and is likely to have evolved and proposed them. The lender had immediate access to the correct terms at their finger-tips. The appeal by the solicitors was allowed (*Steel v. NRAM Limited* [2018] UKSC 13).

Jurisdiction. The High Court refused an application to set aside a preliminary judgment made in the absence of the Claimant. The Claimant had entered into an Islamic finance transaction under the law of United Arab Emirates. The transaction included an ancillary purchase undertaking which was governed by English law. However, the wider transaction was held to be invalid under the UAE law by the Courts of that country. The High Court held that there was no public policy in English law which the purchase undertaking contravened. The original decision was therefore correct (*Dana Gas PJSC v. Dana Gas SUKUK Limited* [2018] EWHC 278 (Comm)).

Security. The Commercial Court held that a bank had acted unreasonably in not consenting to the sale of property which stood as security. The test was objective reasonableness. During the litigation an agreed order had been made and it was known that the property provided as security did not secure the whole indebtedness and that a sale would leave a shortfall. It had not been suggested that a better price could be obtained (*Crowther v. Arbutnot Latham* [2018] EWHC 504 (Comm)).

Consent Orders. On the basis of information supplied, a lender concluded that a loan would not be a regulated activity. Following default the lender sued and the parties entered into a consent order. When the lender sought to enforce the order the borrowers claimed it was a regulated mortgage because over 40% was occupied as a residence. The Court of Appeal upheld a refusal to set aside the consent order. Taking legal proceedings was not administering the contract because it was enforcing the contract. Holding a party to a consent order did not offend public policy (*Fortwell Finance Ltd v. Halstead* [2018] EWCA Civ. 676).

Collective Investments. The Chancery Division ordered restitution under Section 382 of FSMA in a case where the Defendants had promoted unlawful collective investment schemes (*FCA v. Capital Alternatives*, 26th March 2018).

Swaps. The Court of Appeal upheld a decision refusing permission to amend the Claimant's name. A bank had paid compensation to an individual in respect of swap transactions but consequential loss was not agreed. Proceedings were commenced but in the name of a business and not the individual involved. It was held that there was reasonable cause to doubt the Claimant's identity and there were limitation issues (*Best Friends Group v. Barclays Bank* [2018] EWCA Civ 601).

Swaps. Following the collapse of Lehman the High Court considered the "close-out amount" which was to be paid upon the early termination of a forward currency swap transaction made under ISDA. The Court held that the change of wording from "reasonably determines in good faith" in the ISDA master agreement of 1992 to "act in good faith and use commercially reasonable procedures in order to produce a commercial reasonable result" in the 2002 agreement were different tests (*Lehman Brothers Special Financing v. National Power Corporation* [2018] EWHC 487 (Comm)).

Receivers. The High Court discharged an injunction restraining receivers from selling a property. The Claimants said that the receivers were invalidly appointed as the reason for the property development in question not being completed was because of the creditor's own breach of contract in instructing the surveyor not to continue work. The Judge held that it was not in either party's interest to have the property empty for many months with costs being incurred although the Claimants' submissions gave rise to a serious issue to be tried (*Lederer v. Allsop LLP*, 13th March 2018).

Mortgages. The Court of Appeal allowed an appeal in part from a finding that a construction project monitor had been in breach of duty to a bank. The project monitor was to report on the progress of redevelopment funded in part by the bank. The bank terminated the facility realising the project was out of control. The Court agreed with the Judge that the monitor failed to inform the bank that it was being asked to pay for work not covered by the building contract and the recommendation was negligently wrong. The monitor was liable in damages but the Judge had wrongly awarded the entirety of the sums paid pursuant to progress reports. There had been a catalogue of the irresponsibility on the part of the bank which had to take a significant share of the responsibility for having started a project which was not viable (*Lloyds Bank Plc v. McBains Cooper Consulting Limited* [2018] EWCA Civ 452).

Limitations. The High Court granted summary judgment striking out a claim brought against the Defendant financial advisor in respect of allegedly negligent advice regarding the transfer of a pension. There was no contemporaneous evidence to indicate any dispute of primary fact over any event which if established might start time running under Section 14A(5). The issue was when the Claimant acquired sufficient knowledge of the essential matters. The claim was statute barred (*Davy v. 0100654 Limited* [2018] EWHC 353 (QB)).

Mortgage Possession. Possession proceedings were brought in respect of non-payment. The Defendant said that he was elderly, could not speak English and the mortgage had been obtained by undue influence. The undue influence was said to be by his son. He also argued non est factum. Permission to appeal against the dismissal of an application to set aside a Tomlin Order was refused. It was quite clear the Defendant knew what he had agreed to. The argument to the contrary was entirely unsupported by evidence (*Johal v. Elm Property Finance Limited*, 13th March 2018).

LIBOR. The Court of Appeal (Criminal Division) dismissed an application for leave to appeal out of time based upon the conduct of an expert witness called by the SFO. Although the expert witness at the trial went gravely wrong by entering into debate on topics beyond or at the very outer edge of his expertise, the conviction was safe (*R v. Pabon* [2018] EWCA Crim 420).

Land Registry. The High Court said that an important point of principle arose as to whether a Court Order said to have been obtained by reference to forged documents and given effect by an entry on the Registry at HMLR resulted in a mistake for the purposes of the 2002 Act so that the Court had power to alter the register to correct that mistake. The Court held there could not possibly have been a mistake (*Antoine v. Barclays Bank Plc* [2018] EWHC 395 (Ch)).

Financial Ombudsman Service. In an application for judicial review of an Ombudsman's decision the Claimant submitted that insofar as advice relating to unregulated investments was concerned, the compulsory jurisdiction could not apply. It was held that it was artificial to draw a distinction where on the facts an advisor specifically recommended that a regulated investment should be sold because an alternative investment was preferable but would not have made such a recommendation if the alternative did not exist. The activities were so closely linked that they amount to regulated activities on the part of an appointed representative (*R (Tenetconnect Services Limited) v. Financial Ombudsman* [2018] EWHC 459 (Admin)).

Dental Plans. An Advocate General's opinion has been given in respect of a reference from the Upper Tribunal in connection with dental plans. One of the questions was whether the supply of services constitutes debt-collection within the VAT Directive. The opinion was that the supply did not constitute a transaction concerning payments or transfers (*HMRC v. DPAS Limited* Case C-517).

Peer to Peer. The Chancery Division ordered specific disclosure of the names of the underlying lenders arranged by a Peer-to-Peer Investment Agency. Loan agreements had been entered into to buy and develop property and the terms and conditions stated that the underlying lenders would not be identified. It was claimed that the lenders had breached their obligation to lend. The Court held that the underlying lenders were the real contracting party not the Agency and specific disclosure was ordered (*Lederer v. Kisby*, 29th March 2018).

Valuations. The former directors and shareholders of a company operating nursing homes sued a lending bank and a valuer. The Claimants had signed guarantees which they sought to rescind. The High Court held that the negligence claim against the bank failed because it was an ordinary commercial transaction which did not impose a duty of care, the misrepresentation claim failed because it would be unreasonable to hold that simply passing on to an intended borrower the result of the valuation made this a representation about its accuracy, the fiduciary duty claim failed because the relationship was not a fiduciary one, the claim that the guarantee had been discharged by variation failed and in any event there had been consent and the claim against the valuer failed because there was no real prospect of establishing that the valuer knew that they were likely to rely on the reports (*Rehman v. Santander UK Plc* [2018] EWHC 748 (QB)).

Unfair Relationships. One of the issues dealt with in a High Court case between property developers in respect of loans was the issue of unfair relationships. The Judge held that any unfair relationship which had arisen was overtaken by further agreements and nothing after those agreements gave rise to an unfair relationship (*Holyoake v. Candy* [2017] EWHC 3397 (Ch)).

Regulators' Powers. The Treasury has published the draft Financial Regulators' Powers (Technical Standards) (Amendment Etc.) (EU Exit) Regulations 2018.

FOOD

BREXIT. On 1st February 2018 the European Commission published a notice to stakeholders in respect of various aspects of

food law following the withdrawal of the United Kingdom from the EU.

Slaughterhouses. A draft of the mandatory use of closed circuit TV in Slaughterhouses (England) Regulations 2018 has been published.

Novel Foods. The Novel Foods (England) Regulations 2018 came into force on 8th March 2018.

Risk Assessment. The European Commission have published a proposal for a regulation of the European Parliament and of the Council on the transparency and sustainability of the EU risk assessment in the food chain.

Sea Transport. The Court of Appeal considered issues relating to the Carriage of Goods by Sea Act 1971 in the context of three container loads of frozen tuna and the meaning of "covered by a bill of lading" (*AP Moller-Maersk v. Kyokuyo Limited* [2018] EWCA Civ 778).

TRAVEL

Package Travel. A draft has been published of the Package Travel and Linked Travel Arrangements Regulations 2018.

Compensation. The ECJ has held that spontaneous absence of a significant part of the flight crew because of wild cat strikes is not covered by the concept of extraordinary circumstances with regard to compensation under Regulation (EC) No 261/2004 (*Krusenann v. TUI fly GmbH* (Case C-195/17 and others)).

Delay Claims. The Claimant, a firm of solicitors, sought compensation from an airline because a substantial number of claims by its client were paid directly by the airline to the client. The High Court found in favour of the Defendant holding that it was not obliged to indemnify the solicitors in respect of fees where compensation had been paid directly to the client (*Bott & Co Solicitors v. Ryanair* [2018] EWHC 534 (Ch)).

GAMING

Spread Betting. The Court of Appeal dismissed an appeal by a trader following the dismissal of his counterclaim in proceedings brought by a spread betting company. It was held that a provision in the customer agreement regarding closing out bets was not a provision for the benefit of the trader nor was there any claim in contract law because there was no duty (*Ehrentreu v. IG Index Limited* [2018] EWCA Civ 79).

Bonus Promotions. Following an investigation by the CMA three leading gaming operators have agreed to change the way in which they offer bonus promotions so that players can always access their own money.

Advertisements. The Committee of Advertising Practice has announced stricter standards on gaming advertisements including banning "bet now" advertisements during live matches.

Credit Cards. The Gambling Commission is to consider a ban on the use of credit cards for gambling (*Daily Telegraph*, 28th March 2018).

PLANNING

Enforcement Notices. The High Court considered the construction of the word “repair” in an enforcement order in the course of judicial review. The High Court held that the District Judge made no error in finding that “repair” encompassed rebuilding two walls if necessary (*Hargrave House Limited v. Highbury Corner Magistrates’ Court* [2018] EWHC 279 (Admin)).

DISCIPLINARY COMMITTEES

No Case to Answer. The Professional Standards for Health and Social Care appealed against a decision of the Committee of the Nursing and Midwifery Council that there was no case to answer in respect of an allegation of fitness to practice. The High Court held that there was a case to answer and allowed the appeal (*Professional Standards for Health and Social Care v. Nursing and Midwifery Council* [2018] EWHC 70 (Admin)).

LICENSING

Strict Liability. A local authority appealed by case stated against an acquittal of two charges under the London Local Authorities Act 1991. An offence under Section 14(2) relating to body piercing was a regulatory offence of strict liability (*Hounslow London Borough Council v. Aslim*, 21st March 2018).

PRODUCT SAFETY

Pesticides. The Court of Appeal considered the scope of the term “regulated procedure” in the Animals (Scientific Procedures) Act 1986. The case concerned an application for re-authorisation as a producer of slug pellets for commercial and domestic use (*R (On the Application of Chiltern Farm Chemicals Limited) v. Health and Safety Executive* [2018] EWCA Civ 271).

Code of Practice. The Office for Product Safety and Standards has joined with BSI to launch a Government-backed Code of Practice for product recall.

COMMERCIAL AGENTS

Software. The Court of Appeal upheld a decision that computer software supplied electronically and not in any tangible medium was not “goods” for the Commercial Agents Regulations (*Computer Associates UK Limited v. Software Incubator Limited* [2018] EWCA Civ 518).

DATA PROTECTION

Jurisdiction. In a case involving Facebook the ECJ held that Article 15 of Council Regulation (EC) No 44/2001 on jurisdiction etc. should be interpreted as meaning the activities of publishing books etc. and being assigned the claims of numerous consumers for the purpose of enforcement do not entail the loss of the user’s status as a consumer within that Article. Article 16(1) must be interpreted that it does not apply to proceedings brought by a consumer in the Courts of the place where he is domiciled not only his own claims but also claims assigned by other consumers domiciled in the same Member State, in other Member States and in Non-Member States.

MOBILE HOMES

Commission. The Upper Tribunal considered the Mobile Homes Act 1983 and the payment of a commission when buying a mobile home occupying a pitch. It was held that there was no

rule that the Commission was to be paid out of, rather than in addition to, the purchase price (*Elleray v. Bourne* [2018] UKUT 3 (LC)).

DOGS

Destruction Order. The Divisional Court held that a person who had never owned, possessed or been in charge of a dog did not have standing to intervene where there was an application for destruction under the Dangerous Dogs Act 1991 (*Henderson v. Commissioner of Police* [2018] EWHC 666 (Admin)).

Destruction. On appeal from the Crown Court which dismissed an appeal from the Magistrates’ Court, the Divisional Court upheld a destruction order. It was said that the Crown Court was only obliged to consider the issues raised before it and there was only a single issue namely whether a contingent destruction order gave the public the appropriate level of safety (*R (Killeen) v Birmingham Crown Court* [2018] EWHC 174 (Admin)).

Public Spaces Protection Order. An order was issued by a local authority relating to dog control within the open spaces and highways of the borough. The parts of the order which were challenged related to the maximum number of dogs permitted to be walked by one person and what was meant by keeping a dog under proper control. It was held that certain parts of the Order were objectionable. In particular damage to paths or ecology resulting from the presence of an increased number of dogs was a separate matter from wilful damage caused by an individual dog (*Summers v. London Borough of Richmond-Upon-Thames* [2018] EWHC 782 (Admin)).

HOUSING

Multiple Occupation. In an appeal by way of case stated from a ruling by a Magistrates’ Court that children were to be regarded as “residents” for determining whether a house was a “small” or “large” house in multiple occupation, the High Court held that it was clear that children counted as persons forming part of the household (*Paramaguru v. Ealing London Borough Council* [2018] EWHC 373 (Admin)).

TICKET SALE

Secondary Ticketing Sales. Certain ticket companies have formally committed to ensure that better information will be given about tickets following CMA enforcement action. A draft statutory instrument has been published, being the Breaching Limits on Ticket Sales Regulations 2017.

ESTATE AGENTS

Qualifications. The Government has announced that it will make it a requirement that all estate agents have professional qualifications and for transparency about whether fees are paid for referring clients to mortgage brokers, surveyors and solicitors.

ANIMALS

Case Stated. The High Court has held it had no jurisdiction to hear an appeal by way of case stated against a preliminary ruling that a prosecution of animal welfare cases was in time and that a certificate as to the prosecutor’s knowledge was conclusive. There had been no final determination (*Downes v. RSPCA* [2017] EWHC 3622 (Admin)).